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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Judgment: 16th April, 2018*

+ **FAO (OS) (COMM) 55/2018**

M L LAKHANPAL

..... Appellant

Through: Mr.Arvind Nayar, Senior Advocate
with Ms.Neha Singh and Mr.Ashish
Anshuman, Advocates.

versus

DARSHAN LAL & ANR

..... Respondents

Through: Nemo.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J. (ORAL)

1. This is an appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 read with Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (hereinafter referred to 'the Act'). The appellant is aggrieved by an order dated 22.01.2018 passed by learned Single Judge of this Court by which objections to the award have been dismissed.
2. At the outset, we may note that the appellant herein was instrumental in approaching this Court for appointment of an Arbitrator for

resolution of disputes and differences which had arisen between the parties arising out of a Collaboration Agreement dated 06.08.2010 executed by the petitioner and his brother (who was not a party to the arbitration proceedings) and the builder being respondent no.1 herein. Subject matter of the Collaboration Agreement was a property bearing No.E-386, Greater Kailash, Part-1, New Delhi-48. We may also note that after the Arbitrator was appointed, the statement of claim was not filed by the appellant herein. The right to file statement of claim was closed. The Arbitrator proceeded to frame the issues arising out of the counter claim filed by the respondent herein.

3. The following issues were framed by the Arbitrator:-

- “(i) Whether the Respondents are entitled to recover a sum of Rs.16,00,299 by way of interest on the amount of Rs.70,50,000 as mentioned in the counter claim No.1 ?*
- (ii) Whether the respondents are entitled to recover a sum of Rs.24,84,999 from the claimant as interest as mentioned in counter claim No.2 ?*
- (iii) Whether the Respondents are entitled to recover a sum of Rs.6,30,000 from the claimant by way of interest as mentioned in counter claim No.3 ?*
- (iv) Whether the respondent are entitled to claim a sum of Rs.75,60,000 by way of interest as per detailed mentioned in counter claim no.4?*
- (v) Whether the respondent are entitled to recover a sum of Rs.12,60,000 by way of interest as per details mentioned in counter claim No.5 ?*
- (vi) Whether the respondents are entitled to recover a sum of Rs.10,40,000 by way of damages as per details mentioned in counter claim No.6 ?*
- (vii) Whether the respondents are entitled to recover the cost of the proceedings before the arbitration tribunal ?*
- (viii) Whether the respondents are entitled to any other relief?”*

4. All the counter claims raised by the respondent were dismissed by the Arbitrator. Objections to the award were filed by the appellant herein before the learned Single Judge. Two grounds were urged before the learned Single Judge. The first ground being that the order by which the right to file statement of claim was closed, is liable to be recalled and set aside. The second ground which was urged before the learned Single Judge was non-grant of cost of the arbitration proceedings to the appellant herein.
5. At the outset, Mr.Nayar, learned Senior Counsel submits that learned Single Judge has failed to take into account the submissions made that the appellant did not seek grant of cost of arbitral proceedings but, in fact, the appellant had urged before the learned Single Judge that the Arbitrator had failed to grant liquidated damages to the petitioner which the petitioner (appellant herein) was entitled in terms of the Collaboration Agreement entered into between the parties, whereas the learned Single Judge has simply declined to grant cost of the arbitral proceedings. It is contended that even though no statement of claim was filed by the appellant herein, while rejecting the counter claims of the builder, the Arbitrator has reached a conclusion that the entire delay was attributed to the builder. Thus, having held so the Arbitrator should have granted liquidated damages to the tune of Rs.2500/- per day for the delay in handing over the possession and completing the construction to the appellant herein. Mr.Nayar, learned Senior Counsel relies on a judgment *Oil & Natural Gas Corporation Ltd. vs. SAW Pipes Ltd.*, reported in *2003 5 SCC 705*, more particularly para 44 to submit that the appellant/claimant was not

required to file statement of claim or prove any damages for the reason that proving liquidated damages was not required.

6. During the course of hearing, we have asked the learned Senior Counsel to point out as to whether such a ground was raised in the petition filed under Section 34 of the Arbitration and Conciliation Act. Our attention has been drawn to the grounds 'C', 'H', 'I', 'J' and 'K'.
7. As far as the first ground is concerned, Mr.Nayar, learned Senior Counsel submits that the Arbitrator acted in a hasty and harsh manner by not considering that till such time the possession of flat was not granted to the appellant, the appellant was not in a position to file the statement of claim as he could not have assessed the damages based on the deficiencies in the flat. He submits that the appellant took all remedial measures for recalling of the order of the Arbitrator but in vain as the Registry did not list the CM (Main) which was filed.
8. We have heard the learned Senior Counsel for the appellant and given our thoughtful consideration to the matter. Mr. Nayar has submitted that the learned Arbitrator acted in a hasty and in a harsh manner by not allowing the appellant to file the statement of claim.
9. We may note that admittedly the appellant did not appear before the Sole Arbitrator on 24.07.2015 and 26.08.2015. On 26.08.2015 the respondent had urged before the Arbitrator that right of the appellant to file statement of claim be closed due to his absence. The submission was rejected by the Arbitrator and four weeks' time was granted to the appellant to file his statement of claim and the matter was adjourned to 30.09.2015. The learned Single Judge has observed that an application was pending in this Court being

I.A.No.12363/2015 which was filed by the petitioner (appellant herein) seeking modification of order dated 26.05.2015, during the hearing of the said application the appellant was directed to appear before the Arbitrator on 30.09.2015 but on 29.09.2015 the appellant sent an SMS to the Arbitrator expressing his inability to attend the hearing, in turn the Arbitrator sent an SMS calling upon the petitioner to send an application in writing but the petitioner did not appear on 30.09.2015 nor sent an application seeking exemption. Resultantly, the Arbitrator vide order dated 30.09.2015 closed the right of the appellant to file the statement of claim. An application seeking recall of order dated 30.09.2015 which was filed by the appellant before the Arbitrator was allowed with cost of Rs.33,000/-. The appellant moved another application for waiver of cost and explained that since the possession of the ground floor was yet to be handed over to him, in absence thereof he could not estimate the expenses which may be incurred by him to complete the said floor. This application was dismissed on 26.11.2015. Another fact which has been noticed by the learned Single Judge is that the order dated 28.09.2015 of the learned Single Judge dismissing the application of the appellant seeking modification of order dated 26.05.2015 was assailed by filing FAO (OS) No.654/2017. Certain directions were passed regarding the possession. The appellant while relying upon the order of the Division Bench, again sought recall of the order dated 26.11.2015 and sought further time to file statement of claim which was dismissed on 01.07.2016. Meanwhile, the appellant had also filed an application in FAO (OS) No.654/2015 which was disposed of by noticing that the

appellant would file an application before the Arbitrator but no such application was filed.

10. We have extracted the sequence of events in paras foregoing for the reason that as rightly held by the learned Single Judge, there was no impropriety neither the Arbitrator acted in an unduly, harsh manner or in an unreasonable manner. Sufficient time was granted to the appellant to file his statement of claim which the appellant did not avail on the ground that since the possession was not handed over to him, he could not assess the damages.
11. We also find the explanation for not filing the statement of claim to be unreasonable and farfetched. The appellant could have filed the statement of claim and in case of any subsequent events; he could have brought the same on record. Moreover, the ground which is sought to be urged before us today with regard to the liquidated damages was always available and there is no explanation as to what prevented the appellant from making a claim in this regard.
12. We find no infirmity in the view taken by the learned Single Judge. Sufficient opportunities were granted to the appellant to file his statement of claim which he did not. Neither the order by which right to file statement of claim was closed, was challenged in accordance with law.
13. Mr.Nayar, learned Senior Counsel has submitted that since by a detailed award the counter claim of the respondent has been rejected and the Arbitrator reached on a conclusion that the delay was, in fact, on the part of the respondent builder, consequently, the appellant should have been granted liquidated damages as per collaboration

agreement @ Rs.2500/- per day, whether or not any of statement of claim was filed by him. This submission of learned Senior Counsel is without any force, firstly, for the reason that neither such a ground has been urged before the learned Single Judge. We say so for the reason that no foundation has been laid in the OMP (COMM) No.447/2017 under Section 34 of the Arbitration and Conciliation Act, 1996. The relevant paras relied upon by Mr. Nayar are extracted below:-

“(c) That in view of the present facts and circumstances the rejection of right to file the statement of claim and non-grant of costs in favour of the applicant are abuse of the due process of law.

(h) That several other lapses by the builders have also stood proved and established through the arbitral award.

(i) The applicant has suffered tremendously both mentally and financially due to the deliberate acts and omissions of the respondents builders due to various harassments, delay and incomplete work, forged and invalid regularization and plan, delay and holding of the principle amount, non-grant of penalty, loss of value of property, illegal construction, giving possession to purchasers prior to the owners, by providing lift in the basement, providing front entry to the basement, interest, costs, interest etc. That the non grant of permission to the applicant to prefer his valid and legal claim have resulted into conflict with the basic notions of morality and justice. That on the other hand the respondents builders have made enormous monetary benefits by selling the basement, second floor and the third floor with terrace that too on the basis of forged and fabricated documents and regularization plan. The award is in conflict with the public policy of India.

(j) That it was on applicant's petition only the Arbitration proceedings were initiated and the non grant of opportunity to the applicant to file his claim has resulted into loss of legal right of applicant.

(k) That once the award itself establishes the claim and the suffering of the applicant, the rejection of the request for preferring statement of claim is patent illegality on the face of award”.

14. A reading of the aforesaid grounds would show that there is not a whisper with regard to the liquidated damages @ Rs.2500/- per day, thus to say that the learned Single Judge did not decide this issue is not believable. Keeping in view the pleadings, it can safely be said that this ground was not been urged before the learned Single Judge, neither any foundation was laid and in case it was urged and not considered, the appellant would surely have filed a review. Learned Single Judge dealt with the argument for cost in paras 43 and 44 which we reproduce below:-

“43. The only other ground of challenge to the impugned award is to the non grant of the cost of the Arbitral proceedings to the petitioner. It is submitted by the learned counsel for the petitioner that having found that the delay in construction was attributable to the respondents and that the respondents were the defaulters, the Sole Arbitrator should have awarded the cost of the proceedings with respect to the Counter Claim in favour of the petitioner.

44. In my opinion, this was the case where both the parties had failed to prosecute their respective case with diligence. Certain claims of the respondents were also rejected by the Sole Arbitrator on the ground of lack of evidence in support thereof. The Arbitrator, therefore, in his discretion thought it fit to order parties to bear cost of Arbitration equally. Section 31(8) of the Act confers discretion on the Arbitral Tribunal to fix the cost, including specifying in the award who is entitled to cost and who shall pay the cost. The Arbitral Tribunal, in its discretion having found that both the parties have to bear the cost equally, this Court in exercise of its power under Section 34 of the Act does not find anything unreasonable so as to interfere in the Award”.

15. Reading of these paras show that the ground of liquidated damages which are sought to be urged before us today has nowhere been urged before the learned Single Judge nor decided as no such ground was raised in the Section 34 petition.

16. The judgment of the Supreme Court which has relied upon in the case of *Oil & Natural Gas Corporation Ltd.* (supra) in para 44, in our view does not apply to the facts of the present case.
17. In the absence of any statement of claim, the Arbitrator could not have granted any relief to the appellant.
18. The position of law stands crystallized today, that findings, of fact as well as of law, of the arbitrator/Arbitral Tribunal are ordinarily not amenable to interference either under Sections 34 or Section 37 of the Act. The scope of interference is only where the finding of the tribunal is either contrary to the terms of the contract between the parties, or, ex facie, perverse, that interference, by this Court, is absolutely necessary. The Arbitrator/ Tribunal is the final arbiter on facts as well as in law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Sections 34 or 37 of the Act. This Hon'ble Court in the case of **P.C.L Suncon (JV) v N.H.A.I., 2015 SCC Online Del 13192** , in para 24 stated that :

“24. As a postscript, this Court believes that it is imperative to sound a word of caution. Notwithstanding the considerable jurisprudence advising the Courts to remain circumspect in denying the enforcement of arbitral awards, interference with the awards challenged in the petitions before them has become a matter of routine, imperceptibly but surely erasing the distinction between arbitral tribunals and courts. Section 34 jurisdiction calls for judicial restraint and an awareness that the process is removed from appellate review. Arbitration as a form of alternate dispute resolution, running parallel to the judicial system, attempts to avoid the prolix and lengthy process of the courts and presupposes parties consciously agreeing to submit a potential dispute to arbitration with the object of actively avoiding a

confrontation in the precincts of the judicial system. If a court is allowed to review the decision of the arbitral tribunal on the law or on the merits, the speed and, above all, the efficacy of the arbitral process is lost."

19. The scope of judicial scrutiny and interference by an appellate court under Section 37 of the Act is even more restricted, while deciding a petition under Section 34 of the Act. The Hon'ble Supreme Court in the case of **McDermott International Inc. v. Burn Standard Co. Ltd. and Ors, (2006)11SCC181** held as under:

"52.The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."

20. It has been repeatedly held that while entertaining appeals under Section 37 of the Act, the Court is not actually sitting as a Court of appeal over the award of the Arbitral Tribunal and therefore, the Court would not re-appreciate or re-assess the evidence. In the case of **State Trading Corporation of India Ltd. v. Toepfer International Asia Pte. Ltd**, reported at 2014(144) DRJ 220(DB), in para 16 it has been held as under:

"16. The senior counsel for the respondent has in this regard rightly argued that the scope of appeal under Section

37 is even more restricted. It has been so held by the Division Benches of this Court in Thyssen Krupp Werkstoffe Vs. Steel Authority of India MANU/DE/1853/2011 and Shree Vinayaka Cement Clearing Agency Vs. Cement Corporation of India 147 (2007) DLT 385. It is also the contention of the senior counsel for the respondent that the argument made by the appellant before the learned Single Judge and being made before this Court, that the particular clause in the contract is a contract of indemnification, was not even raised before the Arbitral Tribunal and did not form the ground in the OMP filed under Section 34 of the Act and was raised for the first time in the arguments.”

21. In the case of **Steel Authority of India v. Gupta Brothers Steel Tubes Limited**, (2009) 10 SCC 63, the Supreme Court has laid down that an error relating to interpretations of the contract by an Arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award. The Supreme Court has further laid down that the Arbitrator having been made the final arbiter of resolution of disputes between the parties, the award is not open to challenge on the ground that the Arbitrator has reached a wrong conclusion. The courts do not interfere with the conclusion of the Arbitrator even with regard to the construction of contract, if it is a plausible view of the matter.
22. The Apex Court in **J.G. Engineers (P) Ltd. v. Union of India**, reported at (2011) 5 SCC 758, demarcated the boundary while explaining the ambit of section 34(2) of the Act. The Court in the aforesaid judgment relied upon the pronouncement of ONGC Ltd. Vs. Saw Pipes, in paragraph 19, held as under:

“27. Interpreting the said provisions, this Court in ONGC Ltd. v. Saw Pipes Ltd. [MANU/SC/0314/2003 : (2003) 5 SCC 705] held that a court can set aside an award Under Section 34(2)(b)(ii) of the Act, as

being in conflict with the public policy of India, if it is (a) contrary to the fundamental policy of Indian law; or (b) contrary to the interests of India; or (c) contrary to justice or morality; or (d) patently illegal. This Court explained that to hold an award to be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. It is also observed that an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court, as then it would be opposed to public policy.”

23. In **Associate Builders vs. Delhi Development Authority**, reported at (2015) 3 SCC 49, the Supreme Court while further explained the scope of judicial intervention under the appeal in the Act held as under:

*“It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score¹. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In *P.R. Shah, Shares and Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.* MANU/SC/1248/2011 : (2012) 1 SCC 594, this Court held:*

21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second Respondent and the Appellant are liable. The case as put forward by the first Respondent

has been accepted. Even the minority view was that the second Respondent was liable as claimed by the first Respondent, but the Appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the Appellant did the transaction in the name of the second Respondent and is therefore, liable along with the second Respondent. Therefore, in the absence of any ground Under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.”

24. This Court, time and again has emphasized on the narrow scope of section 37. In the case of **MTNL Vs. Fujitsu India Private Limited**, reported at 2015(2)ARBLR332(Delhi), the division bench held as under:

“The law is settled that where the Arbitrator has assessed the material and evidence placed before him in detail, the court while considering the objections under Section 34 of the said Act does not sit as a court of appeal and is not expected to re- appreciate the entire evidence and reassess the case of the parties. The jurisdiction under section 34 is not appellate in nature and an award passed by an Arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the court to interfere with the award merely because in the opinion of the court, another view is possible. The duty of the court in these circumstances is to see whether the view taken by the Arbitrator is a plausible view on the facts, pleadings and evidence before the Arbitrator. Even if on the assessment of material, the court while considering the objections under section 34 is of the view that there are two views possible and the Arbitral Tribunal has taken one of the possible views which could have been taken on the material before it, the court would be reluctant to interfere. The court

is not to substitute its view with the view of the Arbitrator if the view taken by the Arbitrator is reasonable and plausible Jhang Cooperative Group Housing Society v. P.T Munshi Ram & Associates Private limited: MANU/DE/1282/2013 : 202(2013) DLT 218.

The extent of judicial scrutiny under section 34 of the Act is limited and scope of interference is narrow. Under section 37, the extent of judicial scrutiny and scope of interference is further narrower. An appeal under section 37 is like a second appeal, the first appeal being to the court by way of objections under section 34. Where there are concurrent findings of facts and law, first by the Arbitral Tribunal which are then confirmed by the court while dealing with objections under section 34, in an appeal under section 37, the Appellate Court would be very cautious and reluctant to interfere in the findings returned in the award by the Arbitral Tribunal and confirmed by the court under section 34.”

25. The abovementioned view was further upheld by the division bench in **Mahanagar Telephone Nigam Ltd. vs Finolex Cables Limited** **FAO(OS) 227/2017** reported at 2017(166)DRJ1, stated as follows.

“It is apparent, therefore, that, while interference by court, with arbitral awards, is limited and circumscribed, an award which is patently illegal, on account of it being injudicious, contrary to the law settled by the Supreme Court, or vitiated by an apparently untenable interpretation of the terms of the contract, requires to be eviscerated. In view thereof, the decision of the Id. Single Judge that reasoning of the arbitral award in this regard was based on no material and was contrary to the contract, cannot be said to be deserving of any interference at our hands under Section 37 of the Act. In a pronouncement reported at

MANU/DE/0459/2015, MTNL v. Fujitsu India Pvt. Ltd. (FAO(OS) No. 63/2015), the Division Bench of this court has held that "an appeal under Section 37 is like a second appeal, the first appeal being to the court by way of objections under Section 34". Being in the nature of a second appeal, this court would be hesitant to interfere, with the decision of the learned Single Judge, unless it is shown to be palpably erroneous on facts or in law, or manifestly perverse."

26. Having regard to the law laid down by this Court as well as the Apex Court in number of decisions rendered and applying the law laid down to the facts of the present case, we do not find any merit in the appeal. Hence, no grounds are made out to interfere in the impugned order passed by learned Single Judge under Section 34(2) of the Arbitration and Conciliation Act, 1996. Resultantly, the appeal is dismissed.

G.S.SISTANI, J.

SANGITA DHINGRA SEHGAL, J

APRIL 16, 2018

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