

\$-16

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 11th July, 2018

+

O.M.P. 359/2015

GOVT.OF NCT OF DELHI

..... Petitioner

Through: Ms.Purnima Maheshwari, Adv.

versus

M/S GARG BUILDERS

..... Respondent

Through: Mr.Arun Kr. Gupta, Mr.S.K.Choudhary,
Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as to the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 9th March, 2015 passed by the Sole Arbitrator adjudicating the disputes that had arisen between the parties in relation to the Work Order dated 25th February, 2003 awarding the work of "Excavation of supplementary Drain up to DBL between RD 22580 to RD 23218m including lining with hydraulically pressed CC tiles of size 300 x 300 x 50 mm on both side slopes of the drain."

2. The disputes having arisen between the parties, the same had been referred for adjudication to the Sole Arbitrator and resulted in an Arbitral Award dated 23rd July, 2010. The said Award was

challenged by the petitioner before this Court by way of a petition under Section 34 of the Act being OMP No.588/2010. This Court by its judgment dated 9th October, 2013 partly allowed the said petition. The final direction issued by this Court is reproduced hereunder:-

“31. Accordingly, claim nos.1, 2, 4, 9, 11, 12, 13, 15 and 16 preferred by the respondent are sustained. Claim nos.3, 5, 6, 7, 8, 10 and 14 allowed by the arbitrator are set aside. The decision of the arbitrator vis-a-vis counter claim nos.1, 3, 4 and 5 is sustained. However, the arbitrator's decision with regard to counter claim no.2 is set aside. The petitioner will be at liberty to seek fresh arbitration with regard to the said counter claim.”

3. As far as claim no.5 raised by the respondent is concerned, this Court in its judgment set aside the Award holding that the Arbitrator has relied upon Ex.C-75 filed by the respondent as gospel truth of the quantities claimed by the respondent of the rubbish and garbage removed by him. Similarly, for claim nos. 6, 7 and 8, this Court found that the Arbitrator had based his award on Ex.C-76, C-77, C-78 filed by the respondent, which were mere charts of calculations of the claimed amount without any supporting documents. The Court also found that the figures taken in these charts were not matching with the documents on record and the Arbitrator had arbitrarily reduced these figures and taken different figures for awarding the claims of the respondent. The relevant findings of the Court are extracted herein below:-

“17. As regards claim nos. 5, 6, 7 & 8 are concerned, in my view, a perusal of the award qua these claims would show that the learned arbitrator has gone by some details submitted by

the respondent without calling upon the respondent to at least support the details filed with some material on record. I find that in each of these claims, the learned arbitrator has awarded amounts without adverting to any material on record to support the amounts awarded against each of these claims.

17.1 In this behalf, let me first advert to claim no. 5. At a point in time, when reference was sought by the respondent, he had claimed an amount of Rs. 1.75 lacs. Accordingly, the said claim was referred by the Chief Engineer of the petitioner to the arbitrator. At the time of filing the statement of claims, before the learned arbitrator, this amount was enhanced to Rs. 17.50 lacs. This was objected to by the petitioner. The arbitrator overruled the objection and accepted the plea of the respondent that it was a typographical error.

17.2 Claim no. 5 essentially relates to payments sought by the respondent for excavation and disposal of building, rubbish, garbage, slush etc. The arbitrator has noted that the respondent wrote a large number of letters in that behalf to the petitioner, which were “mostly” not refuted. The arbitrator also notes that against a total excavated quantity of 84,988 cum, a claim for a quantity of 14,700 cum was reasonable. Therefore, applying DSR of 1997, the arbitrator awarded a sum of Rs. 10,63,545/- to the respondent. There is no discussion in the award as to how the arbitrator has arrived to the quantity of 14,700 cum of “building rubbish and garbage” except having regard to calculations adverted to in Exhibit C-75 submitted by the respondent. It appears that the learned arbitrator has virtually accepted as gospel truth, the quantities claimed by the respondent by the rubbish and garbage removed by him.

17.3 Similarly, for idle labour/staff, which include two supervisors and six watchmen, under claim no. 6, a sum of Rs. 1,33,470/- has been awarded by the arbitrator against an amount of Rs. 7.50 lacs claimed by the respondent; for idle machinery, a sum of Rs. 8 lacs has been awarded against a sum of Rs. 18.50 lacs claimed; and lastly, a sum of Rs. 7,08,500/- was awarded towards expenses purportedly incurred by the respondent for running and operating gen-sets and pumps. In each of these claims, the learned arbitrator has accepted the

details furnished in the form of exhibits by the respondent. In support of claim no. 6, the exhibit relied upon is C-76, with regard to claim no. 7 the exhibit relied upon is C-77, and lastly, with regard to claim no. 8, the exhibit relied upon is C-78. As correctly argued by Ms Maheshwari, that there was no evidence placed before the learned arbitrator as regards the labour/staff register maintained at site, the details of hire charges awarded at the rate of Rs 2 lacs per month as against the claim of Rs. 3.60 lacs per month, against machinery which was apparently rented out by the respondent. Pertinently, Exhibit C-77, which contained calculations with regard to the claim referred to the following machineries excavator (Tata Hitachi-200), JCB, and Tractor. As indicated above, the cumulative rent for these machineries which the respondent apparently paid was at the rate of Rs. 3.60 lacs per month. The idle period claimed by the respondent was 155 days, though the arbitrator reduced that to four months. The learned arbitrator, on some ipse dixit has reduced the rental charges to Rs. 2 lacs per month and multiplied that with “**effective idle period**” of four months to arrive at the awarded amount of Rs. 8 lacs. There is no reference to any evidence whatsoever with regard to the payment of rental charges by the respondent.

17.4 The position is no different vis-a-vis claim no. 8, whereby cost of running and operating gen-sets and pumps was claimed. The total amount claimed under this head was a sum of Rs. 10,64,566/-. This included amounts towards hire charges at the rate of Rs. 12,500/- per month for each of three gen-sets, apparently, operated by the respondent, cost of diesel consumed at the rate of 6 liters per hour, expenses on consumables such as grease and mobil oil and, lastly, amounts paid to operations, fore-man and staff for running pumps. Once again, no material was placed on record to support any of these amounts referred to above. The learned arbitrator by employing a measure, which was not related to any evidence on record, as none was placed, reduced the cost of running and operating generator sets and pumps from the claimed amount of Rs. 9,766 per day to Rs. 6,500 per day, while keeping intact the idle period claimed by the respondent of 109 days.

18. MrGupta, in defence of each of these claims, took the stand that there was no dispute raised with regard to these claims by the petitioner. It was thus contended that none of these claims required proof.

19. In my view, what the arbitrator has done is simply recorded his conclusion by adopting the details given in the form of exhibits by the respondent. There are no reasons for awarding amounts under any of these claims. Reasons, as is often stated, are a link between the material on record and the conclusion arrived at by an adjudicating authority. [See **Union of India vs Mohan Lal Capoor** (1973) 2 SCC 836]. An arbitrator, under the Act, is bound to give reasons unless the parties have agreed that no reasons are required or the award is on which is an arbitral award on agreed terms passed under Section 30 of the Act. This is clear on a bare perusal of sub-Section (3) of Section 31 of the Act. While an arbitrator is not expected to give “elaborate”, “detailed” reasons, in support of his findings, merely noting submissions without reference to any evidence on record, will render the award flawed. As indicated by me in the beginning of the judgment, adequacy of reasons may not be a ground for interference by this court under Section 34 or the manner of appreciation of evidence, but complete lack of evidence, in support of the conclusions, would certainly be a ground for interference. [See observations of the Supreme Court in **Som Datt Builder Ltd. vs State of Kerala** (2009) 10 SCC 259].

20. In so far as the argument of Mr Gupta is concerned, that there is no denial of the claims raised, in my view, is an argument which is completely contrary to the record. I have examined the defence filed. Against each of the claims, i.e., claim nos. 5 to 8, a defence on merits has been set up. The arbitrator has not discussed the defence of the petitioner. As a matter of fact, as indicated above, the details submitted by the respondent in the form of exhibits, has been accepted quite curiously, contrary to all canons of law. The Supreme court has repeatedly indicated that patent illegality can be a ground for interference by the arbitrator. A complete lack of evidence in respect of these claims, which the respondent did not prove, in

*my opinion calls for interference. [See observations of the Supreme Court in **Steel Authority of India Ltd. vs Gupta Brother Steel Tubes Ltd. (2009) 10 SCC 63** at page 79 in paragraph 18(iv)]. Therefore, the amounts awarded against claim nos. 5 to 8 are set aside. It will, however, be open to the respondent to seek a decision in respect of these claims based on the material, if any, which is already placed on record.*

4. Similarly, this Court found that the Arbitrator had arbitrarily reduced the amount awarded in favour of the petitioner on this claim.

The findings of this Court are reproduced herein below:-

“COUNTER CLAIM NO.2

27. Under this head, the petitioner had sought reimbursement of expenses paid by it to another agency by the name of M/s. Raj Construction for filling up the catch water drain. The petitioner claimed a sum of Rs.7,03,552/-. The arbitrator has awarded a sum of Rs. 1 Lakh. The arbitrator does not disclose the basis for refusing the balance amount. The arbitrator has observed that construction of catch water drain was necessary. He further goes on to hold that the petitioner ought to have given a NIT for refilling work to the respondent, thereby affording opportunity to verify the work being done at site. Lastly, the arbitrator also observed that the excavated earth was dumped on the banks of the catch water drain, therefore, refilling work became easy. In this respect, the arbitrator has accepted the assertion of the respondent.

27.1 Having regard to the observations made by the arbitrator, it is quite clear that he has accepted the fact that the catch water drain required refilling and that dumped earth lay on the banks of the catch water drain. The only question before him was with regard to the quantification of expenses, if any, incurred by the petitioner in that behalf. As indicated above, the petitioner claimed a sum of Rs.7,03,552/-, it provided the requisite material in the form of particulars of the agency and the amount charged by the said agency. The arbitrator was, therefore, in my opinion required to clearly return a finding as to why the claim had been reduced from Rs.7,03,552/- to Rs.1 Lakh. The rejection of this

counter claim by the arbitrator is clearly erroneous. The decision of the arbitrator in that regard is therefore, set aside. The claim is remitted to the learned Arbitrator. The learned Arbitrator shall pass a fresh order vis-a-vis the claim in issue, if approached in accordance with law, based on material already on record.”

5. The present Impugned Award has been passed by the Arbitrator pursuant to the remand on these claims and the counter claim no.2 raised by the petitioner. In the Impugned Award, the Arbitrator, with respect to claim nos.5,6,7,8 and 10 raised by the respondent, has reiterated his earlier award by stating that as there was no dispute raised by the petitioner with respect to the quantification of the claims, the same are deemed to be accepted by the petitioner.

6. I find the approach adopted by the Arbitrator to be completely perverse. Once this Court in its earlier judgment had set aside a similar exercise done by the Arbitrator and had remanded the matter back for a fresh consideration on the basis of the documents, that is, legal evidence led by the parties before the Arbitral Tribunal, the Arbitrator could not have reiterated his award on the basis of some purported admission made by the petitioner with respect to the quantification. This Court, in paragraph 20 of its Judgment quoted above, had already rejected the plea of purported admissions. The respondent did not challenge this Judgment by filing of an appeal. The said Judgment having become final, was binding on the Arbitrator.

7. The petitioner in its reply had denied the very maintainability of these claims. Even if the said stand of the petitioner was found to be incorrect, it was for the respondent to have proved the quantification

of such claims by way of evidence before the Arbitrator. The respondent cannot rely upon mere non-denial of the figures given in form of a chart by him to sustain such claim. The chart itself cannot be treated as evidence. The award having been passed on basis of no evidence, cannot be sustained.

8. It is indeed surprising that for counter claim no.2 raised by the petitioner, the Arbitrator has rejected such claim for want of evidence, while the petitioner had pleaded regarding floating tender for the work and award thereof to M/s Raj Construction Company for an amount of Rs. 5,63,967/-. It is also relevant to note that in the earlier award, the Arbitrator had awarded a sum of Rs. 1 lakh in favour of the petitioner towards counter claim no. 2. This Court in its Judgment dated 09.10.2013 had observed that there was no reason given by the Arbitrator for awarding only Rs. 1 lakh in favour of the petitioner. In the Impugned Award, the Arbitrator has completely rejected the counter claim no. 2 of the petitioner. Such finding of the Arbitrator cannot be sustained.

9. In view of the above, the Impugned Award is set aside and the petition stands allowed with no order as to costs.

NAVIN CHAWLA, J

JULY 11, 2018
RN