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

% *Date of Judgment: 5th September, 2018*

+ **FAO(OS) (COMM) 192/2018 & CM. APPL 34654/2018(stay)**

THE DEPUTY SECRETARY

..... Appellant

Through Mr. Chetan Sharma, Senior Advocate
with Mr. Amit Gupta, Mr. Vivek
Tyagi, Mr. Saurabh Mishra and Mr.
Abhishek Singh, Advocates

versus

M/S BHAYANA BUILDERS PVT LTD

..... Respondent

Through Mr. Gaurav Mitra, Mrs. Meghna
Mishra, Ms. Manmeet Kaur, Mr.
Yashvardhan Bandi, Mr. Adit Singh
and Ms. Riya, Advocates

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S. SISTANI, J. (ORAL)

1. The objections to the interim Award dated 15.11.2017 passed by the sole arbitrator were rejected by the learned Single Judge of this court by an order dated 09.05.2018, which has led to the filing of the present appeal under Section 37(1)(C) of the Arbitration and Conciliation Act, 1996 read with Section 13 of the Commercial Courts Act.
2. The brief facts necessary for the disposal of the present appeal are that the appellant had laid challenge to the Part Award dated 15.11.2017 pertaining to Claim Nos. 5 and 9 wherein the learned Sole Arbitrator

had decided both the claims in favour of the respondent. The present dispute arose with respect to the tender of the construction work.

3. The respondent was awarded the work for construction of Sports Injury Centre at Safdarjung Hospital, New Delhi. Parties had entered into an Agreement dated 25.06.2009, wherein the stipulated date for completion of Construction work was 12 months (i.e. upto 31.05.2010) from the date of commencement of the work i.e. 01.06.2009 and as per the terms of the contract, value of the work was Rs. 32,50,21,011/-. On completion of the said work, the appellant revised the final bill after making certain deductions and awarded Rs. 1.65 crores. The respondent invoked the arbitration clause for recovery of the remaining amount by filing the claims for adjudication.
4. The respondent had raised a claim towards amount withheld by way of deductions for extension of completion time by the appellant. This was termed as Claim no.5. The appellant had retained a sum of Rs.50 lakhs on account of grant of extensions. The appellant stated that the respondent is at default as there was an admitted delay on part of the respondent in achieving the revised milestone Nos. 5 and 7. The appellant had relied on Annexure-D of the tender documents and based on the stipulation, retained the amount of Rs.50 lakhs as they were entitled to levy liquidated damages @ Rs.10 lakhs per week or part thereof in case the respondent failed to complete each of the milestones.
5. The learned Single Judge had declined the objections pertaining to Claim no.5, while relying on the paras 37 and 38 of the Impugned Award. The learned Arbitrator reached the finding that, firstly the

delay was not on account of reasons attributable to the respondent and, secondly the appellant herein had failed to show damages having been suffered on account of the respondent, in not achieving the milestones No. 5 and 7 because the subsequent milestones No. 6 and 8 were achieved by the respondent on time. The learned Arbitrator further noted that the delay in completion of the work was due to the reasons attributable to the appellant and thus, appellant was not entitled to levy any damages on the respondent. In the absence of any default of the respondent, the amount of Rs.50 lakhs retained was held to be illegal, arbitrary and unjust. The second claim which was allowed by the learned Sole Arbitrator and challenged by the appellant herein before the learned Single Judge and before us today is with regard to the price escalation claimed by the respondent for the extended period of the contract *i.e.* between 31.05.2010 to 26.09.2010.

6. Mr. Sharma, learned Senior Counsel appearing on behalf of the appellant submits that the learned Single Judge has failed to take into account the perversity and the error apparent in the reasoning in the Award pertaining to Claim no.9. Mr. Sharma has drawn the attention of the Court to Clause 10.3 (Instructions to Bidders) of the Contract, in support of his submission that the rates and prices quoted by the bidder were to remain fixed and constant throughout the contract period and the respondent would not have claimed any escalation. Clause 10.3 of the contract is reproduced below:

“10.3 The rates and prices quoted by the Bidder shall be fixed for items complete in all respect for the duration of the Contract and not subject to adjustment on any account except as otherwise provided in the conditions of Contract.”

7. Mr. Sharma has also drawn the attention to Clause 40.0 of the Specific Conditions of Contract (SCC). He submits that the learned Arbitrator has exceeded its jurisdiction to grant the escalated price. Clause 40.0 is reproduced below:

“40.0 Rates/Prices

The quoted rates/prices for the items shall be complete in all respect including all labour, material, plant and machinery, tools and tackles, batching plant and pumps for RCC work including water & electricity, all taxes, duties, levies, octroi, statutory levies applicable from time to time and considering others conditions as specified in SCC etc. The Contractor should quote his rates/prices accordingly for the complete items in all respects.”

8. Additionally, Mr. Sharma, while relying on paragraph 61 of the Award, submits that the learned Arbitrator has granted benefit of escalation from the date parties had entered into the Contract, whereas the escalation, if at all, would only have been granted from the price index as on 31.05.2010 to 26.09.2010. It is, in these circumstances, that the learned Senior Counsel for the appellant has urged before this Court that Claim no.9 should be rejected and the order of the learned Single Judge should be set aside. The relevant paragraph is stated as under: -

“61. Once it is accepted that the market rates have increased since the contract was entered into one must take into account the increase in the cost from the date the bid was given till the date the cost was actually incurred by the Claimant. The bid was made on 17.04.2009 when the index published by CPWD for Delhi was 123.

Therefore, the rise in cost has to be seen in reference to the index 123 rather than the index 136.”

9. Mr. Mitra, learned counsel appearing on behalf of the respondent submits that the scope of interference in proceedings arising out of Section 37 of the Arbitration and Conciliation Act, 1996 is even narrower. He relies on the decision rendered by this Court in the case of *State Trading Corporation of India v. Helm Dungenmittel GMBH & Anr*, in FAO(OS)(COMM).76/2016 decided on 30.05.2018, more particularly paragraphs 27 and 29. Mr. Mitra further submits that there is no infirmity, illegality or perversity in the reasoning of the learned Arbitrator as also the order passed by the learned Single Judge upholding the Part Award dated 15.11.2017, which are Claims no.5 and 9. Reliance is placed on the paragraphs 37 and 38 of the Award, which we reproduce below:

“37. He says that the Claimant failed to achieve the revised milestone no. 5 and 7. The milestone 5 was achieved on 31.08.2010 instead of 06.08.2010 and milestone no.7 was achieved on 31.08.2010 instead of 27.08.2010. However, he says that other milestones including milestones no. 6, 8 and 9 were achieved. According to his testimony a sum of Rs.40,00,000 was deducted for delay in achieving the milestone no. 5 and Rs. 10,00,000 for delay in achieving the milestone no. 7 (Exhibit RW1/3). Thus, the liquidated damages are being justified on the excuse of the Claimant's failure to achieve the milestone no. 5 and 7 as stated above. For claiming liquidated damages, the Respondent has to show that some damage has been suffered. Here Respondent is unable to show any damage suffered because subsequent milestone no. 6 and 8 were achieved on time.

38. In the statement of defence the Respondent justifies the withholding of sum of Rs.50,00,000/- as liquidate damages on account of delay in completion of the contract. As has been found in the above discussion, the Respondent was responsible for causing the delays and therefore, the respondent cannot stake any claim for liquidated damages on account of the Claimant's failure to achieve the target set by the contract. There can be no justification for claiming the sum of Rs.50,00,000/- either on account of grant of extension of time till 27.09.2010 or on account of liquidated damages for failure to achieve the milestones no. 5 and 7. The Claim no. 5, therefore, has to be allowed. This claim is for a sum of Rs.50,00,000/- along with interest.”

10. Mr. Mitra also submits that once the learned Arbitrator has reached a finding that the appellant herein was in default and responsible for the delay in construction work, the appellant could not have taken advantage of his mistakes and retained Rs.50 lakhs, which was due and payable to the respondent.
11. We have heard the learned counsels for the parties and have carefully examined paragraphs 37 and 38 of the Part Award and the reasoning of the learned Arbitrator and we find no infirmity in the same. The learned Single Judge has relied upon the judgment of the Supreme Court in the case of *Associate Builders v. Delhi Development Authority*, reported at (2015) 3 SCC 49. This judgment would apply while deciding an appeal. Para 33 of the judgment reads as under:

“33. 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 [Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows:

“General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong”.

It is very important to bear this in mind when awards of lay arbitrators are challenged.] . 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 : (2012) 1 SCC (Civ) 342] , this Court held: (SCC pp. 601-02, para 21)

“21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating 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 nonmember, 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.”

12. The only other ground raised before us is Claim no.9. No doubt, the submission of Mr. Sharma, learned Senior Counsel for the appellant seems attractive at the first instance, but a complete reading of para 61 of the Award would show that the learned Arbitrator has only given a background that market rates have increased since the Contract was entered into and one must take into account the increase in the cost from the date the bid was given till the date the cost was actually incurred. However, escalation has only been granted from 31.05.2010 and only on the price index fixed by the CPWD and not on any calculation of the respondent. Secondly, should the learned Arbitrator have at all entertained such a claim in the light of Clause 10.3 and 40.0 of the Contract, the answer has been given by the learned Arbitrator and has taken note of the decisions. The relevant paras are reproduced below:

“48 ...In *Food Corporation of India v. A.M. Ahmed and Co. and Anr*, reported at 2006 13 SCC 779, the Supreme Court after considering the judgment in the case of *State of Orissa Vs. Sudhakar Das* (Supra) said that when the minimum wages are raised by the Government the employer is bound to pay for higher wages as the contract inter alia prescribed the clause that the contractor shall not pay less than the minimum wages to the labour employed by him. It was also held that when the work is prolonged and the employer was responsible for the delay, the employer was responsible for the consequences of the delay which would include higher cost caused by inflation in the market.

49. The High Court of Delhi in Deconar Services Pvt. Ltd. vs. National Thermal Power Corporation Ltd. FAO(OS)No.135 of 2010 & CM No.352 of 2010 noticed the judgments in the case of Sudhakar Das and certain other judgments and observed that for a contract of fixed prices, the price remains fixed for the period of the contract, and, after the contract period the actual cost, which is a result of escalation in the market, can be granted.

50. A recent judgment of Supreme Court in the case of K.N. Satyapalan vs. State of Kerala and another [2007 13 SCC 1943] the question has been examined in further detail. In this case the term of contract was extended and a new contract was entered into at the old rates with a specific term that the contractor will not claim any enhanced rates. Subsequent to the new contract there were issues of law and order at the site and execution of the contract could not be concluded during the extended period. The Supreme Court held that despite the fact that there was a specific clause against any claim on escalation, the Arbitrator had the power to grant extra cost incurred by the contractor in the circumstances as the Respondent who was the State had failed to live up to its obligations. The ruling as contained in Para 31 and 32 of the judgment are as under:-

“31. The question which we are called upon to answer in the instant appeal is whether in the absence of any price escalation clause in the original agreement and specific prohibition to the contrary in the supplemental agreement, the appellant could have made any claim on account of escalation of costs and whether the Arbitrator exceeded his jurisdiction in allowing such claims as had been found by the High Court.

32. Ordinarily, the parties would be bound by the terms agreed upon in the contract, but in the event one of the parties to the contract is unable to fulfil its obligation under the contract which has a direct bearing on the work to be executed by the other party, the Arbitrator is vested

with the authority to compensate the second party for the extra costs incurred by him as a result of failure of the first party to live up to its obligations. That is the distinguishing feature of cases of this nature and *Alopi Parshad and Sons Ltd. Vs. Union of India*[(1960) 2 SCR 793: AIR 1960 SC 588] and also *State of U.P. vs. Patel Engineering Co. Ltd.* [(2004) 10 SCC 566]. As pointed out by Mr. Dave, the said principle was recognized by this court in *P.M. Paul vs. Union of India* [1989 Supp (1) SCC 368] where a reference was made to retired Judge of this court to fix responsibility for the delay in construction of the building and the repercussions of such delay. Based on the findings of the Learned Judge, this court gave approval to the excess amount awarded by the Arbitrator on account of increase in price of materials and costs of labour and transport during the extended period of the contract, even in the absence of any escalation clause. The said principle was reiterated by the court in *T.P. George vs. State of Kerala* [2001) 2 SCC 758]”.

13. The Hon’ble Supreme Court in *McDermott International Inc. Vs. Burn Standard Co. Ltd. & Ors.*, **(2006) 11 SCC 181**, has categorically held in paragraphs 106 and 110 as under:-

“106...It is an accepted position that different formulas can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or the other formula, having regard to the facts and circumstances of a particular case, would eminently fall within the domain of the arbitrator.

....

110.As computation depends on circumstances and methods to compute damages, how the quantum thereof should be determined is a matter which would fall for the decision of the arbitrator."

14. We find that the learned Arbitrator has correctly applied the law in the facts of the present case. The period of contract was extended beyond 31.05.2010 to 26.09.2010. The respondent was not responsible for the delay as has been held by the learned Arbitrator.
15. Moreover, this court time and again in its earlier judgements, FAO (OS) (COMM) 86/2016 titled as ***M/S. L.G. Electronics India Pvt. Ltd. Vs. Dinesh Kalra***, FAO(OS)(COMM) 55/2018 titled as ***M. L. Lakhanpal vs. Darshan Lal & Anr.*** and in FAO(OS)(COMM) 201/2017 titled as ***ADTV Communication Pvt. Ltd Vs. Vibha Goel & Ors.***, has repeatedly mapped the limited scope of intervention in an appeal under section 37 of the Act and has held as under:-

“It has been repeatedly held that while entertaining appeals under Section 37 of the Act, 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. In the case of *State Trading Corporation of India Ltd. v. Toepfer International Asia Pte. Ltd.*, reported at 2014 (144) DRJ 220 (DB), in para 16 it has been held as under:

“16. The senior counsel for the respondent has in this regard rightly argued that the scope of appeal under Section 37 is even more restricted. It has been so held by the Division Benches of this Court in Thyssen Krupp Werkstoffe v. Steel Authority of India and Shree Vinayaka Cement Clearing Agency v. Cement Corporation of India 147 (2007) DLT 385. It is also the contention of the senior counsel for the respondent that the argument made by the appellant before the learned Single Judge and being made before this Court, that the particular clause in the contract is a contract of indemnification, was not even raised before the Arbitral Tribunal and did not form the ground in the OMP filed

under Section 34 of the Act and was raised for the first time in the arguments.”

In the case of *Steel Authority of India v. Gupta Brothers Steel Tubes Limited*, (2009) 10 SCC 63, the Supreme Court has laid down that an error relating to interpretations of the contract by an Arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award. The Supreme Court has further laid down that the Arbitrator having been made the final arbiter of resolution of disputes between the parties, the award is not open to challenge on the ground that the Arbitrator has reached a wrong conclusion. The courts do not interfere with the conclusion of the Arbitrator even with regard to the construction of contract, if it is a plausible view of the matter.

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. v. Saw Pipes*, in paragraph 19, held as under:—

27. Interpreting the said provisions, this Court in ONGC Ltd. v. Saw Pipes Ltd. [(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.”

16. Having regard to the law laid down by the Apex Court in a number of decisions rendered and applying the law laid down to the facts of the present case, we do not find any merit in the appeal. No grounds are made out to interfere in the impugned order passed by learned Single Judge under Section 34 of the Arbitration and Conciliation Act, 1996.
17. Resultantly, the same is accordingly dismissed.

CM.APPL 34654/2018 (Stay)

18. The application stands dismissed in view of the orders passed in the appeal.

G.S.SISTANI, J.

SANGITA DHINGRA SEHGAL, J

SEPTEMBER 05, 2018

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