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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 29th October, 2018

+ **O.M.P. 643/2011**

IILM ACADEMY OF HIGHER LEARNING Petitioner
Through: Mr. Samrat Nigam, Mr. Sandeep
Mittal & Ms. Rekha, Advocates (M-
9560952425).

versus

S.S. MANN Respondent
Through: Mr. Sandeep Sharma, Mr. Aman
Dhyani & Mr. Nilesh Deep,
Advocates (M-9717464364).

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition under Section 34 has been filed challenging the award dated 13th May, 2011 passed by the Learned Sole Arbitrator who was appointed by this Court vide order dated 11th September, 2006.
2. The brief background is that the Respondent is a contractor who was awarded a contract for construction of the management block of IILM Academy at plots no.17 and 18, Knowledge Park-II, Greater Noida, U.P. The Learned Arbitrator had, on 15th September, 2006, pursuant to the directions of this Court, conducted joint measurements and recorded the same, in the presence of the parties. The present contract was awarded along with two other contracts in the same campus for construction at plot no.16 of Knowledge Park-II, Greater Noida, U.P. and construction of the new workshop building.
3. The present petition, however, relates to the management block. The Learned Arbitrator had conducted the joint measurements which were

jointly accepted by the parties. The contractor was the Claimant before the Arbitrator and the Respondent in the present petition (*hereinafter* 'contractor'). The contractor raised various claims in respect of outstanding payments which were due from the Petitioner. The various claims raised, the amounts awarded as also the objections and findings thereon are set out below:

CLAIM NO.1 AND 2

Claim No.1: Towards work executed at site as per 5th R/A bill on 5.8.2006 Rs.44,48,684/- (net)

Claim No.2 Towards payment of work done after submission of the 5th R/A Bill Rs.10,00,000/-.

There were several items under these claims. Both these claims were decided jointly by the Learned Arbitrator and after considering the various items under which the claims were made by the contractor, the Learned Arbitrator awarded a sum of Rs.15,17,339/-.

4. The allowing of claims under Items No.3 and 12 are objected by the counsel for the Petitioner. The same are in respect of 'anti-termite treatment' and 'earth brought from outside'. The learned counsel submits that these two claims are not liable to be awarded as the anti-termite treatment was not done and there was no evidence to show that earth was brought from outside.

5. These are factual issues and the claims awarded are based on the certification by the Architect as also the correspondence on record. They are beyond the scope of interference under Section 34 of the Act. The same does not warrant any interference.

CLAIM NO.4 - Damages for illegal termination

6. The contractor argued that the termination which had taken place on 28th August, 2006, was illegal and it is therefore entitled to loss of profits for the unexecuted work. The Learned Arbitrator awarded a sum of Rs.88,160/-.

7. The reasoning given by the Arbitrator is based upon the judgment of the Supreme Court in ***A.T. Brij Paul Singh v. State of Gujarat A.I.R. 1984 SC 1703*** wherein the Supreme Court has held that the damages can be granted even by means of estimation. But even in the said judgement it is held that the question as to what proof would be required to sustain the claim would have to be examined. Recently in the case of ***Ahluwalia Contract (India) Limited v. The Union of India FAO (OS) (COMM)143/2017 (decided on 17.10.2017)***, a Division Bench of this Court, has after considering the legal position in ***A.T. Brij Paul Singh (supra)*** and other subsequent judgments held:

“10. That in arbitration proceedings, just as in civil cases, an injured party can claim damages, does not necessarily translate into an award for damages towards loss of profits unless some diligence is exercised by the party (in the present case, Ahluwalia claiming it). In other words, a claim for damages (general or special) in the proceedings, cannot as a matter of course, result in an award, without proof of having suffered injury. The tribunal - as well as the learned Single Judge in this case appreciated the conspectus of circumstances. The former had the benefit of consideration of record as the primary adjudicatory body. The Tribunal was unable to discern any substantial material to justify the claim for damages towards loss of profits. Having regard to these facts, this Court is of the opinion that the rejection of claim Nos. 12-13 was dealt with correctly and reasonably by the learned Single Judge in the impugned judgment, which does not warrant

interference.”

8. The Ld. Arbitrator having not come to the conclusion that the contractor has suffered any actual loss or injury and no evidence having been led in respect of the same, damages on this count could not have been awarded.

CLAIM NO.5 - Towards Material, construction of labour hutments, godowns, construction of site office

9. In respect of this claim, the findings of the Learned Arbitrator are as under:

“(3) After hearing the parties and considering the documents on record I find that the claimant on 24.8.2006 on the request of the respondent prepared a list of materials and indicated the value and submitted the said list to the President of the Respondent Academy. The said letter dt. 24.4.2008 was duly received by the respondent along with valuation of the materials lying at site. After four days i.e. on 28.8.2006, the respondent terminated the contract of the claimant without issuance of any show cause notice. Thereafter the claimant was not allowed access to the site and was not allowed to take back this materials & tools/plants. In the arbitration proceedings the value of the materials have not been controverted nor any suggestion or arguments advanced by the respondent as to what was the actual value of the material left by the claimant at site. The claimant Shri S.S. Maan in his evidence has proved that he has sent the detailed list of materials, T&P etc. along with their valuation and the said list was prepared by his Engineer in his presence after due

verification and counting the list of rate and purchase of the material was duly approved. The said evidence has not been controverted nor there is any cross-examination by the respondent on this aspect. In the cross examination Shri Maan had submitted that after the termination of the contract on 28.4.2006 the respondent had stopped his entry at the site and his staff and labour were removed from the site. The relevant extract from his cross examination is "Thereafter the respondent stopped my entry at the site and our staff & labour were removed from the site. Our material, tools & plants were taken by the respondents in their custody." There is nothing contrary on record to shows that the materials, tools & plants of the claimant were removed. I, therefore, hold that the claimant is entitled to the material left at site by the claimant. I accept the valuation of the material as assessed by the claimant vide his letter dated 24.8.2006. Since the value of the materials shows in the letter dated 24.8.2006 as Rs.36,20,200/- pertained to all the three contracts, the claimant is entitled to only $1/3^{rd}$ of its value under the present contract i.e. Rs.12,00,000/-. However, I consider it appropriate to deduct 20% in the value of materials as given by the claimant. I, therefore award Rs.9,60,000/- under this claim."

In respect of this claim, the submission of Mr. Samrat Nigam, Ld. Counsel for the Petitioner is that there is no basis for the Arbitrator to hold that entry of the contractor was prevented in any manner. He submits that except the bald averment recorded by the Arbitrator in the cross-examination, there is no evidence and it is completely denied that the Petitioner had restricted the access to the premises.

10. A perusal of the paragraph extracted above shows that the contractor had written a letter dated 24th August, 2006 listing out the materials which

were on site and giving the value of the said materials. Admittedly, as recorded in para 2 under claim 5 of the award, the Petitioner received the said letter, but chose not to reply to the same. The only letter which was sent by the Petitioner after the receipt of letter dated 24th August, 2006 was the termination letter on 28th August, 2006. The termination itself was challenged by the contractor in the arbitral proceedings. In any event, the cross-examination recorded of the contractor is clear and categorical that the contractor was stopped from removing the staff, labour, material, tools and plants which were taken by the Petitioner into their custody. The contractor had claimed that the value of the material lying on site, was a total of Rs.36,20,200/- in respect of all three contracts and hence Rs.12 lakhs was liable to be awarded in the present case. The Petitioner does not dispute that it made use of the contractor's machines, tools, plants which were lying in the premises. The Learned Arbitrator deducted 20% in the value claimed i.e. Rs.12 lakhs and awarded Rs.9,60,000/-. The reasoning of the Arbitrator is sound and valid. The objections raised that the same is based on a bald averment of the contractor, is not correct. In fact if the Petitioner felt that there was no material on site, it ought to have led adequate evidence to establish its stand. The contractor failed to do so.

11. The award therefore does not warrant any interference.

CLAIM NO.3 - Interest on delayed payments

CLAIM NO.6 - Interest pendent lite and future

12. These two claims relate to interest on delayed payments and interest *pendente lite* and future interest which has been filed, awarded by the Arbitrator.

13. In respect of interest, on the last two hearings, when the matter was

heard, the calculations were produced on record in respect of payment of interest. Counsel for the contractor had fairly agreed that if the Petitioner is willing to undertake to make the payments due under all the four awards on or before 31st May, 2019 his client is willing to accept Simple Interest @ 6% per annum. However, today when the matter was heard, there appears to be no consensus or agreement between the parties. Accordingly, the interest awarded by the Learned Arbitrator is being examined on merits.

14. The claim of the contractor was for interest @ 15% per annum on account of delayed payments on the fifth running bill which was submitted on 5th August, 2006. The Learned Arbitrator has awarded interest @ 9% per annum on claims no.1 and 2 w.e.f. October, 2006 till date of realization. This is a reasonable rate of interest awarded by the Arbitrator because most items for which the claims were made by the contractor were not even seriously disputed by the Petitioner.

15. Insofar as the claims no.4 and 5 are concerned, claim no.4 now is not pressed by the contractor. In respect of claim no.5, Simple Interest @ 9% per annum from the date of award has been given by the Learned Arbitrator. The same is also reasonable and does not warrant any interference.

16. Insofar as the counter claims are concerned, all of them have been rejected and no objections have been pressed in respect thereof.

17. The OMP is accordingly disposed of in the above terms.

PRATHIBA M. SINGH
JUDGE

OCTOBER 29, 2018

Rahul