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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Judgment: 17th September, 2018

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FAO(OS) (COMM) 56/2018

ASHWANI KHATTAR

..... Appellant

Through

Mr. Pradeep K. Bakshi & Ms. Prachi
V. Sharma, Advocates.

versus

VIJAY KUMAR BHATIA

..... Respondent

Through

Mr. Rajesh Banati with Mr. Ankit
Banati, Advocates.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J. (ORAL)

1. The present appeal has been filed under section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter the "Act") read with section 13 (1) of the Commercial Court Act, 2015, and directed against the order dated 05.03.2018 passed by learned Single Judge of this Court, dismissing the petition under Section 34 of the Act, the appellant herein had led challenge to the award dated 14.12.2017. The objections to the award dated 14.12.17 stand dismissed.
2. Some necessary facts required to be noticed for disposal of this appeal are that the appellant is the sole proprietor of M/s. Shruti & Siddharth Constructions and claims to be a leading builder and developers' company in the real estate market in Delhi. The respondent had approached the appellant for joint development of respondent's properties, being industrial plot bearing nos. 7,8 and 9 in Sector-1, Noida each admeasuring approximately 387 sq. Mts. The parties had

entered into a Collaboration Agreement on 08.04.2008 (hereinafter referred to as the 'agreement'). The appellant herein (Builder) agreed to demolish the structure existing on all the three plots. He was also to get the plan sanctioned, take permissions from the concerned authorities, at his own cost and thereafter, the said plots were to be developed by the appellant by raising a new construction as per the sanctioned plan. For the sake of clarity, it may be noted that in the agreement, plots bearing no.B-8 & B-9 were referred to as property no.2 and the same was allocated to the share of the respondent (Owner), whereas the plot bearing no. B-7, referred to as property no. 1 and was exclusively to fall to the share of a Builder in terms of the agreement. In terms of the agreement, the appellant was to pay Rs.1,75,00,000/- (One Crore Seventy Five Lakhs only) as a refundable security deposit to the Owner. Additionally, the Builder was to bear the cost and expenses for construction of the buildings on all the three plots. An amount of Rs.35,00,000/- was to be paid at the time of execution of the agreement, while the balance amount of Rs.1,40,00,000/- was to be paid by the Builder by 15.05.2008 or within 15 days from the date of grant of sanction for construction of buildings on the plots in question. The refundable security deposit was to be repaid from the revenue generated from property no.2 i.e. built up of land over plots bearing no.B-8 and B-9, Sector 1, Noida. The physical possession of the three plots were handed over to the appellant. However, title and the possession of the property No.1 was to pass in favour of the Builder only upon the completion of the construction of the Owner's share in all aspects. There is no dispute

that the Builder paid the sum of Rs.35,00,000/- to the Owners at the time of signing the agreement and thereafter, paid a sum of Rs.1 crore. The amount paid by the Builder has been recorded in four trenches in the year 2008, the balance payment was made in the following manner :-

- (i) Rs.15,00,000/- on 16.03.2008
- (ii) Rs.20,00,000/- on 08.04.2008
- (iii) Rs.50,00,000/- on 31.05.2008
- (iv) Rs.50,00,000/- on 21.10.2008

3. The appellant failed to pay the balance amount of Rs.40,00,000/- out the total sum of Rs. 1.75 cr to the Owner. It is also not in dispute that the appellant applied for sanction of the building plans and work of demolition also commenced on 09.07.2008. According to the counsel for the appellant, after the building plans were sanctioned, the appellant approached the Electricity Department for grant of electricity connection for the purposes of carrying out construction in October, 2008, but to his utter surprise and shock, the appellant learned that there was a huge demand in the form of arrears amounting to Rs.1,20,00,000/- towards electricity dues with respect to the properties in question. It is also the case of the appellant that since the respondent, even after the repeated requests, did not clear the outstanding amount, rather continued to state that there were no arrears of any dues and further the respondent contested that the appellant had not called upon the respondent to clear the same, resultantly, no construction could commence.

4. It is also the case of the appellant that the appellant filed a complaint with the Economic Offences Wing, Delhi Police, alleging that he had been cheated by the respondent. An FIR bearing no. 217/2011 was registered against the respondent under Section 420 of IPC. Another important fact, which is required to be noticed is that the Owner instituted a suit being Suit No.216/2012 on or around 10.02.2012 in the Court of Civil Judge, Gautam Budh Nagar. The appellant had prayed for a decree of declaration that the agreement entered into between the parties on 08.04.2008 had come to an end on 09.07.2009. The respondent also prayed for a decree of permanent injunction restraining the defendant (appellant herein) from interfering with possession of the property No.2. It is the stand of the appellant that he became aware of the claims in the said suit in March 2013 and immediately filed an application under Section 8 of the Act. It is the consistent stand of the appellant that he served a notice dated 18.04.2013 invoking the arbitration clause and thereafter, in July, 2013 filed an application under Section 11 of the Act. The claims of the appellant herein, stand dismissed solely on the ground of limitation.
5. The appellant also filed an application under Section 9 of the Act seeking an order restraining the respondent from creating any third party interest in property No. 2. On 11.10.2013, the learned Single Judge passed an ad interim order restraining the respondents from alienating the said property. The order was confirmed on 17.02.2014. The Court with the consent of the parties appointed an Arbitrator and subsequently the respondent withdrew the suit.

6. The Arbitral tribunal concluded that the construction of the buildings was to be completed within a period of 1 year from the date of receipts of the sanctioned plans (received on 09.07.2008). However, the tribunal was of the view that the appellant failed to prove that a legal notice dated 18.04.2013 has been served to the respondent and thus, the learned Sole Arbitrator placed reliance upon the date of filing the Statement of Claims and concluded that there is a gap period of three years between stipulated date of construction of the building and filing of the Claims and thus, is barred by the limitation. The Arbitral Tribunal also rejected the appellant's claim for damages in view of the finding that the appellant was guilty of a breach of the contract. The appellant's claim of Rs. 44,90,746/-has also been rejected on the ground of insufficient evidence.
7. Mr. Bakshi, learned counsel for the appellant submits that there is patent illegality in the award passed by the Arbitral Tribunal. He further submits that the Arbitral Tribunal completely lost track of the fact that it is the respondent, who had filed a civil suit seeking a declaration with regard to termination of an agreement. It is thus, contended that even as per the stand and understanding of the respondent, the agreement was in subsistence and in case the agreement was subsisting the claim of the appellant was well within the period of limitation.
8. Counsel for the appellant further submits that in the absence of agreement having been terminated by the respondent or by the appellant, the agreement would continue to subsist. Additionally, Mr. Bakshi contends that there was a constant dialogue between the parties

and parties were very keen to resolve the matter amicably and the respondent was willing to co-operate but the huge demand of Rs.1,20,00,000/- raised by the respondent on an account of pending electricity dues was the deteriorating factor.

9. Mr. Bakshi in support of his contention relies on Sections 39, 55, 64 & 66 of the Indian Contract Act, 1872, which reads as under :

“39. Effect of refusal of party to perform promise wholly. – When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

55. Effect of failure to perform at a fixed time, in contract in which time is essential. – When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of such failure when time is not essential. – If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of acceptance of performance at time other than that agreed upon. – If, in case of a contract voidable on account of the promisor’s failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee

cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance he gives notice to the promisor of his intention to do so.

64. Consequence of rescission of voidable contract

When a person at whose option a contract is voidable rescinds it, the other party thereto need to perform any promise therein contained in which he is the promisor. The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract restore such benefit, so far as may be, to the person from whom it was received.”

66. Mode of communicating or revoking rescission of voidable contract

The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of the proposal.

10. In support of his contention, counsel for the appellant submits that as per the provision of Section 39 of the Contract Act, 1872, if the respondent intended to terminate the contract he would have sought for the termination of the contract only after declaring his intention expressly by words or conduct, his acquiescence in its continuance. Whereas, the respondent never expressed any intention of the termination, as it is evident from the respondent's disposition before the Criminal Court and suit filed in the Civil Court (Noida). Moreover, to begin with, it was not even the case of the respondent that he had terminated or put to an end the agreement between the parties and as such, it continued to subsist or at best has terminated upon filing of the suit in November 2012.

11. Mr. Bakshi laboured hard to submit that under the provision of Section 55 of the Contract Act, which states that even in the Agreement/s, where the time is the essence of a contract, (which is not even the scenario in the present case) the contract does not come to an end automatically, rather it merely becomes voidable at the discretion of the aggrieved party and is required to be terminated, which was never done in the present case.
12. Counsel for the appellant, submits that section 64 of the Contract Act provides that when a party rescinds the voidable contract, the party rescinding such contract shall restore the other party for any benefit accrued from the other party. Furthermore, Mr. Bakshi placed reliance on section 66 of the act and submits that any decision of a voidable contract has to be communicated or revoked in terms of the provision of section 3 and 5 of the Contract Act, which provides the intention of revocation has to be communicated to the other party. It is an admitted fact by the respondent that no such communication with respect to rescinding of the contract has been done.
13. Mr. Bakshi submits that the suit filed by the respondent was an admission on the part of the respondent of subsistence of the agreement in question. Counsel for appellant submits that the respondent filed the suit in November'2012, which implies that at least till then the agreement was subsisting. Counsel further submits that the court concluded that the cause of action had arisen in October 2009. Whereas, the contract was subsisting till the time the respondent has breached the agreement and sold property No.

1 in November'2012, and the knowledge of which came to the appellant in March'2013 upon being served with the copy of the suit filed by the respondent. It is the case of the appellant that when the appellant discovered the dues of electricity department, he kept pursuing the respondent but to his dismay the respondent never cleared the said dues, which makes it evident that the respondent intentionally kept waiting for execution of the Contract for three years in order to shed off his liability.

14. Learned counsel appearing for the respondent submits that post signing of the agreement on 08.04.2008, the plans were sanctioned on 09.07.2008. He further submits that as per the agreement, the construction was to be completed within a period of one year i.e. 08.07.2009. Counsel submits that the appellant after plans were sanctioned took no steps in terms of the agreement to commence the construction over the plots in question. Counsel further submits that even as per appellant, the application for grant of electricity connection was rejected on account of a demand and the demand was not cleared by the respondent, the agreement would come to an end even as per the stand of the appellant. Counsel submits that statement of the claim was filed as late as on 07.04.2014. It is also contended before the Arbitrator that the appellant has failed to show that in fact any demand was in existence against the properties, which were to be constructed. Strong reliance is placed on para 66 of the` award, which we reproduce below :

“66. In fact, I find that admittedly nothing has been brought on record by the claimant to show as to on which

date, in which month and in which year, the claimant had applied in writing to the Electricity Department for temporary electricity connection for the properties as stated above. Further, admittedly the claimant did not serve any notice upon the respondent regarding such electricity connection. Thus, the claimant has failed to prove that he had ever applied in writing for such electricity connection to the Electricity Department of Noida Authority and made aware of this fact to the respondent. So far as dues of electricity of over Rs.1,20,00,000/- (Rupees One Crore Twenty Lakh Only) is concerned, I find that the claimant has only brought on record a photo copy of provisional bill mark M showing that there were electricity arrears of Rs.1,20,15,176/- (Rupees One Crore Twenty Lakh One Hundred Seventy Six Only) for the month of December 2006 in the name of M/s Vijay Cable which is a concern of respondent, but this photo copy without original is not admissible in law. Further, CW-3 Mr. Atul Malhotra from Electricity Department has been examined by the claimant himself who has stated in his cross examination that this provisional bill Mark M has no sanctity in the eyes of law as it does not bear signature of their Executive Engineer. Not only that admittedly no notice was ever served upon the respondent about any electricity dues. Besides, it is significant to note that as per para 10 of F.I.R. Ex. RW1/3 the claimant came to know about arrears of electricity dues after two years whereas admittedly the construction on plots was to be completed in one year. Thus, the claimant has also failed to prove that there were electricity dues of Rs.1,20,15,176/- (Rupees One Crore Twenty Lakh One Hundred Seventy Six Only) in December 2006 as alleged. Even otherwise, there was no occasion for the claimant to apply for electricity connection as the electricity connection was already existed in the building at the time of entering into agreement. Moreover, when the claimant had completed the construction of all the buildings, only then the claimant or the respondent would have applied to electricity department for enhancement of load as per the need of the entire constructed buildings. Apart from the

above, it is noted that for the purpose of reconstructing the old building, it does not require fresh electricity connection as the electricity connection was already existed. So the claimant cannot also take the shelter of electricity dues or electricity connection for not completing construction of properties within one year from the date of sanction of plans which were sanctioned on 09.07.2008.”

15. Counsel for the respondent submits that the appellant had relied upon a photocopy of provisional bill to raise the demand of electricity arrears. The counsel further submits that the bills has no valid standing as it does not even bear any signature of the Executive Engineer, which has been noted by the arbitral tribunal in the award itself based on the evidence of the witnesses produced by the appellant, CW-3 Mr. Atul Malhotra from the Electricity Department.
16. Mr. Rajesh Banati submits that raising of the dispute with regard to arrears of the electricity is completely sham as it is not expected that the Electricity Department would continue to supply electricity when a large amount in the sum of Rs.1,20,15,176/- was due and payable. The respondent never received a single notice by the Electricity Department nor any such notice was produced by the respondent nor by the witness. Accordingly, Mr. Banati submits that raising all the dispute with regard to arrears is imaginary and the ground has rightly been rejected both by the Arbitrator and the learned Single Judge.
17. Mr. Banati, counsel for the respondent, submits that both the Arbitrator and the Single Judge have not believed the appellant with regard to issuance of a notice invoking the arbitration clause as neither the return envelope was produced nor any evidence from the postal department/courier/speed post was produced. The submissions of

learned counsel for the appellant have been considered and rejected by the learned Single Judge. We deem it appropriate to reproduce following paragraphs :

“12. Mr Bakshi, the learned counsel appearing for the petitioner submitted that the impugned award was patently illegal as the Arbitral Tribunal had erred in not taking into account that the respondent had filed a suit before the Civil Judge, Gautam Budh Nagar, Noida in 2012 seeking a declaration for termination of the Agreement. He stated that this clearly indicated that the respondent had also acknowledged that the Agreement was subsisting and, therefore, the Arbitral Tribunal had grossly erred in proceeding on the basis that it came to an end on 08.07.2009, that is, one year after the petitioner obtaining sanctions of the building plans (that is, one year from 09.07.2008). He further stated that since the said suit was withdrawn, the Agreement continues to subsist.

13. This Court finds the aforesaid contention to be unmerited. First of all, the respondent had filed a suit, *inter alia*, claiming a decree declaring that the Agreement had come to an end on 09.07.2009 and that the respondent was the actual allottee on the plots in question. Plainly, the same cannot be construed as an acknowledgment on the part of the respondent that the Agreement was subsisting. The contention that the Agreement continues to subsist as the said suit was withdrawn is equally unmerited.

14. The petitioner claims that he became aware in October, 2008 that *there were huge arrears of ₹1.20 crores pending on account of electricity dues* which the petitioner had failed to clear. This, according to the petitioner, amounted to playing a fraud on the petitioner as he had entered into the Agreement on an express understanding that there are no outstanding Government dues.

15. It is apparent from the above that even according to the petitioner, the cause of action on which his claims are premised had arisen in October, 2009. However, admittedly, the petitioner took no steps for instituting any proceedings for recovery of the amounts claimed. The petitioner claims that it became aware of the suit filed by the respondent in March, 2013 and, thereafter, filed an application under Section 8 of the Act. Although, the petitioner claimed that it had served a notice dated 18.04.2013 invoking the arbitration clause, the same has not been accepted as the Arbitral Tribunal found that the petitioner had failed to prove the same. However, even if it is accepted that such a notice had been issued by the petitioner, his claims would still not be within the period of limitation; according to the petitioner, the petitioner had discovered the alleged fraud in October, 2008 and, thus, the petitioner's claims were plainly barred by limitation.”

18. We have heard the learned counsel for the parties and has taken their rival submissions into consideration, perused the arbitral award and the impugned order passed by the learned Single Judge and also gone through the evidence and documents placed on record.
19. Learned Single Judge has rightly pointed that the suit filed by the respondent was pertaining to the breach of the agreement since appellant was not being able to perform its duties in a timely manner, it would not be appropriate to conceive that mere withdrawal of the suit by default implies that the contract is subsisting. Moreover, the observation of the arbitral tribunal has been rightly upheld by the learned single judge that no relevant and valid evidence has been placed on record by the appellant to press his claims regarding the invocation of the arbitration and the pending electricity dues.

20. Additionally, it is an admitted fact that the cause of action arose in October 2008/2009 and the first act of the appellant was recorded somewhere in March'2013, which has surpassed the timeline of the limitation. The jurisprudence on the limitation has been crystallized that the parties cannot sleep over their rights. Also, the law recognize the maxim of "Equity aids the vigilant, not those who slumber on their rights."

21. In **Prabhakar vs. Joint Director Sericulture Department and Ors.** reported in **AIR 2016 SC 2984**, the Apex Court has observed that :

“36. It is now a well-recognized principle of jurisprudence that a right not exercised for a long time is non-existent. Even when there is no limitation period prescribed by any statute relating to certain proceedings, in such cases Courts have coined the doctrine of laches and delays as well as doctrine of acquiescence and non-suited the litigants who approached the Court belatedly without any justifiable explanation for bringing the action after unreasonable delay. Doctrine of laches is in fact an application of maxim of equity "delay defeats equities".

37. This principle is applied in those cases where discretionary orders of the Court are claimed, such as specific performance, permanent or temporary injunction, appointment of receiver etc. These principles are also applied in the writ petitions filed Under Articles 32 and 226 of Constitution of India. In such cases, Courts can still refuse relief where the delay on the Petitioner's part has prejudiced the Respondent even though the Petitioner might have come to Court within the period prescribed by the Limitation Act.

38. Likewise, if a party having a right stands by and sees another acting in a manner inconsistent with that right and makes no objection while the act is in progress he cannot

afterwards complain. This principle is based on the doctrine of acquiescence implying that in such a case party who did not make any objection acquiesced into the alleged wrongful act of the other party and, therefore, has no right to complain against that alleged wrong.

39. Thus, in those cases where period of limitation is prescribed within which the action is to be brought before the Court, if the action is not brought within that prescribed period the aggrieved party loses remedy and cannot enforce his legal right after the period of limitation is over. Likewise, in other cases even where no limitation is prescribed, but for a long period the aggrieved party does not approach the machinery provided under the law for redressal of his grievance, it can be presumed that relief can be denied on the ground of unexplained delay and laches and/or on the presumption that such person has waived his right or acquiesced into the act of other. As mentioned above, these principles as part of equity are based on principles relatable to sound public policy that if a person does not exercise his right for a long time then such a right is non-existent.”

22. Furthermore, the law is settled on the fact that unless there is any perversity with the arbitral award, the same cannot be held as patently illegal and the court has no jurisdiction under Section 34 to interfere with the findings of the arbitral tribunal. The scope to interfere with the under section 37 is further narrowed as 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.
23. 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 judgement relied upon the pronouncement of ONGC Ltd.

Vs. Saw Pipes, in paragraph 27, 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.”

24. In Associate Builders vs. Delhi Development Authority, reported at (2015) 3 SCC 49, the Supreme Court while further explaining 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 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 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.”

25. **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 ld. 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. We find no infirmity with the decision of the learned Single Judge.
27. Accordingly, the appeal stands dismissed.

G.S.SISTANI, J.

SANGITA DHINGRA SEHGAL, J.

SEPTEMBER 17, 2018/ck