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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P. (COMM) 26/2017**
ASF INFRASTRUCTURE PRIVATE
LIMITED Petitioner

Through: Mr Amit Sibal, Senior
Advocate with Mr Tejas Karia,
Mr Surjendu Sankar Das, Mr
Niranjan Behra and Ms Amee
Rana, Advocates.

versus

JYOTI RATH ASSOCIATES PRIVATE
LIMITED Respondent

Through: Mr Amit Bhagat and Mr V.
Akshay, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER
% **23.03.2018**

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter the 'the Act') impugning the arbitral award dated 26.08.2016 (hereafter 'the impugned award') delivered by the Arbitral Tribunal constituted by a Sole Arbitrator, Justice B. A. Khan, former Judge of this Court (hereafter 'the Arbitral Tribunal'). The impugned award was rendered in the context of disputes that had arisen between the parties in respect of the 'Service Agreement' dated 30.03.2006 (hereafter 'the Agreement'), which was entered into between the parties, whereby the respondent was appointed to render architectural and other allied

services.

2. The petitioner alleged that there was deficiency in the services and the respondent had failed to submit complete drawings and design in respect of various components. The petitioner also alleged that the respondent had abandoned the work and consequently, the petitioner was constrained to avail services of another consultant for execution of the balance work. The petitioner also submitted that the drawings furnished by the respondent were defective and the roof constructed based on the said drawings had sagged. Consequently, the petitioner also claimed damages on that count. The respondent also raised counter claims aggregating ₹6,36,95,517/-. The said counter claims included a claim of ₹1 crore for non declaration of the respondent as the official architect of the project in question; ₹25,49,634/- as the balance contractual fee; and interest of ₹7,45,536/- thereon.

3. The Arbitral Tribunal rejected the claims made by the petitioner and also most of the counter claims made by the respondent. However, the Arbitral Tribunal directed that the respondent be declared as an official architect of the project and further awarded a sum of ₹7,66,000/- in favour of the respondent as balance fee due under the Agreement. In addition, the Arbitral Tribunal also awarded interests at the rate of 9% on the aforesaid fee from the date of termination of the Agreement (that is, 08.03.2007) till the date of actual payment.

4. Although, Mr Sibal, the learned Senior Counsel appearing for

the petitioner had initially advanced arguments with respect to the rejection of certain claims made by the petitioner; however, subsequently, he restricted the challenge to the impugned award only in respect of two aspects, namely: (i) the Arbitral Tribunal's direction to declare the respondent as an official architect of the project; and (ii) the award of ₹7,66,000/- in favour of the respondent along with interest thereon.

5. Briefly stated, the relevant facts necessary to address the aforesaid controversy are as under:-

5.1 The petitioner (then known as Canton Marketing Private Limited) in terms of the Lease Agreement dated 14.04.2006 took on lease two bare shell buildings (Block A & B) comprising of a basement and ground to 6th floor on a piece of land measuring 2.5 acres from Haryana Industrial Development Corporation (HIDC). The object was to develop a Software Development Centre (SDC), which was to be leased to Tata Consultancy Services Limited (TCSL).

5.2 The petitioner, thereafter, appointed the respondent for rendering services relating to the internal fitment, designing and supervision of the project. A Letter of Intent (LOI) dated 04.01.2016 was issued by the petitioner to the respondent. Thereafter, on 30.03.2006, the parties entered into the Agreement (Service Agreement).

5.3 It was agreed between the parties that the petitioner will be paid professional fee of ₹69,50,000/-, in stages, for rendering the services

as agreed under the Agreement.

5.4 The scope of the work was enhanced and the petitioner agreed to pay a further fee of ₹9 lakhs in respect of such enhanced work. Although, there is no dispute that the petitioner had agreed to pay the said enhanced fee, there is some controversy as to the manner in which the same was to be paid.

5.5 The petitioner terminated the Agreement on 08.03.2007 alleging failure on the part of the respondent to comply with its obligations under the Agreement.

5.6 Thereafter, the petitioner sent a notice dated 16.04.2007 claiming a sum of ₹9,01,27,000/- on account of breach of the Agreement alleged to have been committed by the respondent. The petitioner also proposed the name of the Sole Arbitrator to be appointed to resolve the disputes.

5.7 The respondent responded by a letter dated 28.04.2007 disputing the allegations made by the petitioner and further raised the counter claims aggregating ₹6,36,95,517.72/-. The breakup of the counter claims is set out below:-

- “(a) ₹2 crores for the loss due termination of the Contract,
- (b) ₹1 crore for non declaration as the official Architect of the Project,
- (c) ₹2.35 Crores for loss of business opportunity,
- (d) ₹42 lacs for loss caused due to delays of Claimant,

(e) ₹25,49,634/- and for balance contractual fee and ₹7,45,536/- as interest.”

5.8 Since the parties would not agree on appointment of a Sole Arbitrator, this Court by an order dated 18.09.2007 appointed the sole arbitrator to adjudicate the disputes between the parties.

5.9 The Arbitral Tribunal framed the following issues for consideration:-

- “i) Was Respondent wholly and solely responsible for the overall supervision and completion of the project and had he failed in this?
- ii) Had Respondent committed breach of any terms of the service agreement dated 30.03.2006 by delaying the submissions of designs/drawings or by their non-submission?
- iii) Was Respondent’s contract validly terminated and was appointment of new Architect justified?
- iv) Had Respondent supplied any deficient and wrong drawings/designs resulting in the sagging of the 7th Floor or Tower B, which had to be rectified at the cost of Rs.45 lacs?
- v) Had Claimant suffered any loss/damages of Rs. 9,01,27,000/- due to Respondent’s non-performance of the contract?
- vi) In Respondent entitled to Counter Claim of Rs.6,36,95,517.72?”

6. The Arbitral Tribunal held that it was difficult to hold that the

respondent had delayed the delivery of drawings or had committed any breach of the terms of the Agreement resulting in any loss or damage to the petitioner. The Arbitral Tribunal also held that the respondent was not solely responsible for the completion of the project and rejected the plea that the respondent had failed to exercise due control or supervision to coordinate the work with other agencies. Accordingly, the first three issues framed by the Arbitral Tribunal were decided against the petitioner. The Arbitral Tribunal also found that the termination of the Agreement by the petitioner was wrongful and illegal and in contravention of the Agreement.

7. The Arbitral Tribunal also rejected the petitioner's claim that there was any deficiency or defect in the drawings and accordingly, rejected the petitioner's claim for the amount spent on rectification of the defects. Consequently, the fourth and fifth issues were also decided in favour of the respondent and against the petitioner.

8. With regard to the counter claims made by the respondent (the sixth issue), the Arbitral Tribunal rejected the claim for damages on account of loss due to the termination of the contract; loss of business opportunity and loss caused due to delays of the petitioner.

9. Insofar as the respondent's claim for a sum of ₹1 crore as damages for not being declared the official architect of the project, is concerned, the Arbitral Tribunal declined to award any damages in favour of the respondent on this ground but directed the petitioner to declare the respondent as the official architect of the project. The

relevant extract of the impugned order reads as under:-

“Respondent also claims a compensation of ₹1 crore for not being declared the official architect of the project. I find some merit in his demand for his declaration as official architect in a different context, notwithstanding that there is no provision in this regard in the Service Agreement. In my view the Respondent is the author of the project, which is his creation and brainchild. No other architect or creator has contributed to the final shape it has taken. Therefore, his creativity needs to be respected and recognized ignoring the dispute between him and the Claimant. I accordingly deem it appropriate to direct the Claimant to declare him as the official architect of the project by satisfying necessary requirements, which may be attached to such declaration. His monetary claim for this is rejected.”

10. Mr Sibal contended that there is no provision under the Agreement for declaring the respondent to be an official architect and, therefore, the aforesaid direction was outside the terms of the Agreement. This Court finds the said contention merited as the learned counsel appearing for the respondent has not been able to point out any provision under the Agreement which entitled the respondent to be declared as an official architect of the project. Thus, the Arbitral Tribunal's directions in this regard cannot be sustained.

11. The next question to be addressed is with regard to the award of ₹7,66,000/- as the balance fee payable to the respondent. In this regard, the Arbitral Tribunal accepted that the payments were to be made on pro rata basis commensurate with the work implemented. Whereas, the respondent claimed that it had completed 93% of the

work. The petitioner claimed that only 72% of the work had been executed. The Arbitral Tribunal proceeded to award the balance fee on the petitioner's admission that 72% of the work was completed. The relevant extract of the impugned award reads as under:-

“What is certified is 72% of the work by Claimant as per claimant and 74.8% (certified as per Respondent). I take 72% as authentic because this is the Claimant's figure and the Claimant is the certifying authority. Working out the entitlement of Respondent on this admitted percentage of 72% fee dues come to Rs.56,16,000/- out of which he has received only Rs.48,50,000/- leaving a balance of Rs.7,66,000/-.”

12. Mr Sibal further contended that there are three patent errors in the above decision of the Arbitral Tribunal. First is that the Arbitral Tribunal had awarded a claim based on the quantum of work executed and had overlooked the terms of the payment as agreed between the parties. He referred to the terms of payment under the Agreement, which provided that the fee would be paid in nine progressive stages. Respondent would be entitled to 40% of the fee till the fifth stage and 40% of the fee on the basis of pro rata work at the sixth stage. The balance 20% of the fee was to be paid in three stages (from seventh to ninth), which had not been reached. He contended that therefore, the respondent would be entitled to 40% (from stage 1 to 5) and 72% of 40% of the fee due at the sixth stage. He submitted that the Arbitral Tribunal had erred in concluding that 72% of the fee was payable.

13. According to Mr Sibal, the second error is that the payment

received by the respondent was ₹48,65,000/- and not ₹48,50,000/- as noted by the Arbitral Tribunal.

14. Lastly, he stated that the Arbitrator had erred in proceeding on the basis that the fee payable to the petitioner was ₹78,50,000/-. He submitted that the agreed fee was ₹69,50,000/- and the Arbitral Tribunal had erred in including further ₹9,00,000/- on account of additional fee. He stated that the said fee was not payable along with the fee payable at the last two stages and, thus, the stage for payment of such fee had not been achieved. He further stated that the enhanced work for which such additional fee was agreed had not been performed and, thus, the respondent was not entitled to such fees.

15. Mr Amit Bhagat, the learned counsel appearing for the respondent countered the aforesaid contention. He relied on an email dated 04.12.2006, whereby the petitioner had agreed to the increase in the fee by a sum of ₹9,00,000/-

16. There is much merit in Mr Sibal's contention that there are *ex facie* errors in the reasoning and conclusion of the Arbitral Tribunal with regard to the award of ₹7,66,000/-. First of all, there is no dispute that the respondent was to be paid in stages. The terms of payment as included in the Agreement are set out below:

“TERMS OF PAYMENT

- 1.1 Canton shall pay the Contract Price to the Architect as follows:

S.No.	Percentage	Conditions to be satisfied by the
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	of Contract Price	Architect
1.	5%	On signing of the Letter of Intent
2.	5%	On signing of the Agreement
3.	10%	On approval and upon compliance of obligations upto the said stage of schematic drawings by Owner
4.	10%	On approval of designs, material, specifications, finishes, estimate and issue of tenders and upon compliance of obligations upto the said stage.
5.	10%	On issue of working drawings at work commencement stage and upon compliance of obligations upto the said stage.
6.	40%	To be paid in installments consistent with the value of works implemented at site, payable pro-rata upon certification of bills for such works.
7.	10%	On virtual completion of the relevant Project works and handover by respective contractors and upon compliance of obligations upto the said stage.
8.	7.50%	On Project Closure and upon compliance of obligations upto the said stage.
9.	2.50%	On expiry of the Defect Liability Period

17. In the written submissions filed on behalf of the petitioner before the Arbitral Tribunal, the petitioner had accepted that at the time of termination of the Agreement, less than 72% of the work was

complete and the respondent was paid 30% fee at that stage; that is, 75% of 40% fee due at that stage (the sixth stage)

18. The petitioner had also claimed that 78.4% of the work had been certified. Thus, there is no dispute that at the Sixth stage, the respondent would be entitled to claim 30% of the fee (being 75% of 40%). Taking into account that the respondent was entitled to 40% of the fee during the first five stages (stages 1 to 5), the respondent would be entitled to 70% of the total fee and not 72% as held by the Arbitral Tribunal. Although, the difference between the percentage of fee awarded and that as contended on behalf of the petitioner is only 2%, nonetheless, it cannot be disputed that the Arbitral Tribunal has erred in proceeding on the basis that 72% of the total fee due to the respondent was required to be paid by the petitioner. There is also no dispute that the respondent had received a sum of ₹48,65,000/- and not ₹48,50,000/- as noted by the Arbitral Tribunal.

19. The Arbitral Tribunal had proceeded on the basis that the total fee payable by the respondent was ₹78,50,000/-. The Arbitral Tribunal completely ignored the disputes as to whether the enhanced fee of ₹9,00,000/- was required to be included in the fee payable at the sixth stage. In its statement of claims, the petitioner had averred that the petitioner had agreed to pay a sum of ₹9,00,000/- over and above the contract price to avoid further delays and the same was payable in two equal installments alongwith the last two installments of the contract price. The email dated 04.12.2006, which was relied upon by the learned counsel for the respondent, also indicates that the additional

fee would be payable along with the last two installments. Admittedly, the stage for making the payment of last two installments had not been achieved.

20. The learned counsel appearing for the respondent had contended that while calculating the percentage of the work done, the petitioner had taken into account the value of the additional work and thus, it is not open for the petitioner now to contend that the additional fee be excluded from the computation of the amount payable to the respondent. It also contended that the examination of various communications between the parties clearly establish that the respondent was entitled to the additional fee as agreed between the parties.

21. It is not necessary for this Court to examine the disputes whether the additional fee was payable to the respondent or not as it is clear that this is a contentious issue and this controversy has not been addressed by the Arbitral Tribunal. The Arbitral Tribunal has simply proceeded on the basis that the total fee payable to the respondent was ₹78,50,000/- without adjudicating the disputes in regard to the additional fee. In this view, the impugned award to the extent that it awards a sum of ₹7,66,000/- cannot be sustained as the disputes relating to whether the respondent was entitled to additional fee remains un-adjudicated. Consequently, the award of interest on the sum of ₹7,66,000/- in favour of the respondent also cannot be sustained. It will always be open for the parties to resolve these disputes through arbitration.

22. In view of the above, the impugned award to the extent it directs the petitioner to declare the respondent as an official architect of the project and to the extent it awards a sum of ₹7,66,000/- along with interest in favour of the respondent, is set aside.

23. The petition is disposed of in the above terms.

MARCH 23, 2018
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VIBHU BAKHRU, J

