

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CS (OS) 2163/2011

Reserved on: 10th January, 2018

Date of decision: 23rd February, 2018

SUNITA CONST. CO.

..... Plaintiff

Through: Mr.Sandeep Sharma, Mr.Aditya
Vashishth, Advs.

versus

UNIVERSITY OF DELHI

..... Defendant

Through: Mr.G.K.Pathak, Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. The present suit was registered on the filing of the Award dated 06.08.2011 passed by the Sole Arbitrator in the arbitration proceedings between the parties.
2. Upon issuance of the notice of filing of the Award to the parties, the respondent, University of Delhi filed its objection thereto under Section 30 and 33 of the Arbitration Act, 1940.
3. Before dealing with the objection, it would be proper to remind oneself of the limit of jurisdiction of this Court while exercising power under Sections 30 and 33 of the Arbitration Act, 1940. In *Sudarsan Trading Company v. Government of Kerala and Anr.* (1989) 2 SCC 38, the Supreme Court had reiterated that in exercise of power under Section 30 of the Arbitration Act, 1940, the Court has no jurisdiction to substitute its own evaluation of the conclusion of law or fact to come to the

conclusion that the Arbitrator had acted contrary to the bargain between the parties. Whether a particular amount was liable to be paid or damages liable to be sustained, was a decision within the competency of the Arbitrator. The Arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the court to take upon itself the task of being a judge on the evidence led before the Arbitrator. Appraisalment of the evidence by the Arbitrator is never a matter which the Court questions and considers. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisalment of the evidence. The High Court has no jurisdiction to examine the different items awarded clause by clause by the Arbitrator and to hold that under the contract these were not sustainable in the facts found by the Arbitrator. An award is not invalid merely because by a process of inference and argument it may be demonstrated that the arbitrator has committed some mistake in arriving at his conclusion.

4. In ***Food Corporation of India vs. Joginder Pal Mohinder Pal & Anr.***, AIR 1989 SC 1263, the Supreme Court clarified that “it is not misconduct on the part of an Arbitrator to come to an erroneous decision, whether his error is one of fact or law, and whether or not his findings of fact are supported by evidence”. It was further held that the Court cannot sit in appeal over the views of the arbitrator by re-examining and re-assessing the material.

5. In ***Puri Construction Pvt. Ltd. vs. UOI***, (1989) 1 SCC 411, it was again emphasized that “when a Court is called upon to decide the objections raised by a party against an Arbitral Award, the jurisdiction of the Court is limited, as expressly indicated in the Arbitration Act, and it

has no jurisdiction to sit in an appeal and examine the correctness of the Award on merits”.

6. In *Harish Chandra and Company vs. State of Uttar Pradesh* (2016) 9 SCC 478, Supreme Court reiterated as:-

“25. One cannot, therefore, dispute the legal proposition, which is now fairly settled keeping in view the aforementioned law laid down by this Court that an award can be set aside only on the grounds specified in clauses (a), (b) and (c) of Section 30 of the 1940 Act and on no other grounds. Indeed this is clear from the opening words of Section 30 itself which starts with the words “An award shall not be set aside except on one or more of the following grounds”. A fortiori, a reasoned award cannot be set aside unless it falls in any of the three clauses (a), (b) and (c) of Section 30 of the 1940 Act.

26. The grounds such as inadequacy of reasons in support of an award, error committed by the arbitrator on facts, alternate and/or more plausible view could be taken than what is taken by the arbitrator, improper appreciation of evidence done by the arbitrator in recording any finding, etc. are not the grounds on which any award much less a reasoned award can be set aside. In other words, none of these grounds can be made the foundation for setting aside the award because they do not fall within the four corners of any of the three sub-clauses of Section 30 of the 1940 Act.”

7. Keeping the above principles in mind, I now proceed to consider the objections to the Award raised by the respondent-University of Delhi.

8. The disputes between the parties arose out of an Agreement dated 05.11.1983 executed between the parties by which the respondent awarded the work of construction of 200 Boys Hostel, Warden Residential area and Servant Quarters in the Campus of International Students House, University of Delhi in favour of the petitioner Sunita Const. Co. The total agreement amount was Rs.37,15,862.55. The

contract was to commence on 05.11.1983 with the stipulated date of completion as 04.05.1985.

9. Claiming various hindrances in completion of the work, the petitioner claimed the work was completed on 15.06.1986. There was a dispute on this issue as well and the Arbitrator, after discussing the evidence led before him, came to the conclusion that the work was completed by the petitioner in June 1986. The challenge to the award is to the grant of claims under Claim No.1 and 2, 3, 4, 6, 10, 11 and 14.

10. As far as the challenge to Claim Nos.1,2 and 3 are concerned, the same relate to the date of completion of the work. The Arbitrator has held that as the work was completed in June 1986, the petitioner was entitled to claim Renewal Charges/Commission Charges on the bank guarantee for the period 1986 to 1989, when the bank guarantee was withdrawn by the petitioner. In Claim No.3, the Arbitrator granted interest @ 9% p.a. on the bank guarantee amount.

11. The respondent has contended that the bank guarantee was extended by the petitioner on its own and that, as in terms of the final bill, it was the petitioner who was to pay back Rs.1,800/- to the respondent, the said claim of the petitioner is liable to be rejected.

12. I do not find any force in the above contention of the respondent. The Arbitrator has considered the evidence led before him to arrive at a conclusion that the work was completed by the petitioner in June 1986. The said finding is quoted herein below:

“As one looks at the material referred to by the parties on the record and also the cross examination of Ashwani Kapoor who stated that certain defects were removed even after December 1986. In the first blush one may come to a

conclusion that perhaps building was not completed in June 1986 as alleged by the respondent but on closer scrutiny from the evidence on the record it is obvious that what is being stated cannot be accepted. It is obvious from the above correspondence particularly letter C24 which clearly admits that building was ready and delay, if any, was because of electrical and other works that were to be effected. The respondent did not have the courage to examine who wrote the letter to state that he was not aware of the ground realities at the spot. If certain defects were pointed out thereafter time and again and a contractor was called upon to remove those defects which he did in the peculiar facts cannot lead one to conclude that contractor was not completing or that it was not fit for occupation. Common sense would show that once electrical and other work is still to be effected there would always be some defect in the structure that would creep in that would require use of cement time and again and contractor would necessarily will have to repair the same. In totality of facts, therefore, it cannot be taken that the work was not completed in June 1986. The letter C31 cannot be read as an admission that the work in fact was not completed. When read in totality it does not lead one to clear that in fact the work was not complete in June 1986. Accordingly it must be held that plea of the claimant to that effect must be accepted.”

13. The objection petition does not show how the above finding of the Arbitrator can be said to be perverse. The Arbitrator, after reaching the above conclusion, has awarded a sum of Rs.3,000/- as Renewal Charges/Commission Charges in favour of the petitioner and a sum of Rs.821/- as interest on the bank guarantee. The Award of said amount cannot be said to be unreasonable and therefore, I find no merit in the objection raised on the grant of amount in favour of the petitioner under Claim Nos.1 to 3.

14. As far as the Claim No.4 is concerned, the challenge to the Award is on sub-heads constituting Claim No.4. The first challenge is to the award of Rs.4,14,668/- on the account of extra work of making the building earthquake resistant. The respondent contends that the conditions in the contract document specifically provided that the contractor could see the drawing, specification and contract conditions of the work. Once the drawing has been given to the petitioner, it cannot be said that the work of making the building earthquake resistant was an extra work.

15. I am unable to accept the above arguments of the respondent. It is not denied that the contract in question was an Item Rate Contract. It could not be shown by the respondent that the work of making the building earthquake resistant was included in any of the Item Rates mentioned in the contract. The Arbitrator also has granted the above claim observing as under:

“Firstly the claimant seeks Rs. 4,14,668.75 as additional expenditure in making the building earthquake resistance by stating that expenditure was Rs.125/- per sq. mtr. The tender document and contract did not stipulate construction of the building as earthquake resistant. The respondent's contention is that drawings were already available to the claimant when the tender was submitted. The claimant submitted running bills and the additional expenditure now claimed is an afterthought. During the course of submissions the reliance was placed by the respondent on the statement of its witness who stated that when the building has to be made earthquake resistant no extra expenditure is involved.

The said statement comes from an engineer and on the face of it is fallacious. When a building has to be made earthquake resistant it requires extra reinforcement and extra expense necessarily would be involved. The said

statement on the face of it cannot be accepted and when extra work in this regard has been done the amount of Rs.4,14,668.75 is allowed.”

It cannot therefore be said that the Award passed by the Arbitrator is perverse so as to warrant any interference by this Court.

16. The next sub-head of challenge is to the award of Rs.79,454.84 towards the Anti-termite treatment. The Arbitrator while awarding the said amount has held as under:

“The amount of Rs.79,454.84 is claimed for the item of anti termite treatment that was got done. Even the same is being contested. The anti-termite treatment had been done as is apparent from Exhibit R8 dated 13.8.1984. In this argument the respondent pointed out that the anti termite treatment was not being done properly. Correct quantity/quality of material has not been used. There was no subsequent letter pointing that in fact it has not been done immediately. The obvious conclusion would be that anti termite treatment was effected and thereafter after a long period when it is objected to necessarily it cannot be taken to be a just ground. The said amount, therefore, of Rs.79,454.84 is allowed.”

17. The Arbitrator has therefore appreciated the evidence led before him and has come to a conclusion that respondent has failed to prove that the Anti-termite treatment had not been done properly, therefore, the petitioner was entitled to the said claim. The respondent’s assertion that as the claimant had not attended the joint measurement, it could not have been allowed to challenge the deduction made by the respondent in this regard, cannot be accepted. It was for the respondent to show that the complaints against petitioner not doing the Anti-termite treatment during

the course of the work had been raised by the respondent. The Arbitrator has also relied on the above circumstance to conclude that after the completion of the work, if an objection is raised by the respondent on the quality of Anti-termite treatment not being done by the petitioner, the same would not be a justified ground for making deduction. This is a pure finding of fact, which cannot be said to be perverse or unreasonable in nature so as to warrant any interference of this Court.

18. Similar challenge was also made to the award of Rs.84,395.58, which had been deducted by the respondent on account of defects in the work done by the petitioner. The finding of the Arbitrator on the said claim is reproduced herein below:

“Rs. 84,395.58 are being claimed for the deductions by the respondent by substantially reducing the contracted rates after getting the work done. Details have been given in Annexure A appended with the claim. As one glances through the record it is obvious that the contention of the respondent can hardly be believed. The deduction/reduction in rates are put on account of difference in quality and workmanship and reference is made to the fact that iron hinges had been provided at site instead of aluminum hinges. Glass traps provided were of undersize, grooves were not properly made, the width and depth was not as per item, snowcem had not been completed, the final coat of snowcem is pending as final coat was not done. One finds no reasonable ground to deduct the amount because the job was got done and these checks had been made subsequently. If there is any such defect it might well have been pointed and it was so done only later on. Therefore, at this stage the amount so deducted cannot be taken to be justified and claimant would be entitled to Rs.84,395.58/-.”

19. Here again the only submission made by the respondent is that as the petitioner had failed to participate in the joint measurement, the defects so recorded should be deemed to have been admitted against the petitioner. The Arbitrator has held that these defects were not pointed out earlier and therefore, merely because the petitioner had failed to participate in the joint measurement, it could not be said that these defects stood proved. This again is a view which is reasonable and cannot be interfered with in exercise of powers under Section 30 of the Arbitration Act, 1940.

20. The next challenge to the Award is to the grant of Rs.41,867.94 in favour of the petitioner applying Clause 10-C of the contract. It is asserted that the Arbitrator has committed a misconduct in awarding the above amount in favour of the petitioner as the petitioner had failed to produce evidence of payment of the said amount of increased wages and had also not given notice of the same to the respondent before claiming the same. The said argument was noted by the Arbitrator in his Impugned Award but was rejected holding that the amount had been worked out by the respondent itself upon verification of the final bill. As far as the conditions are concerned, the Arbitrator hold that the same was only procedural in nature and therefore, once the respondent itself has calculated the amount based on statutory increase in wages, the same was to be granted in favour of the petitioner. I do not find anything perverse in the reasoning of the Arbitrator. The insistence of the respondent that the petitioner should have shown books of account and other documents reflecting the increased claim cannot be accepted. The respondent does not assert, even in the objection against the Award, that it ever demanded

from the petitioner to produce such books of account. Once the respondent had calculated the amount in terms of the statutory notifications, unless it is shown that there were any complaint made against the petitioner for not paying such statutory increase in wages, insistence on production of books of account was merely a formality and could not have acted as a reason to justify the action of withholding of such a claim. I, therefore, find no merit in the objection on this issue.

21. The respondent has further challenged the grant of Rs.7,750/- in favour of the petitioner on account of testing charges under Claim No.10. Here again, the challenge is based on the fact that the petitioner had failed to produce the evidence in support of such claim. The Arbitrator holds that once the fact of testing is not denied by the respondent, the charges being incidental and arising out of the contract, the same are to be allowed. I, therefore, find no merit in the objection against grant of the said amount in favour of the petitioner.

22. The final objection of the respondent is to the Award of cost of Rs.30,000/- in favour of the petitioner. The respondent in its objection petition has challenged the said Award in the following words:

“13)The Ld. Arbitrator unreasonably awarded costs of Rs.30000.00 in favour of the Claimants despite the fact that the Claimants themselves were responsible for the delay and non completion of the contract works. The Claimants were being paid for the running bills and all of a sudden in the final bill the Claimants as a mere after thought raised frivolous claims as is apparent from the reading of the impugned award itself. Thus the Claim allowed towards costs is liable to be set aside forthwith.”

23. Once the claims raised by the petitioner were found justified, grant of amount of Rs.30,000/- as cost in favour of the petitioner cannot be said so unreasonable so as to warrant any interference of this Court in exercise of its power under Section 30 of the Arbitration Act, 1940.

24. In view of the above, I find no merit in the objections filed against the Award and the same are accordingly dismissed with cost quantified as Rs.25,000/-.

25. As the objections filed against the Arbitral Award dated 06.08.2011 are dismissed, the Award is made Rule of the Court. Decree sheet be drawn accordingly.

NAVIN CHAWLA, J

FEBRUARY 23, 2018/Arya

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