$~24

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

***Date of decision: 17th September, 2018***

\+ **O.M.P. 859/2014**

R.K. MILLEN & COMPANY (INDIA) PVT LTD & ANR ..... Petitioners

Through: Mr. Nikhil Jain, Advocate (M-8826119007).

versus

NATIONAL BUILDING CONSTRUCTION CORPORATION LTD ..... Respondent

Through: Mr. Debarshi Bhadra, Advocate (M-9899091969) along with Mr. R. Gohain, DM (Law), NBCC.

**CORAM:**
**JUSTICE PRATHIBA M. SINGH**

**<u>Prathiba M. Singh, J.</u> (Oral)**

1. This is a petition under Section 34 of Arbitration & Conciliation Act, 1996 challenging the award dated 28th February, 2014 passed by Justice Dr. M.K. Sharma (Retired) – Learned Sole Arbitrator who was appointed by this Court on 29th November, 2011.

2. Notice was issued in the petition on 4th August, 2014. Subsequently, the matter has been adjourned for arguments. Today, counsel for the Petitioners has submitted that he does not have any instructions from the Petitioners and he wishes to seek discharge in the matter. He has placed on record several emails which show that repeatedly instructions are being sought from the instructing counsels in Kolkata as also the client, but no

replies were received. He further submits that he has now received instructions that, as per the certificate issued by the doctor, the Petitioners' representative has hypertension for the last 3-4 months and it will need a further period of three months.

3. On the other hand, Counsel for the Respondent has placed on record e-mail dated 21st July, 2018 from M/s. Sinha & Company to the Petitioner's counsel, which was inadvertently marked to him wherein the instructing counsel have informed the Petitioner to seek an adjournment as the Petitioner is in financial hardship. The contradiction between the email dated 21st July 2018 and the medical certificate is apparent. In the former, financial hardship is being given as the reason for seeking an adjournment and in the latter, for the same period, illness is being asserted. It is clear that the Petitioners are avoiding addressing arguments before this Court on one pretext or the other. All the e-mails are taken on record. Counsel for the Respondent objects to the adjournment as a substantial sum is to be recovered under the Award by NBCC. Thus, no cause is made out for adjourning the matter again.

3. The background facts are - NBCC had published an advertisement dated 3rd February, 2007 inviting offers from various parties for development of land on an outright sale/resource sharing basis. In response to the said advertisement, the Petitioners offered their land admeasuring 34.83 acres, located at Mouza Kulai, P.S. Panchala on N.H.6, Howrah District, West Bengal (*hereinafter, 'land'*), for joint development. Accordingly, a 50-50% joint venture partnership firm was formed as per registered partnership agreement dated 9th October 2007. The name of the said J.V. firm, formed as a partnership firm, was NBCC-R.K. Millen. In lieu

of transfer of Rs.10 crores to the Petitioner company, the land was transferred to the newly formed firm, vide various sale deeds. Vide supplementary Memorandum of Understanding dated 28th November 2007, it was agreed that the Bank account of the Partnership firm would be operated by NBCC only. The relevant modification to Clause 7.1 reads as under:

> *"Provided however that till the CLU is obtained by RKM, the Bank account in the name of NBCC-R.K. Millen (Partnership Firm) shall be operated by NBCC only and the amount received on account of sale of 34.83 acres or part thereof can be withdrawn by NBCC and credited to its account to recover its due amount, without any restriction as aforesaid."*

As agreed, NBCC made a payment of Rs.10 crores on 22nd November 2007, to the Petitioner company and the land was sold to the Partnership firm. NBCC incurred a substantial sum of expenses to the tune of Rs.1,12,11,978/- as stamp duty on the registration of the sale.

4. Subsequently, on 7th February 2008, the land was acquired by the Government of West Bengal. The said acquisition came to be challenged in the Calcutta High Court and vide order dated 27th October, 2017, the Calcutta High Court upheld the said acquisition. Three writ petitions were filed by the Petitioner challenging the acquisition as also payment of compensation. In fact, in the writ petitions challenging the payment of compensation in the name of the J.V., various observations were made by the Calcutta High Court in order dated 27th October, 2011 which are set out herein below:

> *"(51) The more I think about this case, the more I feel convinced that this is not only an entirely meritless writ*

*application but is also utterly dishonest. The writ petitioners have approached this Court with so much dirt in their hands that even the strongest hand wash would not be sufficient to cleanse their hands. This writ petition deserves dismissal solely on the ground of suppressio veri and suggestio falsi. However, since I have heard the parties at length, I propose to deal with the case of the petitioners on merits as well.*

*……………*

*(56) In the present case, it is not in dispute that the petitioners sold the land in question to the respondent no. 3 firm by executing two separate deeds, both dated 28 November, 2007. The sale deeds were registered on 15 May, 2009. In the meantime, pursuant to the land acquisition proceeding, the Award was passed on 3 December, 2008. As on the date of the Award, the petitioners remained the owners of the land in question in the eye of law since the sale deeds had not yet been registered. However,- once the sale deeds were registered on 15 May, 2009 by virtue of Sec. 47 of the Registration Act, the said firm became the owner of the said land with effect from 28 November, 2007 and the petitioners ceased to be owners of the said land from the said date. Hence, it was incumbent upon the Collector to correct the Award by substituting the name of the respondent no. 3 firm in the place and stead of the petitioners as the awardee. I have absolutely no doubt in my mind that ·the Collector acted well within his jurisdiction in effecting the necessary amendment to the Award.*

*(57) <u>I should also notice that that the petitioners received approximately Rs. 10 crores from NBCC for transfer of the land in favour of the said firm.</u> Receipt of also the compensation by the petitioners would result in their unjust enrichment which cannot be permitted. If the petitioners have not received full sale*

*consideration, as they contend, they are at liberty to initiate appropriate legal proceedings to recover the same."*

5. Thus, insofar as the vesting of the land with the J.V. firm is concerned, the challenge to the same failed in the Calcutta High Court. The above order also takes note of the payment made by NBCC to the tune of Rs. 10 crores. The compensation paid for the acquisition is stated to be lying in the accounts of the J.V. firm.

6. Coming back to the award which is under challenge in the present case, the Learned Arbitrator has, after perusing the various agreements and the sale deeds, held that the Respondent – NBCC is entitled to recover a sum of Rs.10 crores along with the stamp duty and other expenses and also interest thereon. The relevant portion of the Award is set out below:

*"39. The sole witness of the claimant has stated in his deposition that since the period of 12 months stipulated in the Memorandum of Understanding expired without any progress in the project sought to be undertaken, the notice terminating the Memorandum of Understanding was issued and served on the respondent. In the said notice, the claimant not only mentioned about termination of Memorandum of Understanding but also demanded refund of the entire amount of Rs.10 crores alongwith interest @20% per annum as stipulated alongwith all expenses thereto. The Memorandum of Understanding and the notice are proved as exhibits CW-1/6 and CW-1/25 respectively. Both the documents speak for themselves and the validity of the same could not be and was not challenged in any manner and form by the respondents. It is therefore, proved and established on record that the respondents did not apply for obtaining a certificate of the nature as stipulated in clause 8.8 of*

*the MOU and also did not obtain such a certificate in terms of the responsibility assumed. Therefore, the claimants were legally justified in taking recourse to the provisions of clause 8.8.*

*40. There is not only violation but also non-performance by the respondents in discharge of their responsibility stipulated in the agreement and therefore, it is held that the respondents are legally bound and responsible to refund the aforesaid amount of Rs.10 crores paid to the respondents for the land alongwith interest and charges incurred towards stamp duty and registration of the sale deeds. An amount of Rs.81,00,116/- was incurred by the claimant towards stamp duty for the sale deeds executed in respect of the land in question and a further sum of Rs.31,11,862/- was incurred by the claimant towards deficit stamp duty and the registration of the sale deeds executed for the land in question as directed by the Registrar of Assurances, Calcutta. In terms of the stipulation in clause 8.8 of the MOU and also in view of the findings recorded herein that the respondents failed to discharge their responsibility as stipulated in the MOU read with the partnership deed, the respondents are not only liable to refund and pay back the amount of Rs.10 crores to the claimant but also the aforesaid sums paid by the claimants towards stamp duty, deficit stamp duty and registration fee. Both the aforesaid amounts awarded in favour of the claimants viz. the amount of Rs. 10 crores, Rs.81,00,116/- and the sum of Rs.31,11,862/- shall also carry interest @20% per annum from the date of the claim till the date of realisation as agreed and stipulated in the Memorandum of Understanding. It is also held that once the respondents pay the entire amount is awarded to the claimant and as and when the entire amount as payable is realised and the decree stands satisfied, in the event the claimant shall be liable to recall the two* *sale deeds or to re-convey the land which is the subject matter for payment of the consideration of Rs.10 crores to the respondent in accordance with law subject, however, to payment of all charges including incidental charges by the respondents to the claimants.*

*Issues No. 6, 7, 8, 10, 11 & 12*

*41. There are other claims which are raised by the claimant in its statement of Claims which are of the following nature:*

*(i) Rs. 1,03,807.46 allegedly incurred by the claimant in publishing the public notices in the newspapers;*

*(ii) Rs.18,000/- as allegedly paid by the claimant to M/s A.K.Khanna and Associates for getting the land in question evaluated;*

*(iii) An amount of Rs.3,67,500/- allegedly paid by the claimant to one M/s S.C. Nanda as their professional fee;*

*(iv) An amount of Rs.1,50,000/- allegedly paid by the claimant towards legal services availed;*

*(v) A sum of Rs.70,000/- allegedly paid by the claimant towards topographical survey of the land;*

*(vi) A sum of Rs.98,315/- spent by the claimant towards 3-D presentation;*

*42. So far these claims are concerned, such of the bills and demands and the payments receipts in support of such claims are not placed on record. That apart no sufficient evidence had been led by the claimant to establish their right to payment of such amount. Documents in support of the claims should have been placed and proved in evidence. There are in the nature of indirect expenses allegedly incurred by the claimant. Counsel appearing for the claimant, during the course of arguments also could not substantiate the claim and left it to the discretion of the Arbitral Tribunal regarding payment of the aforesaid claim amount. On the basis of the evidence on record, I hold that the* *claimant has failed to prove and establish with substantial and clinching evidence regarding their entitlement of payment of these amounts and therefore, I reject these claims.*

*43. Having held thus, I am left with the responsibility of giving my finding in respect of the claim towards costs. <u>Since I have allowed the major and substantial claims of the claimant, the respondents shall also be liable to pay the entire costs of the present proceedings. It may also be mentioned herein that the respondents did not pay their 50% share of amount of the proceedings and took recourse to the provisions of Section 38. Consequently, the Claimant had to pay the entire amount of the proceedings. Therefore, 50% of the amount of the proceedings shall also be liable to be paid by the respondent and included in the costs.</u>*

*44. Before parting with the matter, it would be appropriate to mention that during the proceedings it was <u>brought to my notice that an amount of Rs.10.70 crores was lying with the Syndicate Ban in an account of the partnership without interest.</u> The said amount was directed to be invested in an interest bearing account with a view to fetch maximum interest, so that at the end of this litigation, the said amount with interest could be disbursed to the party who is ordered to retrieve the same. Since that amount was transmitted in the name of the partnership firm with the condition that the payment of the same would be subject to the condition of final outcome of the writ petition pending before the Calcutta High Court as stated in paragraph 8 f the application filed on behalf of the claimant under Section 17 & 23 of the Arbitration and Conciliation Act, the said amount would be so kept in an interest bearing account, till an order regarding disbursal of the same is obtained from the executing court. "*

The Petitioners are unable to make any submission insofar as the objections to the said award are concerned. Insofar as jurisdiction of the Learned Arbitrator, the same has been discussed in issue no.1 by the Arbitrator and there can be no other view that can be taken in the matter inasmuch as the arbitration clause is crystal clear and the reference to the Arbitration was also made by this Court, with the consent of parties as recorded in order dated 29th November 2011. Relevant portion of the said order is set out below:

> *"**ARB. P. 263/2011***
> *1. This is a petition under Section 11 of the Arbitration and Conciliation Act, 1996 ('Act') seeking appointment of an Arbitrator for adjudication of the disputes between the National Building Construction Corporation Limited ('NBCC') and Respondents 1 and 2, R.K. Millen & Co (India) Private Limited and R.K. Chakraborty & Sons Limited (hereinafter jointly referred to as 'RKM')*
> *2. Notice. Mr. Ramesh Singh, learned counsel, accepts notice on behalf of the Respondents.*
> *3. Having considered the submission of learned counsel for the parties, and with the consent of learned counsel for the parties, this Court appoints Dr. Justice M.K. Sharma, learned retired Judge of the Supreme Court, as Sole Arbitrator to adjudicate the disputes between the parties. The fees of the learned Arbitrator will be in terms of the Delhi High Court Arbitration Centre (Arbitrator's Fees) Rules.*
> *4. The petition is disposed of. A copy of this order be communicated to the learned Arbitrator forthwith."*

7. Insofar as the other claims of the NBCC are concerned, the same were rejected by the Arbitrator.

8. A perusal of the proceedings before the Arbitrator shows that the

claim of the Respondent was primarily in respect of the recovery of Rs.10 crores. The Petitioner repeatedly sought adjournments before the Arbitrator and even failed to pay the fees of the Arbitrator. The same ground of hypertension is cited even before the Ld. Arbitrator. The Ld. Arbitrator repeatedly noted the dilatory tactics of the Petitioner and how the proceedings were being repeatedly stalled. The Ld. Arbitrator has vide order dated 24th October, 2013 and 28th February, 2014, expressed that from the conduct of the Petitioner, it was apparent that they merely intended to stall and delay the proceedings. In fact, in the arbitral award, as well, the Ld. Arbitrator observes as under:

> *"19.......After completion of the aforesaid cross-examination of the sole witness of the claimant, date was fixed for recorded the cross-examination of the witness of the respondents namely – Shri Udayan Chakraborty. Initially the sole witness of the respondents, Shri Udayan Chakraborty sought for an adjournment in respect of his cross-examination. Such request of the respondent, for adjournment of his cross-examination was accepted on 14.05.2013 and 23.07.2013. On 26.08.2013, Shri Udayan Chakraborty, the sole witness on behalf of the respondents made himself available for cross-examination, after his application filed on that day seeking for adjournment was not accepted. He tendered his affidavit by way of evidence as his examination-in-chief. But immediately after a few questions by way of cross-examination were put to him by the counsel for the claimant, he stated that he was unwell and therefore, his further cross-examination should be deferred. His aforesaid prayer was accepted and his further cross-examination was deferred for 01.10.2013 and 03.10.2013. However, on the adjourned date, he again sent an application for adjournment on the ground that the mother of the*

*witness was unwell. Accepting the request of the witness, his further cross-examination was adjourned and deferred till 24.10.2013, but on specific order of payment of costs of Rs.25,000/- which was directed to be paid to the counsel for the claimant before the next date.*

*20. On 24.10.2013, Mr. Udayan Chakraborty, respondent No.l neither took any steps to pay the cost imposed nor did he appear, instead a request for adjournment was made on the ground that he was suffering from chronic hypertension. Photocopy of a medical certificate was produced by him, in which it was mentioned that he was admitted to hospital on 30.09.2013. The stand taken by respondent No.l was not accepted by a speaking order as the prayer was not valid and as it was contrary to the request made by him on 01.10.2013 for seeking adjournment. As the sole witness of the respondents did not appear despite directions, and had been seeking adjournments on one ground or the other, it was noted that the only intention of the respondents and their sole witness Mr. Udayan Chakraborty was to stall and delay the proceedings."*

The Petitioner even failed to pay the fees of the Arbitrator. Finally, the claims that were allowed are to the extent of refund of Rs.10 crores and interest as also payment of 50% of the Learned Arbitrator and expenses.

9. The factum of NBCC having paid the sum of Rs. 10 crores being not in dispute and the same having been confirmed even by the Calcutta High Court, no fault can be found with the Award that has been passed. The objection that there is non-application of mind is not made out. The stand that there is violation of principles of Natural Justice is untenable as is evident from the various orders passed by the Ld. Arbitrator. It is clear therefrom that the Petitioner was trying to seek adjournments in the matter.

The allegation of misconduct against Ld. Arbitrator is simply reckless. The question of jurisdiction is also not made out because the Ld. Arbitrator was appointed with the consent of parties. The chronology of events before the Arbitrator also shows that similar adjournments as are being sought here were also sought during the arbitral proceedings. It also appears that counsels who were conducting the matter for the Petitioner were also forced to withdraw themselves in view of the conduct of the Petitioner. The Respondent cannot be deprived of its money for a long time, without any reason. Obviously, the Petitioner is interested in delaying the disposal of the petition. The Court has perused the reasoning given and does not see any fallacy in the same. The scope of interference, being limited, none of the grounds raised in the Petitioner under Section 34 are made out.

10. The Petition is dismissed with no order as to costs. All pending I.A.s are disposed of.

**PRATHIBA M. SINGH**
**Judge**

**SEPTEMBER 17, 2018**
*Rahul*