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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment Pronounced on: 01.11. 2018

+ O.M.P. 424/2007

MCD

..... Petitioner

Through Mr.V.Gangotra, Advocate for MCD.

versus

M/S. HARCHARAN DASS GUPTA
CONSTRUCTION PVT. LTD.

.... Respondent

Through Mr.Harish Malhotra, Sr. Adv. with
Mr.V.K.Sharma, Adv.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. This petition is filed under section 34 of the Arbitration and Conciliation Act, 1996(*hereinafter referred to as the 'Arbitration Act'*) seeking to impugn the award dated 09.03.2007 passed by the learned sole arbitrator.

2. The respondent herein had instituted two separate proceedings, i.e. invoked the arbitration clause pursuant to the agreement dated 16.04.1998 and also instituted a suit being CS(OS) 607/2003. The said suit pertains to the levy of compensation imposed upon the respondent Sh.Harcharan Dass Gupta Construction Pvt. Ltd. (vide letter dated 02.01.2003). Vide a separate judgment today, I have decided the suit filed by the respondent. The relevant facts of this case are as stated below.

3. Tenders were invited for the construction of pedestrian sub way on Netaji Subhash Marg Delhi” by the petitioner. Contractor/respondent submitted its bid and was awarded the contract vide communication dated 16.4.1998. An agreement was executed on 21.4.1998. The stipulated date for start of work was 25.4.1998 and completion of time was one year. Accordingly, the work was to be completed on 24.4.1999.

The case of the respondent/claimant was that the work envisaged construction of two subways. Subway-1 being at Netaji Subhash Marg, Jain Mandir (Police Post) and Subway 2 being opposite Lajpat Rai Market, Delhi. The case is that on account of obstructions, delays and hindrances on the part of the petitioner the completion of work got delayed. The work was actually completed on 31.10.2011 i.e. after a delay of 2 years 6 months and 7 days.

4. It is the case of the Contractor/respondent that the delay took place on account of various reasons including that with regard to the site at Netaji Subhash Marg, Jain Mandir when the work started on the due date i.e. 25.4.1998 during excavation of foundation, underground water line and electric cables were encountered which was a hindrance in the excavation. Repeated requests had been made to have all the hindrances removed. It is further pleaded that there was delay in handing over of designs and drawings. Further, payments of running bills for the work executed on monthly basis to maintain the flow of funds was also delayed.

5. It is further pleaded by the respondent that instead of taking care of the obstructions and obstacles which were being faced by the respondent in timely completion of the work the Executive Engineer of the petitioner on 4.1.1999 levied a penalty under clause 2 of the Agreement at 6%. It was pleaded that the petitioners were guilty of the following:-

“A. There were hindrances at site which were not being removed well in time.

B. Payment of the running account bills are not being made regularly and in time, thus, adversely affecting the plaintiff financially.

C. Site for the work was not provided in time in accordance with the agreement and even till 24th of December, 1999 the complete site was not handed over.

D. Designs and drawings were not provided timely thereby delaying the execution of the work. The drawings with regard to the Police Post were given only on 17th April, 2001.

E. Additional work worth about Rs. 20 lacs was required to be done by the plaintiff and in this behalf instructions were given to the plaintiff on 6th of June, 2001 only.”

6. It is further pleaded that in addition to the above, it was also the liability of the petitioner to settle the final bill and to make the payment thereafter which was more than Rs.20,00,000/-. However, it is pleaded that instead of taking care of the above defects, after completion of the work on 31.10.2001 on 2.1.2003 a letter was issued under Clause 2 of the Agreement slapping a levy of Rs.20,61,637/- by way of compensation @ 10% for the delay in execution of the work till 31.10.2001.

7. Petitioners have denied the allegations made by the respondent. It is pleaded that time was the essence of the work as per the Agreement. It is further stated that in the event the respondent failed to comply with the condition of working with due diligence and timely completion of the contract he was liable to pay a compensation amount as the Engineer

Incharge may decide on the estimated cost of the whole work provided that the compensation will not exceed 10%. It is pleaded that in the present case there is a delay of 2 year 6 months and 7 days on account of which the petitioner had no alternative but to levy compensation by invoking clause 2 of the Agreement.

8. The contract was to be completed on 24.4.1999 but was actually completed on 31.10.2001, i.e. after a delay of 2 years 6 months and 7 days. Based on this delay, the MCD levied damages on the contractor for a sum of Rs.20,61,637/-. The respondent on the other hand sought to raise the various claims against the MCD, the details of which are as follows:

Sl.No.	Description of Claim
Claim -1	Non-payment of the 17 th running account bill for Rs.22 lacs
Claim -2	Claim of Rs.5 lacs approximately towards final bill after drawing of the 17 th running account bill.
Claim -3	Refund of Rs.1 lac as security deposit.
Claim -4	Non-release of escalation on material and labour under clause 10 CC of the agreement.
Claim -5	Interest on delay in release of payment of various passed bills as per table signed by the respondent Ex.C-21
Claim -6	Non-payment for bailing out accumulated water from the site of execution.
Claim -7	Non-release of withheld amounts from

	running bill and in part rates totaling Rs.2.43 lacs.
Claim -8	Loss sustained due to loss of profit on work not executed as envisaged in agreement.
Claim -9	Loss/damages sustained due to delay in execution of work during extended period for staff and machinery.
Claim -10	Interest @ 24% on all the due payments (Pre, pendent lite and future interest.
Claim -11	Cost of arbitration

9. A perusal of the award shows that each of the claims have been dealt with as follows:

Claim No.1 which pertains to non-payment of the 17th running account bill of Rs.22 lacs. The Bill had been withheld by MCD on account of compensation levied upon the respondent for a sum of Rs.20,61,637/-. The award concludes that there is no dispute that payment of the 17th bill of Rs.21,49,604.53 is payable. Noting the issue of damages sought by MCD of Rs.20,61,637/- is sub-judice before the High Court, the award was passed for the said amount in favour of the respondent subject to decision of this court.

On claim No.2 which was towards the final bill after drawing of the 17th running account bill, the learned arbitrator noted that there is no justification for not drawing of the final bill after the 17th running account

bill. An award was passed in favour of the respondent for a sum of Rs.4,72,195/-.

Claim No.3 pertains to Rs.1 lac given as security deposit. MCD contested the claim on the ground that there has been leakage of water in the sub-way and the same has not been attended to by the respondent and therefore, security deposit cannot be released. The learned arbitrator noted that till close of hearing in the proceedings, no action was taken by MCD to get the work rectified nor any expenses have been incurred in this behalf. The award concludes that there is no justification to withhold the payment of security amount and directed to release to the said sum of Rs.1lac.

Claim No.4 pertains to claim of Rs.37.11 lacs towards escalation payable under clause 10-CC of the agreement. The learned arbitrator noted that the issue of delay was attributed to the respondent by the petitioner. The award notes that the parties were directed to sit together and workout the undisputed portion of the claims. MCD accepted that escalation was payable of Rs.26,94,611.71 after affecting recoveries towards income tax, work contract tax and 2% surcharge, the net amount payable being shown as Rs.25,31,857/-. The award concludes that the payment of escalation is based on increase in wages of labour and wholesale price index on which the contractor/respondent has no control and an award was passed for the claim in favour of the respondent for Rs.25,31,857/- subject to the decision of this court in the above suit.

Claim No.5 relates to interest for the delay in payment of various passed bills passed. The learned arbitrator allowed the claim in favour of the respondent @ 18% per annum.

Claim No.6 pertains to payment of bailing out accumulated water from the site of the execution. The award notes that quantity of water pumped at site has been produced duly signed by the claimant but it does not bear the signature of the MCD. Award notes that the only plea of MCD is that no amount is payable. An amount of Rs.2 lacs was awarded to the respondent.

Claim No.7 relates to release of amount withheld from running bills totalling Rs.2.43 lacs. The said claim was accepted.

Claim No.8 pertains to loss of profit and an award of Rs.1.60 lacs was passed in favour of the respondent.

Claim No.9 relates to loss/damages suffered by the respondent due to prolongation of the contract by 30 months. A sum of Rs.54.30 lacs was claimed. The awards notes the list of hindrances annexed with the application for extension of time being Ex. C-15 - The Award concludes that Item Nos.1 to 9 of the list cannot be attributed to the respondent whereas extension of time sought by the respondent due to rainy season or labour shortage cannot be taken in account. The hindrances due to holding of the Independence and Republic Day functions for one month was held to be justified. Therefore, 50% of the claim for Rs.28.40 lacs was awarded.

On claim No.10, *pendente lite* and future interest @ 18% was accordingly awarded.

Regarding Claim No.11, the claim was rejected.

10. I have heard learned counsel for the parties. No particular contentions were made by the learned counsel for the MCD when the matter was heard. He has relied heavily on the written submissions that have been filed by the petitioner. A perusal of the written submissions shows that the main contentions is that the learned arbitrator ought to have adjourned the arbitration proceedings in view of the fact that the suit was pending in this court filed by the respondent.

11. A perusal of the plaint filed by the respondent in this court in the suit being CS(OS)607/2003 shows that the limited relief sought in the plaint was regarding letter dated 02.01.2013 by which the petitioner had levied compensation of Rs.20,61,637/- under clause 2 of the Agreement. Legality and validity of this compensation imposed by the petitioner has not been dealt with the learned arbitrator. In fact, he has recorded a finding that it is an 'accepted matter' under clause 2 of the Agreement. Hence, it is clear that the suit and the arbitration proceedings were dealing with different aspects and issues. There was no reason/occasion for the learned arbitrator to adjourn the arbitration proceedings *sine die* as pleaded.

12. I am also look at the grounds on which the petitioner seeks to challenge the award. The grounds in the petition read as follows:

A) That, the learned arbitrator erred in not appreciating the sub-judice nature of the various claims of the respondent and counter claims of the petitioner, due to pendency of the suit No.607 of 2003 titled as M/S Harcharan Dass Gupta Construction Pvt. Ltd. v. MCD & another.

B) That, the learned arbitrator erred in not appreciating that the arbitration as the whole is liable to be adjourned sine-die till the outcome of the decision of this Hon'ble court, subject to liberty to revive the same by the parties under arbitration before the learned arbitrator.

C) That, the learned arbitrator erred in not appreciating that the status of the jurisdiction of Hon'ble High Court of Delhi is above then the learned arbitrator's jurisdiction.

D) That, the learned arbitrator erred in not appreciating that he acted upon by pronouncing the award and giving his findings not being a fair arbitrator and on the basis of Principles of personal views/finding on the subject matters i.e. of conjunctures and surmises as and may affect adversely the final decision of Hon'ble High Court of Delhi in the above mentioned Suit no. 607 of 2003 titled as M/s Harcharan Dass Gupta Construction Pvt. Ltd. Versus M.C.D & Anr.

E) That, the learned arbitrator erred in not appreciating that the nature of award is null, void and ab-initio in the eyes of law as the same is not enforceable as per the verdict of the learned arbitrator himself.

F) That, the learned arbitrator erred in not appreciating that the award as the whole is against the public policy and a admittedly a patent mistake, committed on the part of learned arbitrator, in compliance of the provisions of section 34, of the arbitration Act, 1996.

G) That, the learned arbitrator erred in acting far beyond the terms and condition of the notification number MWB/Accts/003/490, dated 16.12.2003 by pronouncing the findings of the additional claim of the contractor/ respondent.

H) That, the learned arbitrator erred in not appreciating at the time of pronouncing of award against the contents of the terms and conditions, terms of the agreement and against the prevailing trade practices, as such, the award as a whole is against the provisions of sections 28 (3) of the Arbitration and Conciliation Act, 1996.

I) That, the learned arbitrator erred in not appreciating at the time of pronouncing of the award, under challenge, which is against the basic principles of law of evidence prevailed and appreciable to all of the matters under disputes inclusive the disputes before the arbitrators.

J) That, the learned arbitrator erred in not appreciating in course of the proceedings by not prescribing any procedure in compliance of the provisions of section 18 and 19 of the Act, so as to enable the parties, observe despite oral submission, by the petitioner in course of proceeding of the arbitration.

K) That, the learned arbitrator erred in granting any amount being interest against the petitioner.

L) That, the award of the learned arbitrator as such is based on the erroneous approach taken and therefore leads to miscarriage of Justice and is also against the public policy as such.

M) That, the present petitioner has not filed any similar petition before Supreme Court or any other court.

N) That, the impugned award 9.3.2007 but received by the petitioner MCD on 16.3.2007 and as such there is no delay in filing of the present OMP.

13. In my opinion, none of the grounds stated in the present petition to challenge the award raise any issue which shows that the award is contrary to the Fundamental Policy of Indian Law or that it was in conflict to the basic notions of morality or justice. The entire award is based on findings of fact recorded by the learned arbitrator. This Court does not sit as a court of appeal over the findings of the fact recorded by the learned Arbitrator. Such findings cannot normally be subject to challenge under Sec.34 of the Arbitration Act. Reference may be had to the judgment of the Supreme Court in *Associated Builders v. DDA, (2015) 3 SCC 49*. The Supreme Court held as follows:-

“12The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where-

1. a finding is based on no evidence, or
2. an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or
3. ignores vital evidence in arriving at its decision,

such decision would necessarily be perverse. A good working test of perversity is contained in two judgments. In **H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons**, 1992 Supp (2) SCC 312 at p.317, it was held:

7.It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.

In **Kuldeep Singh v. Commr. of Police**, (1999) 2 SCC 10 at para 10, it was held:

10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.”

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 score. 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 & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.**(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.

.....”

14. There are no valid grounds raised to challenge the findings of facts recorded by the learned Arbitrator. There is no merit in the present petition and the same is dismissed.

(JAYANT NATH)
JUDGE

November 01, 2018/v