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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment Pronounced on: 16.08.2018

+ O.M.P. (COMM) 259/2017

DELHI STATE INDUSTRIAL & INFRASTRUCTURE
DEVELOPMENT CORPORATION LTD. Petitioner

Through Mr.Moni Cinmoy and Mr.Arvind
Pandey, Advs.
Mr.Jatinder Kumar, EE (Civil).

versus

BLS SUMER JV

..... Respondent

Through Mr.Ashish Dholakia, Mr.D.Kishore
Kumar and Mr.Arvind Sharma, Advs.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

IA No.7576/2017 (exemption)

Allowed subject to all just exceptions.

O.M.P. (COMM) 259/2017 & IA No.7575/2017

1. Present petition is filed under section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as the 'Act'*) seeking to challenge the Award dated 3.3.2017 passed by the Sole Arbitrator.
2. The brief facts are that the respondent was awarded the work of Integrated Infrastructure of 28 Govt. Schools in East Delhi on 1.10.2009. The stipulated date of start of the contract was 25.10.2009. The work was to be completed within 12 months i.e. by 24.16.2010. The respondent thereafter commenced the construction work. On account of differences having arisen

between the parties the respondent sought appointment of an arbitrator on 08.01.2014. In the meantime, the petitioner terminated the contract on 13.09.2013. The petitioner appointed a Sole Arbitrator on 5.3.2014. The learned Arbitrator Sh.S.C.Vasudeva entered upon reference on 27.3.2014. The award has now been passed on 3.3.2017 in favour of the respondent for a sum of Rs.12,38,25,162/-.

3. Before the learned Arbitrator the respondent raised the following claims:-

Claim No.1 Sum of Rs.3,55,50,777/- on a/c of final bill of the work

Claim No.2 On account of PG. Rs.2,46,54,650/-

Claim No.3 A sum of Rs.1,94,97,133/- on a/c of release of withheld amount due to mile stone

Claim No.4 Release of Security Deposit of Rs.3,03,46,470/-

Claim No.5 On a/c of Escalation due to market rise amounting to Rs.4,50,00,000/-

Claim No.6 Damages due to prolongation of the Contract Rs.7,20,00,000/-

Claim No.7 On a/c of loss of profit on unexecuted work Rs.98,38,531/-

Claim No.8 On a/c of Bank charges for keeping the BG of PG and that of SD alive a further charges to be incurred if any

Claim No.9 On a/c of loss of profitability, turn over loss is head office losses Rs.16,31,00,000/-

Claim No.10 Interest on delayed payments of R/W, withheld amount and final bill

Claim No.11 Cost Rs.5,00,000/-

While filing the Statement of Defence (i.e. SOD) on 5th March 2015, petitioner raised the following counter claims:

Counter claim No.1 On a/c of loss due to transfer of projects from the respondent-Rs.20.23 crores

Counter claim No.2. On a/c of action under clause 2 & 3 of the Agreement-Rs.6,35,75,338/-

Counter claim No.3 On a/c of loss of salary-Rs.1,41,05,000/-

Counter Claim No.4 On a/c of interest @ 18% P.A. on the above counter claims

Counter claim No.5 Towards cost of arbitration-Rs.5,00,000/-.”

4. On 18.8.2015 the learned Arbitrator framed the following issues:-

“(i)Whether there has been breach of Contract & if so which party is responsible for the breach
(ii)The claims and counter claims
(iii)Whether Claimant is entitled to any relief in r/o the claims
(iv) Whether respondent is entitled to any relief in r/o the counter Claims”

5. The following claims of the respondent were allowed by the learned Arbitrator:-

Claim no.	Amount claimed (rupees)	Amount awarded (rupees)

1	3,55,50,777/- (on a/c of final bill)	1,55,22,984/-
2	2,46,54,650/- (on a/c of PG)	2,46,53,656/- plus interest on FD.
3	1,94,97,133/- (amount withheld due to mile stone)	1,93,43,051/-
4	3,03,46,470/- (release of security deposit)	1,91,50,854/- plus release of BG for SD for 80,00,000/-
5	4,50,00,000/- (due to escalation)	68,47,817/-
6	7,20,00,000/- (damages due to prolongation of contract)	1,44,00,000/-
7	98,38,531/- (loss of profit)	REJECTED
8	26,98,919/- (bank charges)	96,000/-
9	16,31,00,000/- (loss of profitability etc.)	2,13,45,485/-
10	Interest not quantified	16,28,925/- on R/A bills delay Simple Interest on amounts awarded against claims i.e 1,3,4,5 @12% p.a. w.e.f. 08.01.2014 till the date of this award. For claims 1,3,4,5,6,8,9,10 and under section 38 (2) @

		10% p.a. w.e.f 45 days after the award date till payment.
11	5,00,000/- (costs)	35,640
	Under section 38(2) of A&C Act	8,00,750/-

Total amount Awarded – Rs. 12,38,25,162/- plus interest and release of BG.

6. The main issue was issue No.1, namely, as to whether there has been a breach of contract and, if so, which party is responsible for the same. A perusal of the Award would show that the learned Arbitrator on facts came to a conclusion rejecting most of the submissions of the petitioner and held that the delay in execution of the work was occasioned by the petitioner due to its inability to hand over sites in time, make available the drawings/decision for execution in time, release the running accounts payment in time and also due to contribution delay caused by the respondent on account of slow progress in execution of the work. The petitioner was held responsible for 60% of the delay whereas the respondent was held responsible for 40% of the delay.

7. Some of the reasons stated for the said conclusions are as follows:-

(i) The Award notes that from the “Hindrance Register” and Site Order Book maintained by the petitioner it is clear that site of most of the schools was made available to the petitioner with delay of a month or more. In some instances it was even more than that, namely, in Patparganj there was a

delay of 6 ½ months. The learned Arbitrator notes that for a work which is to be completed in 12 months delay of 6½ months to 7 months is a huge delay in handing over the Site.

(ii) The Award also notes that the Lay Out Plans/Foundation drawings/drawings for rectification which are the starting point for the contractor to proceed with the work were delayed from one and half months to three months. There was delay in preparation of drawings at Schools at Radhey Shyam Park, Rani Garden, Kondli, C. Block Vivek Vihar and Lalita Park. At Dallupura there was a delay of 51 days, at Patparganj it was six months. The Award notes that this delay is evident from the entries in the Hindrance Register. It also notes that the petitioner did not furnish the Drawings register which raises a doubt and an adverse inference can be drawn for the failure on the part of the petitioner to produce the said documents.

(iii) The Award also notes that there was some delay on the part of the respondent but part of it is attributed to the delay in payments being made to the respondents by the petitioner which would have the effect of squeezing the respondent financially and slowing the work.

8. Based on the above evidence on record the learned Arbitrator concluded that the delay was occasioned by the petitioner. The Award concludes that the exact apportionment of the delay may not be possible.

However, it concludes that the petitioner was responsible for 60% of the delay whereas the respondent was responsible for 40% of the delay.

9. The Award rejected the submissions of the petitioner that the respondent had sublet the contract to a third party. The Award also notes that there were two separate Engineers In-Charge, namely, one for the civil items and one for the electrical items. It notes that the Show Cause Notice was issued to the respondents by the Civil Engineer. Hence, the recession of the contract by the Civil Engineer, including contract pertaining to electrical work over which he had no jurisdiction, was held to be illegal. Based on the above findings the learned Arbitrator dealt with the respective claims of the respondent.

10. I have heard learned counsel for the parties. Learned counsel for the petitioner has submitted as follows as to why the award be set aside:-

(i) It is stated that the learned Arbitrator was nursing a deep bias against the petitioner which vitiates the arbitration proceedings. It is stated that the learned Arbitrator fixed an abnormally high fee contrary to the terms of appointment, despite protest by the petitioner. As the petitioner did not pay the abnormally high fees contrary to the terms of the appointment, the learned Arbitrator directed the respondent to pay the share of the petitioner which the respondent agreed upon. As the respondent was paying most of the fees, there was a bias in favour of the respondent. Hence, it was urged that the Award is vitiated on account of bias of the learned Arbitrator. Learned counsel for the petitioner relied upon the judgment of Madhya Pradesh High Court in *Ardeskar Irani V. State of MP AIR 1974 MP 199* to support his contention.

The petitioner filed proceedings under sections 12 (3)(a) and 16 of the Act before the learned arbitrator that was dismissed on 11.12.2014. The order of the learned arbitrator was challenged in OMP 120/2015 before this court which was rejected by this court on 27.01.2015 in view of the judgment of the Division Bench in *Progressive Career Academy Private Limited vs. FIIT JEE Limited*, Arb. LR 323 (Del.) (DB) inasmuch as the petitioner was advised to await the Award. An appeal filed against the order of the Single Bench dated 27.1.2015 being FAO(OS) 229/2015 which was also dismissed by the Division Bench on 28.4.2015.

(ii) It is further urged that there was no breach of contract on the part of the petitioner. The learned arbitrator has failed to take into account relevant material. More than 90 letters are said to have been written by the petitioner to the respondent pointing out the delay and slow progress of the respondent. It is urged that none of these communications have been referred to by the learned Arbitrator. It is also stated that one of the facts taken into consideration in the Award to conclude against the petitioner for alleged delay in providing drawings was the absence of the drawing register. In the Award it is noted that the petitioner failed to furnish the Drawing Register on account of which an adverse inference can be drawn against the petitioner. It is urged that the drawings register had been placed on record as is evident from the cross-examination of the witnesses. Hence, again a document on record was ignored to come to wrong conclusion of facts.

(iii) It is further stated that the learned Arbitrator has completely ignored Clause 20 of the terms and conditions of the Agreement to conclude that the determination of the contract by the petitioner was illegal as it was done by the Executive Engineer, Civil, whereas the said Executive Engineer was only

In-Charge of the civil work. It is urged that under Clause 20 of the Agreement the Executive Engineer of the major component was the composite work incharge/engineer incharge of the work. Hence, it is urged that this vital clause of the agreement was ignored by the learned Arbitrator. Based on these, it is strongly urged that findings recorded by the learned Arbitrator holding the termination of the contract as illegal is entirely erroneous.

(iv) It was also urged that while claim No.6 and claim No.9 were determined in ratio of 40/60 on the basis of apportionment of the blame for the delays caused by the learned Arbitrator, however, there is no such apportionment for claim No.1.

(v) It was further stated by learned counsel that in claim No.1 the learned Arbitrator has permitted addition of various items contrary to clause 12.2 of the Agreement. Further, it is urged that completely erroneous and incorrect rates have been taken while awarding claim No.1 as for deviated items the award has determined the rates payable based on sanctioned cost indexes of DG, CPWD. It is urged that no evidence was led by the respondent on the rates and hence the entire calculation of claim No.1 is entirely erroneous.

(vi) Lastly, it was urged that claim No.5 which deals with escalation and claim No.1 which is for the final bill are overlapping and hence excess amount in any case has been awarded to the respondents.

11. Learned counsel appearing for the respondent has countered the submissions of the learned counsel for the petitioner. On the issue of alleged bias of the learned Arbitrator, he has pointed out that the petitioner has not placed on record the complete clause of the arbitration agreement, namely, clause 25 which provides for the settlement of disputes and arbitration. He

submits that as per the said clause, the learned Arbitrator has the discretion to fix his fees which he has done. Merely because, he did not follow the dictate of the petitioner in adhering to the fees wrongly fixed by the petitioner, it cannot be said that the learned Arbitrator acted with bias.

On the contention of the petitioner that the drawing register was filed and the learned Arbitrator has wrongly noted that the same was not filed and has drawn an adverse inference, he submits that no drawing register has been filed by the petitioner. At the time of cross-examination of the respondent's witness, some pages of the drawing register were produced which have been marked. However, the complete register has not been filed.

Regarding the contention of the petitioner that claim No. 1 and claim No. 5 overlap, he submits that no such submission was made before the learned Arbitrator. He further submits that this plea is not even taken in the present petition and is being raised for the first time before this court. He reiterates that the petitioner is only challenging the findings of fact recorded by the learned Arbitrator which is not permissible as per the provisions of Section 34 of the Act.

12. I will now deal with the submission of the learned counsel for the petitioner. On the first plea taken, namely, regarding bias the petitioner had moved an application before the learned Arbitrator under Section 16 read with Section 12(3)(a) of the Act which was dismissed on 11.12.2014. In the application, it was noted that the fees is payable to the learned Arbitrator as per the office memorandum of the petitioner dated 25.03.2013 and the fees had been fixed at Rs.1 lakh. However, in the application it was stated that via order dated 27.03.2014, it transpired that the learned Arbitrator had fixed the fees at Rs.13.74 lakhs and the petitioner's share was to be borne by the

respondent as the petitioner was not paying. It was pleaded that this order was passed despite there being no consensus amongst the parties regarding the fees of the learned arbitrator. It was however stated that the petitioner had no doubt on the integrity of the learned arbitrator.

The learned Arbitrator in his order dated 11.12.2014 noted that the application is barred by the principle of res-judicata in view of the earlier order of the learned arbitrator dated 05.09.2014 rejecting the objections under Section 12(3)(a) and Section 16 of the Act and barred by time having been filed beyond the stipulated period stated in Section 13(2) of the Act. However, the objections of the petitioner were still dealt with on merits. The Award notes that the order dated 27.03.2014 fixing the fees was dictated in the presence of the parties. The learned Arbitrator relies upon Clause 25 of the agreement to conclude that he could have fixed his own fees. The learned Arbitrator notes that at no point of time any allegation of partiality has been made. Merely because the Arbitrator is not willing to follow the directions of the appointing authority regarding the fees being charged, does not justify the allegations of bias or partiality which cannot be sustained. The application was accordingly dismissed.

13. It has not been disputed by the petitioner that there exists clause 25 of the Agreement between the parties. Relevant portion of clause 25 of the agreement reads as follows:

"25. xxx

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in

his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid"

14. A perusal of the above clause of the contract would show that there is no fixed fee for the learned arbitrator stipulated in the agreement. On the contrary, the aforesaid clause notes that the fees of the learned Arbitrator is at the discretion of the Arbitrator. Merely because on account of some administrative instructions passed by the petitioner fixing some fees of the arbitrator to be appointed would not ipso facto mean that the Arbitrator is guilty of having acted unfairly or having done any misconduct. The learned arbitrator was bound by the terms of the agreement and not by the administrative instructions of the petitioner. The interpretation of the above clause 25 of the agreement is a reasonable interpretation.

15. Even otherwise, the fees fixed by the learned arbitrator, in my opinion is reasonable. As per the order of the learned Arbitrator dated 27.03.2014, the learned Arbitrator noted that the value of claims in dispute is Rs.40.50 crores. As per the schedule fixed by the Delhi High Court Arbitration Centre, the fees of the learned Arbitrator would work out to Rs.20.15 lakhs. As per ICA Rules of Arbitration, the fees of the learned Arbitrator would work out at Rs.13.74 lakhs. It noted that the fees fixed by DSIIDC/petitioner as per its memorandum dated 25.03.2013 is unworkable keeping in view the magnitude of the work and number of claims. Hence, the learned Arbitrator

fixed the lower of the two figures i.e. Rs. 13.74 lakhs as his fees. The order also noted that the petitioner are willing to pay only 50 % of their share of Rs.1 lakh (i.e. the fees fixed by the administrative order of the petitioner.) and accordingly, the respondent/claimant were asked under Section 38(2) of the Arbitration Act as to whether they were willing to pay the share of the fee of the petitioner which the respondent/claimant agreed to pay.

16. The petitioner has relied upon the judgment of the Madhya Pradesh High Court in the case of *Ardeshar Irani vs. The State of M.P.*, (supra) to press his submission regarding bias. Relevant portion of the judgment reads as follows:-

“10. It would not be out of place to state at, the outset the nature of function of an arbitrator and the manner in which he has to perform his duty. A relevant passage in Russell on the Law of Arbitration (17th Edition) at page 132 under the head "The Duty to act fairly" is as follows:--

"The first principle is that the arbitrator must act fairly to both parties, and in the proceedings throughout the reference he must not favour one party more than another, or do anything for one party which he does not do or offer to do for the other. He must observe in this the ordinary well-understood rules for the administration of justice."

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12. Thus, such is the wide meaning that the expression 'misconduct' has assumed in legal parlance and that is how the expression has to be understood in relation to arbitration proceedings. It is not only the cases where moral turpitude of the arbitrator has been made out which alone fall within this category but even the cases where no moral turpitude is definitely proved against the arbitrator, yet the facts disclose a

technical or legal misconduct in relation to the arbitrator's conduct or the proceedings that a ground of misconduct for setting aside the award under Clause (a) of Section 30 of the Act would be made out.

17. It is not clear as to how and in what manner the aforesaid judgment helps the case of the petitioner.

18. Reference may be had to the judgment of the Division Bench of this court in *M/s Jeevan Industries Pvt. Ltd. v. Haji Bashiruddin Madhusudan Dayal*, *ILR (1975) 1 Del. 533*. The court held as follows:

“As a result of the analysis of the provisions of law and the relevant authorities, our conclusion is that there is nothing illegal or improper in the demand made before the award by the arbitrator or umpire of fees and expenses from the parties provided they are fair and reasonable and are not extravagant or excessive and they are made on both the parties equitably within the knowledge of both the parties. It would not be illegal and improper if on the failure of one of the parties to make the payment, he either stays proceedings or directs the other party to pay the whole amount pending the decision of the dispute by arbitration. The arbitrator would also be justified in waiting till the making of the award and then proceed in accordance with Section 14(2) or Section 38 of the Act and have the matter determined by the court. The arbitrator, in our opinion, however, is likely to be charged with misconduct for having been illegally induced to make an award if he accepts any money on any account whatsoever from one of the parties without the knowledge of the other party. Such a charge would also be open, if the amount demanded is exorbitant having no relation to the work done or anticipated, nor to the standard of fees normally payable to arbitrators for such a work. In order to avoid such a charge and also to avoid having to give evidence before the court to justify the payment of fees, the best course to adopt for the arbitrator is to make a record about his fees and, the reasons, therefor, if any, in the record of the proceedings itself within the knowledge of both the parties. If he does not do

so he will be involved in defending himself against the allegations of misconduct, if made.”

Hence, this court held that there is nothing illegal or improper for the learned arbitrator to demand fees and expenses from the parties provided they are fair and reasonable and in the knowledge of both the parties.

19. In the present case, there is no allegation that any fees has been accepted behind the back of the petitioner. In fact, it also cannot be said that the fee which is fixed is unreasonable. Keeping in view the fact that the claim was for a sum of Rs.40.50 crores, the fees that has been charged i.e. Rs.13.74 lakhs is as per usual norms in arbitration proceedings. Further the fees charged by the learned Arbitrator is as per agreement between the parties. The respondent has paid the share of the petitioner as it refused to pay its full share. This was as per Section 38 (2) of the Act. It cannot be said that there is any bias on the part of the Arbitrator. The plea is without merit.

20. The next submission that was strenuously submitted by the learned counsel for the petitioner was that the learned Arbitrator has ignored the terms of the contract and evidence on record and has erroneously come to a conclusion that the petitioner are responsible for 60% of the delay and the respondent are responsible for 40% of the delay.

21. The finding recorded by the learned arbitrator that the petitioner is responsible for 60% of the delay is a finding of fact based on the evidence on record. The learned arbitrator has in the award noted that on a perusal of the Hindrance Register and Site Order Book, it is manifest that in a number of schools there was a long delay in handing over the sites. Similarly, Lay Out Plans/Foundation drawings/drawings etc. which are starting point for

the contractor to proceed with the work were delayed from one and half month to three months. This delay was evident from the entries in the hindrance register. The learned arbitrator also noted that this slow work of the respondent was partly attributable to delay in making payments by the petitioner which resulted in a financial squeeze and throwing the financial management out of gear for the respondent. These are the findings of fact which do not warrant any interference of this court. Hence, this submission of the petitioner is without merits.

22. It has also been urged that the learned Arbitrator has wrongly come to a conclusion that the recession of the contract by the petitioner dated 13.09.2013 is illegal as the show cause notice was issued by the Executive Engineer (Civil) whereas the said Executive Engineer was only responsible for civil items of the work and not for the electric items. It is urged that the learned Arbitrator ignored clause 20 of the agreement which provided that the Executive Engineer of the major component who called the tenders shall be the Engineer-in-Charge of the work.

23. In my opinion, the above contention is completely without merits. The learned Arbitrator has relied upon the definitions as stated in the agreement which read as follows:-

"2 (i) Engineer-in-Charge For Civil Items of Work Executive Engineer, CD-XVI ..

2 (ii) Engineer-in-charge, For Electrical items of Work Executive Engineer (ED-V)".

24. Clause 20 of the Agreement which is relied upon by the petitioner reads as follows:

“20. The Executive Engineer of the major component who called the tenders for this composite work shall be the Engineer –in-Charge of the work. The earnest money will be fixed with respect to the combined estimated cost put to tender for the composite tender. Security deposit will be worked out separately for each component corresponding to the estimated cost of respective component of works. The earnest money will become part of the security deposit of the major component of work.”

25. Based on the above nomenclature, the learned Arbitrator came to the conclusion that two separate Engineers were In-Charge of different areas of work. Hence, Engineer-in-Charge of the civil works could not terminate the contract for electrical works. This is a plausible interpretation of the contract.

In any case, nothing much turns on the argument of the petitioner. The learned arbitrator had no doubt noted that show cause notice has been issued by the wrong Engineer-in-Charge and hence it is illegal. However, the said recession of contract was held to be illegal not only because of exercise of powers by a wrong authority but also on account of the fact that though the stipulated period for completion of contract was over, time was never made the essence of the contract. The learned arbitrator concluded that by the conduct of parties, time was not the essence of the contract. It may be noted that on 18.12.2012 a show cause notice was issued to the respondent by the petitioner stating that on account of the suspension of the work and slow progress, the work has not been completed within the stipulated period. The respondent was directed to show cause within 10 days why action should not be taken for breach of contract. The contract was rescinded on 13.09.2013. Once the learned arbitrator had come to a conclusion that

substantial delay had taken place on account of the acts of the petitioner, the question of upholding the termination of the contract would not arise.

26. It may also be noted that subsequent to the show cause notice dated 18.12.2012 several extensions were granted by the petitioner themselves. In fact on 30.08.2013 provisional extension of time for completion of the work was granted upto 31.12.2013 without prejudice to the rights to recover the liquidated damages. Despite this extension the contract was terminated on 13.09.2013. Hence, it is clear that time had ceased to be the essence of the contract. The learned arbitrator was correct in concluding that even otherwise in these facts, the termination of the contract was wrongful. No fault can be found with the said conclusion of the learned Arbitrator.

27. A strong submission has also been made by the learned counsel for the petitioner that the learned Arbitrator has drawn an adverse inference against the petitioner as the Drawing Register had not been filed. A finding was recorded by the learned Arbitrator based on the hindrances register that there was delay in furnishing of drawings for carrying out construction. In addition as the Drawing Register was not produced, the learned Arbitrator concluded that an adverse inference can also be drawn for the failure on the part of the petitioner to produce this document. The petitioner relied upon the cross-examination of Sh. Suresh K. Mehta where the Drawing Register was put to the said witness. Based on this cross-examination, it was urged that the Drawing Register had been filed and the learned Arbitrator has wrongly drawn an adverse inference against the petitioner.

However, it is clear from the said cross-examination that the Drawing Register had been brought for the cross-examination only. This is also clear as the objections of the respondent are noted that witness has been

confronted with new set of documents which were neither pleaded nor exhibited nor placed for admission/denial. The learned Arbitrator had upheld the objections and the question was disallowed.

28. Question No.42 that was put to Mr.Suresh K.Mehta in cross-examination by the petitioner reads as follows:

“Question No.42: Is it correct that all the drawings were handed over to the claimant on the dates, as mentioned in the drawing register?

The learned counsel for the claimant objected to the mode of confronting the witness with new sets of documents which were neither pleaded by the respondent nor exhibited nor placed for admission/denial. Hence, the new set of documents which comprises of 19 sheets cannot be taken on record in this manner. Hence cannot be exhibited.

Per Tribunal: The objection is sustained. The question as such is disallowed. However, if the learned counsel for the respondent wants to confront the witness with drawing registers of one or two particular schools, he may do so.

The witness is now shown the drawing register pertaining to Vishwas Nagar.”

29. It is clear from the above cross-examination which has been relied upon by the petitioner that the Drawing Register was not filed. This was categorically affirmed by the learned counsel for the respondent to which there was no serious objections taken by the learned counsel for the petitioner. Hence, this plea is totally incorrect and is without merits. Even otherwise, the finding of delay in furnishing of Drawings is not based only on the said absence of the Drawing Register. The learned arbitrator has also taken into account the Hindrance Register.

30. The next objection taken by the learned counsel for the petitioner was that the costs of additional items have been wrongly calculated. The award

notes that for the deviated items there is no dispute about the quantities of the items executed. The petitioner do not dispute this aspect. However, the Award further notes that for arriving at the market rate for such deviated quantities, the cost can be determined based on the indices by DG, CPWD. Based on that, the costs were computed by the learned Arbitrator. However as per the petitioner, these should have been as per clause 12.2 of the contract which reads as follows:

“Clause 12.2. In the case of extra item(s), the contractor may within fifteen days of receipt of order or occurrence of the item(s) claim rates, supported by proper analysis, for the work and the engineer-in-charge shall within one month of the receipt of the claims supported by analysis, after giving consideration to the analysis of the rates submitted by the contractor, determine the rates on the basis of the market rates and the contractor shall be paid in accordance with the rates so determined.”

31. The above clause merely states that the Engineer-in-Charge is to determine the rates on the basis of market rates and the contractor shall be paid in accordance with the rates so determined. It is manifest that in case, a notice is not given claiming the rates and the engineer does not determine the rates, it would not ipso facto mean that the contractor/respondent would not be entitled to receive any amount for the deviated items. In fact there is no dispute regarding the quantity of the items. The rates had to be as per the prevailing market rates for the items so used. There can be no illegality in the act of the learned Arbitrator using indices of DG, CPWD as has been done to determine the market rates. These objections are without merit.

32. The last contention as raised was about overlapping of claim No. 1 and claim No. 5.

33. Learned counsel for the respondent has pointed that no such plea was raised before the learned Arbitrator or in the present petition. It is matter of fact that no such plea has been raised in the present petition. Petitioner hence cannot be permitted to raise this plea even otherwise. It may be noted that claim No. 1 pertains to the final bill i.e. the actual bills raised whereas the claim No. 5 pertains to escalation in the prices because of prolongation of the contract purely for the reasons attributable to the petitioner. There is no clarity as to how there is overlapping of the two claims. It is clear that the objections are entirely without merit.

34. The findings of fact have been recorded by the learned Arbitrator based on the evidence and the documents placed on record by the parties. The findings are plausible. The petitioner has failed to point out any vital evidence that has been left out while arriving at the findings of fact. The learned arbitrator is the master of the quality and quantity of the evidence to be relied upon. The findings recorded are reasonable and cannot be faulted with.

35. The Supreme Court in *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49 held 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.

32. A good working test of perversity is contained in two judgments. In **H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons**, 1992 Supp (2) SCC 312 at p.317, it was held:

7.It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.

In **Kuldeep Singh v. Commr. of Police**, (1999) 2 SCC 10 at para 10, it was held:

10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.”

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.

.....”

36. There are no grounds to interfere in the award. Accordingly, there is no merit in the present petition. The same is dismissed.

**(JAYANT NATH)
JUDGE**

AUGUST 16, 2018/n/rb