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

% *Date of decision: 29.01.2018*

+ O.M.P. (COMM) 222/2017

UNION OF INDIA

..... Petitioner

Through Mr.Saurabh Chaddha, Adv.

versus

M/S JIA LALL KISHORI LALL PVT.LTD..... Respondent

Through Mr.Arvind Sharma, Adv.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. Present petition is filed under section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as 'The Act'*) seeking to set aside the Award of the Sole Arbitrator dated 5.12.2016 and the corrected Award dated 6.12.2016, 18.12.2016, 19.12.2016 and 9.1.2017. The respondent is a contractor engaged by the Public Works Department for construction activities. The petitioner called bids to carry out construction of the bridge and widening of the roads at four lane bridge over Bara Pula Nala at Ring Road near Sarai Kale Khan, New Delhi. Pursuant to the bidding the contract was awarded to the respondent. An Agreement dated 8.7.2005 (*in short 'the said Agreement'*) was executed. The stipulated date of start of work was 30.7.2005. Seventeen months' time was allowed for execution of the contract from the date of start. As per the said Agreement the date of

completion of the work was 29.12.2006. It is the case of the petitioner that the respondent has executed the work in 34 months. It is also the case of the petitioner that the respondent has failed to achieve the milestone within the stipulated time as he had failed to properly mobilize the resources due to his own defaults in payment to the Sub-Contractors. Since there was a delay in execution of the work the petitioner issued a letter dated 1.1.2009 imposing a penalty of Rs.64,70,049/- on account of delay in execution of the work. The said letter was challenged by the respondent in a suit being Suit No. 250/2009 seeking a decree of declaration that the letter dated 01.01.2009 is null and void before this court in Suit No.250/2009. The respondent sought reference of the said dispute to the learned Arbitrator who had been appointed as disputes had arisen between the parties. This court accepted the plea of the respondent and referred the said dispute also to the already constituted Arbitral Tribunal.

2. Before the learned Arbitrator several claims were made by the respondent. The details of the claims made and the Award made in favour of the respondent are as follows:-

Claim No.	Claimed on a/c of	Claim amount (Rs.)	Award Amount (Rs.)
1.	Prolongation of contract	2,32,63,000	84,44,737
2.	Price Escalation	85,00,000	35,84,498
3.	Extra Work	1,11,24,510	78,07,018
4.	Losses due to reduction in scope of work	59,59,566	8,59,693
5.	Cost of arbitration	5,00,000	NIL
6.	Withheld amount	1,02,53,560	66,30,255
7.	Physical, social and mental agony.....	1,45,00,000	NIL
Addl. Claim	Illegal levy of compensation	64,70,049	64,70,049
	TOTAL	8,01,70,685	3,37,96,250

3. I have heard learned counsel for the parties. Learned counsel for the petitioner sought to impugn the Award on stated grounds.

He has firstly stated that the Award is liable to be set aside on account of the bias of the learned Arbitrator. It has been urged that the Sole Arbitrator has given large number of opportunities to the respondent for filing details, documents, evidence and submissions of the respondent. However, he became impatient on the very first hearing earmarked for the petitioner. It is also claimed that he has sought to take revenge against the petitioner on account of some old differences during his service tenure with the department.

It was secondly submitted that the entire dispute hinges around as to who was responsible for the delay in completion of the contract. It has been urged that the findings recorded by the learned Arbitrator that the delay took place on account of the petitioner are mischievous, erroneous and incorrect. It is urged that the respondent took possession of the site in July, 2005. At no stage did the respondent protest that there were hindrances at the site. This plea was raised later on as an after thought and as an excuse to justify the delay on the part of the respondent.

Thirdly, it is pointed out that the learned Arbitrator has ignored the terms of the said Agreement between the parties. Clause 2.3.1 (xviii) clearly provides that services like water supply lines, sewer lines, electric and telephone cables etc. if any, falling in the alignment of the work which are required to be shifted would be shifted by the petitioner but time taken for the same shall be accounted for towards extension of time if hindrance was caused but no monetary claim for delay due to the above reasons would be entertained. Reliance was also placed on clause 7.16 and 7.41 of Special

Condition to make the same submissions. It is urged that despite noticing these clause and also other such clauses the learned Arbitrator has given a go bye to the same. Relying on section 73 of the Contract Act the learned Arbitrator has wrongly and illegally awarded claims in favour of the respondent.

4. I will now deal with the submissions of learned counsel for the petitioner. I will first take up the second and third pleas raised together. On account of delay in completion of the work the learned Arbitrator has awarded for prolongation of contract a sum of Rs.84,44,737/-. The learned Arbitrator notes that a site does not mean just a piece of land or place where work is executed. It would envisage giving possession of land whereby it is feasible for the contractor to commence execution of the work. It is pointed out that the admitted fact is that overhead electrical lines were existing for which the petitioner took time to shift. These are said to have been shifted on 9.4.2006, namely, more than eight months after the stipulated date of start. It is only thereafter that the piling work could be started. Hence, the learned Arbitrator concludes that the petitioner miserably failed to live up to its obligation in regard to making available hindrance free site.

The award further records that the nature of work demanded that the petitioner be issued all the working drawing immediately as no comprehensive and meaningful planning could be done for deployment of resources and execution of work involving construction of a bridge without the drawings. It is pointed out that it is only on 30.1.2006 that the Chief Engineer decided that only one single bridge with all the four lanes will be constructed on the downstream side of the existing bridge. Accordingly GAD (General Arrangement Drawing) was issued on 30.1.2006. Various

such other instances have been noted in the Award. Hence, the learned Arbitrator concluded that the required drawings were not issued by the petitioner within a reasonable time. In fact the petitioner failed to issue the complete drawings even as the period for the contract expired on 29.12.2006. Issue of drawings is said to have continued till 10.1.2009 that is more than two years after the stipulated date of completion. Hence, the Award concludes that there was monumental delay on the part of the petitioner in making available the drawings which was the most fundamental obligation. The Award also notes that the petitioner issued notices to the respondent for determination of the contract on the ground of slow progress four times over two years, namely, on 02.11.2006, 19.7.2007, 19.5.2008 and 18.11.2008 but never took any action.

5. Some of the conclusions noted by the learned Arbitrator of the conduct of the petitioner are as follows:-

“24.3.14 The sum and substance is that not only the drawings as required were not issued by the respondent just as the work was awarded or even within reasonable time thereafter, the respondent failed to issue the complete drawings even as stipulated contract period expired on 29.12.2006. In fact, issue of drawings continued up to 10.01.2009, that is, up to more than two years after the stipulated date of completion. Therefore, there could be no two opinions that there was monumental delay on the part of the respondent in making available the drawings which was one of its most fundamental obligations.

.....

24.3.16 I have perused all the relevant provisions of the agreement and rival submissions of the parties and I have no hesitation to say that it is a case of massive delays and defaults

on the part of the respondent in regard to its most fundamental obligations. In fact, it is more than obvious that the respondent called tender without doing its proper home work because of which not only there was monumental delay in making available hindrance free site and working drawings and deciding the GAD, there also arose necessity of subsequent changes, such as, change from originally proposed cast-in-situ RCC girders to pre-cast girders, shifting of location of abutment 'A2' and consequent reduction in the length of end span on Sarai Kale Khan side and change from originally proposed girder & slab to only solid slab in the end span on Sarai Kale Khan side. The poor planning by the respondent also gave rise to deviation items which caused further delay.

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24.4 Decision:

Based on my finding above, it is held that the respondent committed a serious breach which is of the most fundamental nature and which goes to the very root of the contract and that the respondent is entirely responsible for the delay in completion of the work.”

6. The above are the findings of fact recorded by the learned arbitrator which cannot be challenged in the present proceedings. Reference in this context may be had to the judgment of the Supreme Court in the case *Associate Builders vs. DDA, AIR 2015 SC 620*, where the Supreme Court as follows:-

“31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where-

1. a finding is based on no evidence, or
2. an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or
3. ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

.....

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. 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, 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.

.....”

7. Keeping in view the finding of the facts recorded by the learned Arbitrator and the above legal position, it is manifest that there is no merit in the plea of the learned counsel for the petitioner stating that the learned Arbitrator has wrongly concluded that delay took place on account of the acts of the petitioner.

8. As far as the other plea of learned counsel for the petitioner is concerned, learned counsel has relied upon various clauses of the said Agreement to contend that no payment of damages could have been given on account of the delay caused therein by the petitioner. The learned Arbitrator has wrongly and illegally awarded damages to the respondent for the alleged delay caused by the petitioner.

9. Reliance is placed on clause 2.3.1 (XVIII) of the said Agreement, Special Condition Number 7.16 and Special Condition Number 7.41. The relevant clauses read as follows:-

“(B) CLAUSES 2.3.1 (xviii) AT PAGE 21 OF THE AGREEMENT

“Services like water supply lines, sewer lines, storm water drains, electricity lines, over head and underground

cables/structures, if any falling in the alignment of the work (which are required to be removed or shifted in the opinion of the Engineer-in Charge shall be removed/shifted by the Department if found necessary by the Engineer-in Charge. Time taken for its shifting, removal, diversion shall be accounted for towards according extension of time if it actually causes hindrance in execution as per the discretion of the Engineer-in Charge. No claim for delay or otherwise due to above reasons shall be entertained on this account.

.....

(E) SPECIAL CONDITION No.7.16 AT PAGE-79 OF THE AGREEMENT

"The contractor will not have any claim in case of any delay by the Engineer-in-Charge in removal of trees or shifting, raising, removing of telegraph, telephone or electric lines (overhead or underground), water and sewer lines and other structures etc., if any, which may come in the way of the work."

(F) SPECIAL CONDITION No.7.41 AT PAGE-84 OF THE AGREEMENT

"The drawings listed in the tender documents placed In Volume-II of the tender documents are indicative. The execution drawings may undergo changes. The drawings enclosed with the tender documents explain the concept and the complexity involved in the project. It is made clear that changes made in the execution drawings due to technical reasons in the opinion of the Engineer-in Charge shall be incorporated in the work within the quoted rate and nothing extra shall be payable for such changes."

10. A perusal of the Award would show that the learned Arbitrator has noted the above clauses. The award, however, concludes that the intention of these terms was not to deny to the contractor payment, if same is due under section 73 of the Contract Act. It is not possible the award conclude to hold

that if the said agreement is prolonged for any length of time due to reasons attributable to the petitioner, no amount would be payable to the respondent. The award also concludes that statutory damages which would flow from Section 73 of the Contract Act cannot be ousted from the said agreement by the consent of parties. He also relies upon section 28 of the Arbitration Act to note that as per the Arbitration Act the Arbitrator is to decide in accordance with substantive law in force in India. Hence, the learned Arbitrator concludes that the respondent is entitled to damages on account of prolongation of the contract.

11. I may note that the learned Arbitrator concludes that the petitioner has committed serious breach which is of a fundamental nature and which goes to the very root of the contract and the petitioner is entirely responsible for the delay in completion of the work

12. The clauses relied upon by the learned counsel for the petitioner would show that the said clauses provide that where services like water supply lines, sewer lines, storm water drains, electricity lines, over head and underground cables/structures, if any falling in the alignment of the work which are required to be removed or shifted shall be accounted for towards according extension of time, but no claim due to delay caused will be entertained. The special condition No.7.16 the same conditions regarding removal of trees or shifting, raising, removing of telegraph, telephone or electric lines (overhead or underground), water and sewer lines and other structures etc. The condition No.7.41 states that changes made in the drawings shall be incorporated in the work within the quoted rate and nothing shall be payable for extra work.

13. I may note that the learned Arbitrator has taken the view that the parties cannot contract out the provisions of Section 73 of the Contract Act. Having recorded a finding of fact that the petitioner was guilty of breach of the most fundamental nature which goes to the root of the contract, the learned Arbitrator has awarded the above claims in favour of the respondent for the delay caused by the petitioner.

14. A single bench of this court in *Simplex Concrete Piles (India) Ltd. vs. Union of India, ILR (2010) II Delhi 699* had also accepted such a proposition. This court held as follows:-

“15. The issue therefore boils down to whether rights which are created by Section 73 and 55 of the Contract Act can or cannot be contractually waived. If there is a public policy or public interest element in these Sections, then the rights under these sections cannot be waived. Let us examine the matter. If we look at that portion of the Contract Act, 1872 till Section 73 it broadly comprises of three parts. The First part is the formation and the requirements for the formation of a legal agreement/contract. The second part deals with the performance thereof. The third part deals with the effect of breach of the contract.

Provisions pertaining to the effect of breach of contract, two of which provisions are Sections 73 and 55, in my opinion, are the very heart, foundation and the basis for existence of the Contract Act. This is because a contract which can be broken at will, will destroy the very edifice of the Contract Act. After all, why enter into a contract in the first place when such contracts can be broken by breaches of the other party without any consequential effect upon the guilty party? It therefore is a matter of public policy that the sanctity of the contracts and the bindingness thereof should be given precedence over the entitlement to breach the same by virtue of contractual clauses with no remedy to the aggrieved party. Contracts are entered into because they are

sacrosanct. If Sections 73 and 55 are not allowed to prevail, then, in my opinion, parties would in fact not even enter into contracts because commercial contracts are entered into for the purpose of profits and benefits and which elements will be non-existent if deliberate breaches without any consequences on the guilty party are permitted. If there has to be no benefit and commercial gain out of a contract, because, the same can be broken at will without any consequences on the guilty party, the entire sub-stratum of contractual relations will stand imploded and exploded. It is inconceivable that in contracts performance is at the will of a person without any threat or fear of any consequences of a breach of contract. Putting it differently, the entire commercial world will be in complete turmoil if the effect of Sections 55 and 73 of the Contract Act are taken away.

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16. Provisions of the contract which will set at naught the legislative intendment of the Contract Act, I would hold the same to be void being against public interest and public policy. Such clauses are also void because it would defeat the provisions of law which is surely not in public interest to ensure smooth operation of commercial relations. I therefore hold that the contractual clauses such as Clauses 11A to 11C, on their interpretation to disentitle the aggrieved party to the benefits of Sections 55 and 73, would be void being violative of Section 23 of the Contract Act. The interpretation given by the Supreme Court in the Ram Nath International case is a literal and strict interpretation of clauses whereby the expression "reason beyond the control of the contractor" has been so strictly and literally interpreted to include even those cases which are on account of the defaults of the employer itself and but for the said judgment I would have preferred to interpret the clauses in the manner which the Arbitrator has done and not strike them down by applying Section 23 of the Contract Act. I have also reproduced above the reasoning given in the

Award which in my opinion, would otherwise have been enough to dispose of this case, however, the said findings in the award being totally against a direct opposite interpretation given to such clauses by the Supreme Court, would therefore have to give way.”

15. However in my opinion even on a reading of the said clauses, they would have no application here. I may note that the learned Arbitrator has noted various facts which have led to monumental delay on the part of the petitioners. Some of the facts noted by the learned Arbitrator include making available hindrance free site by the petitioner, making available working drawings, deciding on GAD etc. The clauses relied upon by learned counsel for the petitioner, namely, Clause 2.3.1 (xviii), Clause Special Condition No.7.16 and special condition No.7.41 do not necessarily deal with these grounds. None of these clauses stipulate that in case the supply of drawings is delayed, the respondent shall not be entitled to claim damages for the same. The said clauses do not also deal with damages arising due to delay caused due to repeated changes in the required construction, poor planning, etc. In fact the extent of delay is monumental. The learned Arbitrator notes that as per the Agreement the work was to be completed within 17 months. The work was to conclude on 29.12.2006. However, the issue of drawings by the petitioner continued even after this period of 29.12.2006 and has continued till 10.01.2009 that is more than two years after the stipulated date of completion of the contract. In the light of these glaring delays found by the learned Arbitrator, the learned Arbitrator has awarded the necessary damages. This is a plausible interpretation of the terms of the contract.

16. Interpretation of an agreement is within the domain of the arbitrator. Reference may be had to the judgment of the Supreme Court in the case of *McDermott International Inc. vs. Burn Standard Co. Ltd. and Ors.*, (2006) 11 SCC 181, wherein the court held as follows:

“112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement, is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot, be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See *Pure Helium India (P) Ltd. v. Oil & Natural Gas Commission*: AIR 2003 SC 4519 and *D.D. Sharma v. Union of India*: (2004) 5 SCC 325].

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.”

Hence, there is no merit in the afore-noted plea of the petitioner.

17. As far as the plea of the petitioner of bias of the Arbitrator is concerned, it may be noted that the Arbitrator is the nominee of the petitioner. The contention is that on account of the some old differences while in service the Arbitrator has made the Award against the petitioner.

18. Reference in this context may be had to the judgment of the Supreme Court in the case of *Government of T.N. vs. Munuswamy Mudaliar and Anr., 1988 (Supp) SCC 651*. The court held as follows:

"12. Reasonable apprehension of bias in the mind of a reasonable man can be a ground for removal of the arbitrator. A predisposition to decide for or against one party, without proper regard to the true merits of the dispute is bias. There must be reasonable apprehension of that predisposition. The reasonable apprehension must be based on cogent materials. See the observations of Mustill and Boyd, Commercial Arbitration, 1982 Edition, page 214. Halsbury's Laws of England, Fourth Edition, Volume 2, para 551, page 282 describe that the test for bias is whether a reasonable intelligent man, fully appraised of all the circumstances, would feel a serious apprehension of bias.

13. This Court in International Authority of India v. K.D. Bali and Anr., held that there must be reasonable evidence to satisfy that there was a real likelihood of bias. Vague suspicions of whimsical, capricious and unreasonable people should not be made the standard to regulate normal human conduct. In this country in numerous contracts with the Government, clauses requiring the Superintending Engineer or some official of the Govt. to be the arbitrator are there. It cannot be said that the Superintending Engineer, as such cannot be entrusted with the work of arbitration and that an apprehension, simpliciter in the mind of the contractor without any tangible ground, would be a justification for removal. No other ground for the alleged apprehension was indicated in the pleadings before the learned Judge or the decision of the learned Judge. There was, in our opinion, no ground for removal of the arbitrator. Mere imagination of a ground cannot be an excuse for apprehending bias in the mind of the chosen arbitrator."

19. Clearly, the allegations made against the learned Arbitrator are vague and whimsical and need not be dealt with any further.

20. It is clear that what has been recorded by the learned Arbitrator are essentially findings of fact. Other than making a vague and unsubstantiated plea about bias on the part of the learned Arbitrator nothing else has been argued before this court.

21. Hence, none of the submissions made by the learned counsel for the petitioner have any merits. There are no reasons for this court to interfere with the award passed by the learned arbitrator. There is no merit in the present petition. Same is dismissed.

(JAYANT NATH)
JUDGE

JANUARY 29, 2018/n

Signed and corrected on 15.02.2018.