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

Reserved on : February 01, 2018

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Pronounced on: December 14, 2018

+ **FAO(OS) (COMM) 162/2017 & CM APPL. 3913/2018**

WISHWA MITTAR BAJAJ AND SONSAppellant

Through: Mr. Raghavendra M. Bajaj with
Mr. Shreyas Mehrotra, Advs.

versus

**SHIPRA ESTATE LTD AND JAIKISHAN ESTATES
DEVELOPERS PRIVATE LIMITED** Respondent

Through: Mr. Amit Mahajan with
Mr. Arbaaz Hussain,
Mr. Jaiyesh Bakhshi,
Mr. Animesh Sinha &
Mr. Kabir Chilwar, Advs.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

J U D G M E N T

A.K. CHAWLA, J.

1. The appellant (hereafter “Bajaj”) is aggrieved by the judgment of the learned Single Judge which upheld the objections of the respondent (hereafter “Shipra”) under Section 34 of the Arbitration and Conciliation Act 1996 (in short 'the Act') against the arbitral tribunal's award dated 03.01.2017 (in short 'the impugned award').

2. The genesis of the dispute is the contract entered into amongst the parties for the construction of a Multistorey Residential Complex - 3 bed Rooms (Block - B6 & B7) [(B+G+10+Pent House), (B+G+6+Pent House)] at Plot No. 14, Phase IV, Indirapuram, Ghaziabad (Civil, Electrical, Public Health & other works) (in short 'the subject works'). The rates, terms and the conditions of the subject works to be executed by Bajaj, were enumerated in the letter Ref. No. SEL/JKEDPL/WMBS/05-06/51 dated 19.11.2005 (in short 'the work order'). A total sum of ₹7,07,66,614/- was to be paid to Bajaj. The terms and conditions for the execution of the subject works *inter alia* provided the completion of the works within 16 months from the twenty first day of the date of the issue of the said communication or from the starting of the work, whichever was earlier and that, no mobilisation/secured advance was to be paid under the contract.

3. During the course of the execution of the works under the subject contract, Shipra amended the works, the last of which undisputedly was on 27.04.2009. According to Bajaj, the amendments of work were made by Shipra four times through its communications Ref. No. SEL/JKEDPL/WMBS/05-06/52 dated 27.03.2006, Ref. No. SEL/JKEDPL/WMBS/07-08/52 dated 11.07.2007, Ref. No. SEL/JKEDPL/WMBS/08-09 dated 06.09.2008 and Ref. No. SEL/JKEDPL/WMBS/09-10 dated 27.04.2009. Shipra does not dispute the amendments to the work order by communications dated 11.07.2007, 06.09.2008 and 27.04.2009. Any amendment to work order dated 19.11.2015 by letter dated 27.03.2006 is however, seriously

disputed; Shipra states that the latter letter is a forgery and was fabricated by Bajaj. With the amendment of work order by communication dated 11.07.2007, the cost of the work was increased to ₹7,11,84,940.37. The amendments to the work order provided for the extent of construction and the increase in the cost of work. With amendment of work order dated 06.09.2008, the cost of the work increased from ₹7,11,84,940.37 to ₹7,42,25,285.37 and with the amendment of work order dated 27.04.2009, the cost of work increased from ₹7,42,25,285.37 to ₹8,15,40,250.54.

4. During the currency of the contract, Shipra used to settle the running bills raised by Bajaj. The last and the final 28th running bill dated 07.10.2010 is said to have been raised and submitted to Shipra on 09.10.2010, though, under the cover of its letter dated 07.10.2010 only. Its non-payment by Shipra inspite of the reminders *inter alia* vide letters dated 23.11.2010 and 16.12.2010, resultantly resulted in serious disputes amongst the parties. By its letter dated 17.01.2012 Bajaj gave final notice to Shipra for the clearance of the dues demanded by it. Vide its letter dated 05.09.2012, Shipra disputing and denying the demands raised by Bajaj, raised claims to the tune of ₹82.08 lacs on Bajaj *inter alia* towards RA bills payments.

5. On 15.01.2015, upon a petition moved by Bajaj before this Court under Section 11 of the Act, an Arbitrator was appointed to adjudicate the disputes amongst the parties including their claims and counter claims, keeping the issue of existence of the arbitration clause equally open for the Arbitrator to decide inasmuch as, according to Shipra, the

letter dated 27.03.2006, which *inter alia* provided for an arbitration clause, was forged and fabricated. Arbitrator entered the reference and vide its award dated 03.01.2017 allowed the claims of Bajaj in part. Shipra challenged the said award by way of filing the objections under Section 34 of the Act. Ld. Single Judge allowed the said objections and set aside the award vide the impugned judgment. Aggrieved thereof, Bajaj has preferred the appeal in hand under Section 37 of the Act.

6. Though, the very existence of an arbitration clause has been in issue both the Arbitral Tribunal as also the learned Single Judge consistently ruled about the existence of the agreement of arbitration amongst the parties in relation to the subject matter. Such concurrent findings of fact, in our considered view, do not require any interference. Shipra on its part has also not agitated the issue on this aspect. We therefore, do not see any reason to interfere in the findings of the Arbitral Tribunal that an arbitration clause existed amongst the parties in relation to the subject matter, which the learned Single Judge, has upheld.

7. Before the Arbitral Tribunal, Bajaj raised the following claims :

- (i) Claim No.1 for payment of 2,54,64,400.00
Residual amount of work done
at site, i.e. the unpaid Final Bill.
- (ii) Claim No. 2 for payment of 2,01,34,000.00
compensation @ 18% P.A. for
the damages suffered on
account of delay in
Payment/Under Payment in

R.A. Bills & Final Bill.

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| (iii) | Claim No.3 for payment of extra expenditure incurred by the Claimant on additional monthly overhead expenses due to default on the part of Respondent. | 2,75,19,800.00 |
| (iv) | Claim No.4 for payment of loss of profit due to reduction in turnover on account of default on the part of Respondent. | 76,39,197.55 |
| (v) | Claim No. 5 for reimbursement of payment made to labour, which remained idle due to acts of omission and commission on the part of Respondent. | 10,20,900.00 |
| (vi) | Claim No.6 for payment of expenditure incurred on idle Machinery and Equipments due to defaults on the part of Respondent. | 84,02,800.00 |
| (vii) | Claim No.7 for payment of price escalation on work done during extended contract period. | 79,61,600.00 |
| (viii) | Claim No.8 on account of any other relief which may accrue during the period when claims are settled. | Right was reserved to pray for such relief. |

- (ix) Claim No.9 for payment of @ 18% P.A. as interest as per Section 31 Sub per Para 9.4 Section 7 (a) & 7(b) of Arbitration and Conciliation Act-1996.
- (x) Claim No. 10 for cost of 5,00,000.00 Arbitration & Conciliation Act-1996.

8. Claims No. (iii) and (iv) were not pressed by Bajaj before the Arbitral Tribunal; this was so observed by the learned single Judge. As for the relief against claim no.(viii), it does not emerge that Bajaj made any such claim till the passing of the award. The Arbitral Tribunal as such was left with adjudication on seven claims, i.e. nos. (i), (ii), (v), (vi), (vii), (ix) and (x) only.

9. To establish its case, Bajaj examined Shri Akhil Mohan Bajaj and so, Shipra had examined one witness namely Shri Ajay Gupta, though, the award by itself does not specifically mention so.

10. Bajaj's claim mainly was for ₹2,54,64,400/- towards residual amount of work done by it at site and referred it to be the unpaid final bill. For the construction work to be carried out by Bajaj, it was to be paid on item rates basis quoted in the original work contract or the subsequent amendments made thereto, is also not in dispute. It was thus necessary for Bajaj to prove the extent of construction work carried out by it to prove and justify claim no.(i). The award by itself does not speak of the extent and the nature of evidence that came to be led by Bajaj to prove its claim, but for a reference having been made by Bajaj

having examined one Shri Akhil Mohan Bajaj and documents having been exhibited. Discarding the deposition of RW1 Shri Ajay Gupta, a witness of Shipra, the claim nos. (i)(ii)(v)(vi)(vii)(ix) and (x), as observed to by the Arbitral Tribunal in the award, proceed on the basis of the findings/observations, as follows :

"63.It appears that the respondent was not interested in getting the work done in time. It is difficult to fathom as to how the builder and the contractor harassed the consumers on one pretext or the other. This is a pathetic story where the builder and contractor, both are guilty of delaying the case of the consumers/allottees. There is a provision under clauses 25 and 26 of the agreement dated 19.11.2005 entered between the parties, which clearly specifies that the penalty of Rs.25,000/- per day subject to maximum of Rs.25 lakhs, shall be imposed in case of delay in work. Had the respondent been serious, he would have taken action against the contractor under these clauses. Their only witness, Shri Ajay Gupta, RW-1, admitted that no action was taken under this clause.

64. it is pertinent to note that Shri Ajay Gupta, Financial Controller of the respondent company appeared as RW-1. He is a niddle noodle witness upon whom much reliance cannot be placed.

.....Important witnesses such as Shri S.K. Agarwal, Shri Mohit Singh, Shri prem Bhatt, Mr. jaiswal, Architect were not produced in the dock. The production of real work record would have gone a long way to elicit the clear picture. It is difficult to understand why did not the main record see the light of the day. The claimant has repeatedly taken the stand that the work was done and the amount was worked out on the rates given by the respondent and actual measurements at sight. The respondent did not lead the evidence in rebuttal. The best evidence in the records, work book, measurements was not

adduced. Even Audit and Ernst and young suggested the payment of Rs.20 lakhs pending audit vide Ex.74 dated 20.11.2011 submitted by the claimant.

65. The record reveals that the claimant has been asking the respondent to pay it further money so it may complete the work. There is a number of letters in this regard. It was also pointed out by the complainant that it had constructed extra work. The question of raising third bed room was also in dispute though the site plans mentioned about the three bed rooms. However, what surprises this Tribunal the most, is silence on the part of the respondent. This silence can be pernicious.

66. The bills mostly were paid late as it is apparent from the record.

67. It is also clear that the total cost of the project in the year 2005 was on the lower side. Why there were amendments in cost of the project? It appears that the respondent on the one hand failed to supply the cement and steel and on the other hand did not reply to the requests made by the claimant.

..... Instead of taking action under clauses 25 and 26 by imposing penalty the respondent went on amending the cost of the project and paid more amount than the last agreed amount. One has to take the down to earth view. What is the explanation, why the more amount was given that the agreed one? The real facts were kept under the hat.

68. Shri Ajay Gupta admitted that there was no payment schedule. No books of account or any other book was produced for the perusal of this Tribunal.

69. There is no cogent and plausible evidence to show that TDS etc. was not paid to the claimant. This point goes in favour of the respondent. The respondent has produced authentic record in bank statement.

70. It was further argued that the claimant had left the work incomplete but there is no proof that any payment was due to the claimant at that time. The certificate showing

how much amount was given to the new contractor, was not produced. The new contractor was also not produced in the dock. It was argued that the respondent/company awarded the balance work to "Sysha Construction Pvt. Ltd." The computer generated form and the letter produced on their behalf does not bear any signature of the said contractor. Shri Ajay Gupta admitted this fact during his cross examination

71. This story appears to have been made out of whole cloth. The respondent/company vide its letter dated 5.9.2012 directed the claimant to settle and close the amount. The claimant has produced on record the list, which goes to show that the payments were not made within the lee way prescribed in the contract. List has been shown, which clearly goes to show that this much amount was delayed. This piece of evidence was never rebutted.

72. The claimant had asked the respondent that he was severally cash strapped and therefore, he had no other option that to stop the work. The detailed negotiations took place between the parties, which have been proved on record as ext. C-40 to 45, C-46 to 72, C-74 to 77, C-80 to C-99 and C-101 to C-105.

73. Further more, the respondent lodged an FIR against the claimant and harassed them to no end. I have already decided that there was no forgery and FIR lodged by the respondent was not genuine. It is also surprising to note that the respondent/company had not raised any counter claim against the claimant. If they were to get money from the claimant, they would have lodged the counter complaint immediately.

74. Moreover, the letter dated 14.5.2011 Ex.C-58 is crucial. It may be mentioned here that letter dated 6.6.2011 already discussed above wherein the demand of Rs.1,21,17,816/- was made, was not complete because in that letter the losses or extra over heads were not included. It mentions that the total amount incurred by the claimant is Rs,9,74,399/-. The claimant has already paid a sum of

Rs.8,45,882/- as per the bank statement. The difference comes to Rs.1,28,75,517/-. The claimant has claimed that total work was done by it as per the total qualities, executed, multiplied by rates prescribed by the respondent company."

11. In view of the above observations/findings, the tribunal awarded the claims of Bajaj, as under :

"CLAIM NO.1.

75. *Consequently, I have come to the conclusion that the respondent is liable to pay a sum of Rs.1,28,75,517/- to the claimant.*

CLAIM NO.2

76. *The claimant has claimed interest in the sum of Rs.2,01,34,000/- for the delay payment at the rate of 18% p.a. Some delays in payment of money are obvious, natural and expected, particularly, in this country. The conduct of the claimant has also to be seen. He did not press clause 2 F cited above. He also did not show any extra interest in winding up the work. However, it must be borne in mind that payment of bills made on the nail would have gone to strengthen the said impecunious (penniless) firm. As such I allow this claim at the lump sum of Rs.10 lakh only.*

CLAIM NO. 5, 6, 7 AND 8

78. *I am of the considered view that claims No 5, 6, 7 and 8 shall stand satisfied as I, hereby, order that the respondent will pay a sum of Rs.1,28,75,517/- alongwith interest @ 18% per annum w.e.f. 14.5.2011 till the realization of the entire amount. I also award costs of Rs.5 lakhs towards the arbitration fee, Rs.5 lakh towards harassment and mental agony and Rs.10 lakhs for delay in payments of running bills. The said amount of Rs.20 lakhs be paid within 90 days from the date of pronouncement of*

the order, failing which, this amount will carry interest @18% per annum till their realization. The claimant is also directed to pay the court fee within a period of forty five days from the date of pronouncement of the order.”

12. Shipra objected to the award, under Section 34 of the Act contending that though the rates were revised, it had not agreed to the higher rates claimed by Bajaj. The learned single judge, after considering – first, the question of whether the parties agreed to arbitration, and upholding Bajaj’s contention, proceeded to decide the objections by considering whether the tribunal had indeed exceeded its jurisdiction and gone beyond the contract.

13. The impugned judgment recorded the following findings:

“28. It is apparent from the above that the respondent essentially seeks to claim an amount larger than what was agreed under the Agreement (as subsequently amended). This would be plainly impermissible as the respondent had agreed to the lump sum rates and it was not open for the respondent to claim a higher amount than as agreed merely on the basis of unilaterally claiming that the rates were not reasonable or justified. The protest letters sent after expressly accepting the rates as specified in the amendment letters would be of little consequence. Since the claim awarded is on the basis that the amount awarded was contractually payable to the respondent, it would be essential for the respondent to establish that Shipra had agreed to pay the amounts claimed or at least the basis on which such amounts were computed.

29. It is essential to understand the nature of the claim awarded to the respondent under the impugned award. According to the respondent, the rates as indicated in the

Agreement were based on item rates for various items comprised in the works and the amounts to be paid were arrived at by multiplying the quantities of items of works with the agreed rates. It is claimed that the lump sum consideration as specified in the Agreement was arrived at between the parties on the aforesaid basis. It is the respondent's case that the actual quantities of items of work involved were larger and therefore the rates as specified in the Agreement as amended on 27.04.2009 were required to be reworked. In other words, it was the respondent's case that the rates as accepted by it, by signing the amendment letter dated 27.04.2009 was not applicable and was required to be reworked.

30. *Plainly, in order to sustain such claim, it was necessary for the respondent to establish (a) that Shipra had agreed to certain item rates for various items of work; (b) that Shipra had agreed that the scope of works would involve specified quantities of item works; (c) that the quantities of item works executed were in excess of the specified quantities of work and consequently the lump sum rate per sq. ft. of the specified floor was required to be revised; and (d) the amount paid by Shipra to the respondent for work done fell short of the amount payable on such revised rates.*

31. *During the course of the arguments, the learned counsel for the respondent was pointedly asked whether there was any material on record to establish the analysis of item rates and quantities providing the break-up of the rate per sq. ft. as initially agreed under the Agreement and as subsequently revised. He had fairly conceded that apart from the e-mail dated 28.12.2010 sent by Mr. Rastogi, wherein Shipra had alleged that excess payments had been made to the respondent, there was no other document on record which could establish the item work quantities and the rates used to calculate the amount payable on the basis of item rates and quantities. He also added that the item*

rates as indicated in the said e-mail were also incorrect and did not take into account subsequent increases.

32. This Court finds it difficult to accept that the e-mail dated 28.12.2010 sent by Mr. Rastogi (of Shipra) establishes that the parties had agreed that the respondent would be paid on the actual quantity of item works executed on item rates basis as per the Agreement, as the subsequent amendments signed by the parties indicate that payments were to be made on a lump sum basis. However, even if it is accepted that this was so, there is nothing on record which would establish the various item rates allegedly agreed to by Shipra considering that the respondent claims that the item rates as mentioned in the annexures to the said e-mail were not correct.

33. It is relevant to observe that the offer made by the respondent was also on a lump sum basis. The respondent had quoted rates on per sq. ft. basis for different floors. These rates were obviously subject to negotiations and the rates as finally agreed between the parties were recorded in the Agreement executed on 19.11.2005. All subsequent revisions only revised the agreed rate per sq. ft. Even if it is accepted that the initial offer and the Agreement were based on an analysis of rates and quantities, it would be essential for the respondent to not only establish the quantities of item works but also the item rates justifying the rate per sq. ft. as agreed to by the parties in the Agreement. In addition, the respondent would have to establish that the parties had agreed to revise the item rates since the respondent was not accepting the item rates as indicated in Mr. Rastogi's e-mail dated 28.12.2010 (which as stated earlier is concededly the only document emanating from Shipra which records any separate rate for item works).

34. Further, not only was it necessary for the respondent to establish the revised item rates agreed to by Shipra but it was also necessary for the respondent to project an agreed modified rate per sq. ft. for each floor. This is so because

even as per the respondent, in terms of paragraph 2 to clause 22 of the Agreement - as amended by the letter dated 27.03.2006 - the rates as quoted in the Agreement were required to be revised. Concededly, no such revised rate was projected by the respondent. To further illustrate this point one may refer to the consideration payable for the basement floor. The rate per sq. ft. of the basement floor was agreed at Rs. 618 per sq. ft. This was revised subsequently and in terms of the amendment agreed to by the parties on 27.04.2009, the said rate was increased to Rs. 668 per sq. ft. According to the respondent, such rates were required to be revised on the basis of analysis of actual quantities executed. Thus, the respondent was required to establish a revised rate (per sq. ft.) on the basis of which its claim could be computed. However, no such rate has been projected by the respondent. More importantly, there has been no determination by the arbitrator as to what rates (per sq. ft.) were to be applied in terms of the Agreement between the parties while partly awarding claim no. 1 in favour of the respondent. The arbitrator has merely accepted the statement of work done as claimed by the respondent in its letter dated 14.05.2011. It is relevant to mention that in the said letter, the respondent had claimed that it had executed various quantities of items of work for which it was entitled to be paid at specified rates. There is no document or evidence on record which would establish that Shipra had agreed to pay the revised item rates as indicated in the said letter. A perusal of the impugned award also indicates that there has been no clear determination by the arbitrator of the item rates as indicated in the said letter being agreed to by Shipra. The least that was required was that a determination/adjudication be made as to (a) the quantities of items of work executed by the respondent and (b) the agreed rates of such items of work. This Court is unable to find that there has been any such clear determination by the arbitrator.

35. Concededly, there is no material on record which would indicate that Shipra had agreed to any revised item rates of item works. Further, it is the respondent's case that the lump sum rates were amended thrice but such revision was adhoc and without any basis, thus concededly, the said revisions were not on the basis of any rate analysis of separate item of works. However even if it is assumed that Shipra had agreed to a revision of item rates which were evidenced by the amendments to the Agreement, it was still necessary for the respondent to establish the item rates for separate items of work or at least establish that the revised per sq. ft. rates translated to item rates as claimed by the respondent in its letter dated 14.05.2011, but no such exercise was carried out by the respondent or by the arbitrator.

36. Whilst, there can be no quarrel to the proposition that an arbitrator is the final fact finding authority and his decisions on questions of fact are final and binding on the parties, it is essential that there has to be a reasoned determination. A mere award without determination/adjudication of the facts necessary to return findings would render the arbitral award susceptible to challenge under Section 34 of the Act.

37. This Court has also examined the impugned award and it is apparent that the arbitrator has not determined the real questions involved in partly awarding claim no. 1 in favour of the respondent. There is no determination of the agreed item rates for various items of works and when and how such rates were agreed to by Shipra; there is no determination of the quantities of separate item works to be executed under the Agreement and the quantities which were actually executed by the respondent; and there is no determination regarding the applicable revised rate (per sq. ft.) for each floor in terms of the Agreement, considering it was the respondent's case that such rate was to be revised based on actual analysis.

14. Mr. Raghavendra Bajaj, learned counsel appearing for Bajaj, urged that the impugned judgment has rendered findings contrary to admitted facts and record, as it held that the Email dated 28.12.2010 issued by Shipra to Bajaj, which contained the payment schedule and methodology in terms of 'actual item rates basis', cannot be relied upon since there have been subsequent amendments to the work order. This finding is attacked as incorrect since, the last amendment to the work order took place on 27.04.2009 and it was duly accepted to by Bajaj under protest by protest letter dated 30.04.2009. It was argued that the single judge incorrectly faulted the methodology adopted by the tribunal on the ground that there existed no basis for that except for the email dated 28.12.2010 and subsequently admitted letter dated 14.05.2011 issued by Bajaj to Shipra, which detailed the total amount due to the Bajaj in terms of the format and methodology prescribed by Shipra, by its email dated 28.12.2010. It is urged that the single judge failed to appreciate that (a) Shipra had agreed to pay Bajaj on item wise rates by way of amendment agreement dated 27.03.2006. Shipra had challenged the authenticity of the said amendment agreement dated 27.03.2006 before the tribunal; however it was held to be a genuine document by order dated 17.10.2016 and the same was never challenged by Shipra. (b) Further, the single Judge in para 18 of the impugned judgment, held the amendment agreement to be a valid and genuine document. The specific quantities and item wise rates were also contained in the tender documents which were only shown to Bajaj and never handed over at the time of signing of the work order in the year 2005. The production of those tender documents was sought by Bajaj

before the tribunal by way of an application under Order XI Rule 15 & 16 of CPC. The tribunal passed various orders directing the Shipra to produce the said tender documents. However, Shipra's counsel made a categorical statement before the tribunal that she had not received any instructions from her clients regarding the production of the said documents and therefore, she would not rely on the said documents. Subsequently, an order was passed by the Arbitrator indicating that adverse inference will be drawn. (c) The letter dated 14.05.2011, issued by Bajaj to Shipra, which forms the basis of Claim No. 1 awarded by the Ld. Arbitrator, contains the details of payment due to Bajaj on the basis of item wise rates in the format as prescribed by Shipra by their email dated 28.12.2010 and the same is an admitted document.

15. It was urged that Shipra's claim was that the agreement between the parties was a lump sum contract and the last amendment of the contract took place on 27.04.2009, whereby, the total value of the Contract was ₹81540250; however, admittedly, Shipra, till date, paid a sum of ₹84578882 to Bajaj, and no counter claim has ever been filed by Shipra. Therefore, the reasoning of the single judge that the last amendment was final and evidence had to be led is incorrect. It was moreover argued that Shipra's sole witness, Ajay Gupta, in cross examination, admitted that (i) the agreement dated 19.11.2005 was not sacrosanct and variations were made to it from time to time; (ii) there is no evidence regarding execution or handing over to Bajaj, of Annexure B (mode of payment and payment schedule) to the Agreement/Work order dated 19.11.2005; (iii) Shipra did not file any document on record

to show the basis of escalation of value of contract; (iv) he was ignorant when asked categorical questions pertaining to the basis of calculation of the three undisputed amendments to the work order dated 19.11.2005; and also when asked a categorical question regarding the contract being item based as evident from the email dated 28.12.2010 issued by Shipra to Bajaj.

16. It was argued that the tribunal, in the award, rendered categorical findings with regard to the conduct of Shipra. It is pointed out that in para 46, the award held that :

"It is also apparent that the Shipra has not approached this Tribunal with clean hands in as much as during the pendency of this case, it denied letter dated 10.11.2005 Ex C-1 as fabricated but at the fag end of this case, the counsel for the Shipra admitted it to be genuine and place reliance on it."

17. It was pointed out that the tribunal found, on consideration that Ajay Gupta was unreliable and that he had no personal knowledge of the case prior to the year 2010. He had stated that old records were scrapped. On many points he feigned ignorance. The relevant records were not produced. The witness, who could have given the details of the case was not produced for reasons best known to Shipra. Important witnesses such as Shri. S.K. Agarwal, Shri. Mohit Singh, Shri Prem Bhatt, Mr. Jaiswal, Architect were not produced during the proceedings. Counsel urged that the production of real work record would have gone a long way to elicit the clear picture. It is difficult to understand why the main record did not see the light of the day. Bajaj's consistent stand

was that the work was done and the amount was worked out on the rates given by Shipra and actual measurement at sight. Shipra did not lead evidence in rebuttal. The best evidence in the record, work book, measurements etc. were not produced.

18. It was urged that at paragraph 68 of the award, the tribunal found that Shri. Ajay Gupta admitted that there was no payment schedule and no books of account or any other book was produced before the tribunal. The tribunal relied on the letter dated 14.05.2011 and reduced the total work done/mentioned in that letter, from the amount already paid by Shipra and held in favour of Bajaj in regard to claim No. 1. It was argued that the single judge failed to appreciate that in light of the admission of the letter dated 14.05.2011, the measure and item wise rates needed no further proof. It is submitted that the single judge failed to appreciate that the arbitrator, being the master of facts, relied on the best evidence available before the tribunal and accordingly made the award. The standard of calculation which was criticized by the single judge, is the best possible one which any tribunal can arrive at, keeping in mind the peculiar facts of the present case, in particular, Shipra's conduct.

19. The finding on the measure, which ought to have been given by the tribunal, in terms of the impugned judgment, is unfeasible in light of the limited evidence adduced by Shipra and the conduct shown by it during the course of Arbitral proceedings.

20. Mr. Amit Mahajan, learned counsel for Shipra, urged that the single judge's decision requires no interference, because the tribunal

made the award ignoring the provisions of the Act and also in total disregard to the contract between the parties. The contract dated 19.11.2005 clearly provided for payment to the contractor on lumpsum basis whereas the tribunal travelled outside the scope of the contract and awarded an amount on item-wise claim. The tribunal while allowing the item-wise claim made by the appellant did not discuss as to how said claims have been awarded despite not being provided for in the contract. It was argued that Shipra's case was that, on the basis of alleged amendment dated 27.03.2006 the nature of the contract changed from lump-sum to item-wise contract. It is submitted that assuming though without admitting the amendment dated 27.03.2006 to be correct, the payments to be made as per the contract dated 19.11.2005 do not change and still remain to be made on lump-sum basis. Counsel highlighted that it was undisputed that all running bills totaling twenty-eight (28) in number were cleared and duly paid to Bajaj, except the last running bill. The said amount was not paid since Shipra found, upon calculation, that Bajaj was paid extra amounts.

21. It was argued that the circumstances and the conduct of the parties clearly showed that the alleged amendment dated 27.03.2006 is an unreliable document. Undoubtedly the contract dated 19.11.2005 was subsequently amended on three different occasions i.e., 11.07.2007, 06.09.2008 and 27.04.2009. By way of those amendments the consideration payable for the works to Bajaj was enhanced from ₹707,66,614/- to ₹8,15,40,250/-. Mr. Mahajan argued that the amendments admittedly made amendment in the original contract dated

19.11.2005 and did not refer to the alleged amendment dated 27.03.2006. Further, the amendment letters specifically mention that rest of the terms of the original work order dated 19.11.2005 will remain the same. It is alleged by Bajaj that the three amendments were protested by it by issuing the protest letters dated 20.07.2007, 15.09.2008 and 30.04.2009. Shipra contended that those letters were never sent to it but were produced during the course of the arbitration proceedings. It is submitted that assuming without admitting these protest letters to be correct even then these letters do not mention the alleged amendment dated 27.03.2006. Bajaj, for the period of five years from 19.11.2005 till 7 October, 2010 continued working without any protest except the alleged letters mentioned above, and raised its running bills from time to time.

22. It was contended that after submitting its last running bill, Bajaj issued various letters dated 02.11.2010, 16.12.2010, 29.12.2010, 03.01.2011 and did not mention any balance payment except the last running Bill. Its demand for payment of crores of rupees was made for the first time after the submission of the last running bill on 14.02.2011 i.e. after five years of the contract and after the work had been terminated. The demand had been raised giving details of items with its rates allegedly used by Bajaj for the construction of the building. It is submitted that the appellant had been given the contract for construction of the building / project on a lump-sum basis which were subsequently enhanced and provided for the rates which would be payable for per square feet of construction. The contract specifically provided that the rates include all items of civil, electrical, sanitary, plumbing, etc. The

alleged amendment dated 27.3.2006 did not alter the nature of the contract from lump sum to item wise.

23. It was argued that the tribunal ignored that the proposition agreed to as per the work contract was that payments for the bills shall not be disbursed merely on the submission of the bills by Bajaj, but a due process of certifying the bills from the site engineers of Shipra was involved in the same. By a look at the computation analysis for the delay in payments, compensation and interest charged prepared by Bajaj, it is evident that not even a single day/date is mentioned in regard to when the bills were certified and how the payment is delayed after the due certification of the said 'running Account Bills'. Counsel also said that the tribunal erred in ignoring that Para 6 of the statement of defense and reply to Claim no. 2 shows various payments with respect to the different running bills in a tabular form. Therefore, Bajaj's claim for delay in payments was untenable. It is also argued that the letter dated 05.09.2012 shows that an excess payment of around ₹ 83.73 lakhs was made to Bajaj.

24. It was highlighted that Bajaj tried to argue that the claim raised by it will fall within the purview of clause 22 of the contract. It is submitted that the argument was urged by it for the first time, and the tribunal did not allow it. Clause 22 does not cover the claims made by Bajaj, but covers extra/ substitute items, which in Shipra's submission would include items which were not in the scope of the contract and were asked by the respondent to be used. These however will not include the difference in per square feet rate of construction sought to

be arrived at on the basis of items used. It is not Bajaj's case that Shipra asked it to do something extra or use material other than what was provided in the contract. Extra items include something not provided for and to claim under this head it is necessary to show that extra work was done at the instance of Shipra.

25. Mr. Mahajan stated that Shipra, even today, is willing to pay for any extra square feet of construction being carried out by Bajaj. However, the award was made on the basis of the claim on an item-wise basis, which is beyond the purview of the contract. The tribunal, is a creature of contract and is not allowed to travel outside the scope of the contract. Thus, any award contrary to the terms of the contract is liable to be set aside. It is further submitted that the tribunal, in addition to an award of ₹ 1,28,75,517/- also granted interest at the rate of 18% per annum which in Shipra's submission is liable to be reduced. The award for ₹5 lakhs towards harassment and mental agony is outside the scope of the contract and the tribunal was not empowered to pass an award on that head.

Analysis & Conclusions

26. It would thus be seen that while the tribunal rejected the deposition of Shipra's witness, its failure to produce its records as could be relevant to the subject, substantially weighed the mind of the arbitrator in partially granting the claims of Bajaj.

27. It is crucial that the letter of 27 March, 2006, which was initially disputed by Shipra- which denied the existence of an arbitration clause

was later not denied. The single judge has not disturbed the findings by the tribunal regarding the arbitration agreement. The sole basis of that finding is that letter, which also states that:

“The areas are only indicative. In case of quantities of items increase or decrease, after measurement, as per actual at site, as per drawings, as per directions by Engineer-in-charge, Consultant the quoted rates shall also stand revised from as shown in clause 1 of the work order. Covered area shall be as per actual calculations and will be considered for payment. All other terms and conditions will remain same as per provisions of the Work Order, dated, 19.11.2005.”

28. The contract was amended three times: on 11.07.2007, 06.09.2008 and 27.04.2009. Shipra does not deny this fact. According to it, these amendments resulted in enhancement of consideration payable for the works to Bajaj from ₹707,66,614/- to ₹8,15,40,250/-. At the time of receipt of the last amendment letter, Bajaj, on 30 April, 2009 wrote stating that:

“We again reiterate to submit that the rates amended vide your above amendment are not at all reasonable and justified in view of the details(as per actual measurement at site) of items being executed by us. We accept this amendment "under protest" and request you to please further, amend these rates based on actual analysis and actual rates of each item jointly worked out by us.”

29. Bajaj has relied on a series of email exchanges and letters between the parties (dated 23-11-2010, 12-4-2011; 14-5-2011 and 06-

06-2011) among others, to support its claim that actual rates of the works done and the items involved were furnished to Shipra, in continuation of its position, that the last amendment was not unconditionally accepted, but that it was constrained by the circumstances to continue the work. Its email of 18 October, 2011 reads as follows:

“That, we have, in the past six years submitted every possible justification in regard to our due payments, The accounts clearly show- The total payment made to us is Rupees 7,64,32,215.00 (including "Central Purchase") whereas the measurements (i.e. every inch of our work done and as asked for by Mr Rajesh Rastogi, along with references to every section from the drawings and actual physical measurements, reference our letter dated 12th April' 2011) show total cost of work done of Rupees 9, 74, 54, 399. 00 due.

That, there really is no 'dispute' on the subject of 'rates' of the items as was being tried and challenged by Shri Ajay Gupta with regards to our rates being "unofficially" received from Mr. Rajesh Sharma of A.T.R. as the same stands redeemed through letter dated 29th December" 2010, written and addressed to us by your Project Head, Mr Rajesh Rastogi (a most definitive record of the rates and the methodology for calculation of our dues).

That, we have shown, with example (copies of the legal notices, documents, etc.) the gravity of the situation, the serious threats from all concerned and directly related to supply of materials, loan of money, etc. for the above mentioned work and its progress thereof. For us, jail is a distinct possibility and' legal abuse is imminent as a direct consequence of the payment due and owed by your good selves.

That, we have informed you, repeatedly, in written and otherwise, of the daily threats, both physical and verbal, again from the people who are directly related to the progress of the above work and the work done. Again as a direct consequence of the same, our own mental health is suffering, the anguish and trauma is unbearable, the suicidal thoughts very real, and the same is, once again, a direct result of the non-payment of our above mentioned dues.

That, as a mark of faith, and in a bid to resolve the above at the earliest we have not claimed "extra" for:

Overheads.

b. Damages suffered on account of delay in payments.

c. Damages for payment of compensation for under payments.

d. Losses of profit and gains prevented.

c. Reimbursement of expenditure on 'idle labor', 'idle machinery and shuttering and tools and

plants' escalation of cost of both, labor and materials.

d. Various other losses as a direct result of "Breach of contract" on your part, etc.

That, further to the above, in a bid to save ourselves from the onslaught of the above-mentioned people and agencies, we have repeatedly offered to "settle" for much less than even what is owed to us by the above-mentioned simple calculation refer para. 3) i.e. not including the above justified claims which we have not even raised. All we want, require, need is sufficient payment to cover at least the above-mentioned creditors born of the work done for your good selves. As for fears that we may take legal recourse even after this "settlement" are concerned, as informed already please take this email itself as our agreement to not do so after the "settlement". Please take

note, emails are a most definitive record in the eyes of the law and even the Hon'ble Supreme Court of India takes due cognizance of the same.

That, our final request is only this-

Please uphold the sanctity of morals, ethics, fair play and law. Please rely only, in the interest of justice, on actual facts and figures. Assume nothing, verify everything. In a bid to please, appease, please do not misinform, interpret wrongly, the facts to your good selves Esteemed M.D. nor allow yourself to be misinformed etc. in the same fashion.

Once again, assuring you of our good intentions, the continued good faith and the hope and prayer for mercy and justice.”

30. The arbitrator, in the award, had noticed that findings were rendered at an earlier stage, on the issue of production of documents and submissions made. That order (dated 17-10-2016) *inter alia*, reads as follows:

“5. On 20.2.2006. the claimant wrote to the respondent emphasizing that certain clauses contained in their proposal letter dated 10.11.2005, did not find mention in the work order dated 19.11.2005. It also transpired that claimant had to do extra work to achieve what was mentioned in the work order. Claimant accordingly, requested for an amendment of the work order before preparation of contract documents. The same was received by Mr. Prem Bhatt, admittedly the employee of the respondent. It was prayed that its receipt must be reflected by summoning the correspondence register of the respondent. However, no such register was ever produced by the respondent. Thereafter, amendment letter dated 27.3.2006 was entered into between the parties. This amendment carried arbitration clause at serial No. 30. The

additional clause 29 also provides for timely payment, which was admittedly followed by the respondent. The amendment was made on the letter-head of the respondent/company and bears a sequential reference number in continuation to the work order. Thereafter, the rates were modified vide respondent's letter dated 1.7.2007. The total value of the work order was increased to Rs. 7,11,84,940.37. This is an undisputed document. The protest letter was sent on 20.7 2007, Annexure C-17, which was received by Mr Prem Bhatt. The rates were again partially raised to Rs.7,45,25,285.37 vide amendment dated 6.9.2008 in ex. C-27. The protest was made vide letter dated 15.9.2008, which is annexed as Annexure 28, which is being challenged by the respondent. The same was received by respondents own employee Mr. Prem Bhatt. The rates were again raised partially to Rs.8,15,40,250.54 vide amendment dated 27.4.2009. Protest letter dated 30.4.2009 was sent, which is annexed as annexure C-33. Mr. Bhatt received the reply.

6. In between 1.5.2009 to 16.1.2012, various letters were written by the claimant to the respondent requesting for payment/delay in payment and losses being suffered, the payment demanded for actual work done and executed between the parties. The work was finally concluded by the claimant with the submission of 28 running bill, which remains unpaid till date. The covering letter of 28 running bill is dated 7.10.2011. Between October, 2010 to January, 2012, several requests were made to the respondent to pay the amount but the needful could not be done.

7. On 7.11.2011 the claimant sent a letter inter alia stating "We shall be forced to seek justice through arbitration or any other legal remedy or civil". The same was placed on record as Ex. C-75. The said letter was never responded by the respondent at any stage. On 17.1.2012, a final notice for making payments of dues i.e. a sum of Rs. 10.65 crores, was sent to the respondent, which was placed on record as Annexure C-76. The respondent

sent letter dated 5.9.2012 stating that on the contrary, the claimant owed a sum of Rs.82.08 lakhs. That letter was responded and the claim to the claimant was refuted.

8. Sometime, in February, 2012, the respondent had claimed through negotiation that certain documents were not on their record, including the documents containing arbitration clause. The claimant filed a report with the police on or around 5.3.2013 that the respondent's employees came to their office, threaten them intimidated them and tried to seize the documents of the claimant. The proceedings under Section 156(3) Cr.P.C. are pending. The respondent also filed an FIR alleging fraud, cheating and forgery amongst other allegations against the claimant and its persons in relations to the documents. The investigating officer did not find force in the allegations of the respondent and concluded the said FIR as civil dispute, sometime in 2014. The matter is still pending.

.....
12. The learned counsel for the respondent also argued that since the claimant has failed to produce the partnership deed showing that partnership firm was authorized to enter into such like arbitration, therefore, this petition. itself is not maintainable.

13. Instead of touching the heart of the problem, learned counsel for the respondent just skirted it. I have perused the agreement dated 19.11.2005. It is signed by both the parties. This has acquired the status of a contract. It appears that both the parties have signed the same voluntarily. Shri S. K. Aggarwal, authorized signatory signed this document on behalf of the respondent-company, It is on the letter-head of the respondent company.

14. Learned counsel for the respondent next submitted that these documents are forged and there was no arbitration clause.

15. *It appears that this objection was raised merely for the sake of cavil. The duty casts on the judiciary is to winnow the truth from the falsehood. The letter dated 20.2.2006 was received by Mr Prem Bhatt, the employee of the respondent. The amendment letter bearing the date i.e. 27.3.2006 was signed by Shri S. K. Aggarwal authorized signatory of the respondent. Other letters were also signed by Shri Prem Bhatt acknowledging their receipts. It was the bounden duty of the respondent to produce Shri S.K Aggarwal, Mr. Prem Bhatt and Mr. Jaiswal, Architect, its employees in the dock. They were not summoned as witnesses for the reasons best known to the respondent. Their production would have gone a long way to elicit the real facts.*

16. *My attention was invited towards the letter dated 5.3.2012 sent to the claimant by Shri S K. Aggarwal in Hindi language. Paras 2, 3 and 4 of the translated letter runs as follows:*

“2. That the documents which have been mentioned by you in the letter and those two documents which you had attached with the letter, those documents/letter I had signed being Project Head of Shipra.

3. That before leaving Shipra's employment I had handed over all the documents and records pertaining to Shipra's work to them. And now I do not have any relation with Shipra.

4. That documents/records signed by me copy of which you have attached with the letter whether the same is available or not then Shipra is accountable for the same, I have nothing to do with this.”

17. *No cogent or plausible reason was given why the site witnesses were not summoned. There is no allegation*

that these few witnesses ever worked in cahoots with the claimant. This is an exercise in shirking and fudging rather than confronting the reality their absence has added another twist in the tale, Both the witnesses of the claimant stated in one voice that this letter was signed by Shri S. K. Aggarwal in their presence. On the other hand, the evidence of Shri Ajay Gupta, respondent's sole witness is not reliable. He admitted that he had no personal knowledge of this case prior to the year 2010, He contended that the old record had been scrapped On many a points, he feigned ignorance. To a question, he made the following reply.

Q. (i).Is it correct to suggest that the letter dated 27.3.2006, C-4. was duly printed on an official letter head of the respondent/company and signed by an officer authorized by the respondent company?

Ans. The impugned order of 27.3.2006 is already contested and is a matter of record Most importantly, it was admitted that copy of this letter was also sent to Mr. Jaiswal. Architect of his project. No effort was made to produce Mr. Jaiawal, Architect of project to say that he did not receive that letter.

18. In his cross examination, Shri Ajay Gupta admitted that the impugned letters were sent to them on 17.12.2012. While explaining the delay of 14 months in lodging the FIR, the witness stated that these letters were disputed on the first meeting itself and the opportunities were given to Mr. Bajaj verbally. He could not explain the delay of 14 months stating that he was not the complainant of the company in the FIR. It is, thus, clear that there was inordinate delay in lodging the FIR.

19. He admitted that the company did not raise any objection for invoking arbitration clause by the claimant vide letter dated 7.11.2011. He admitted that they did not give any reply to the letter dated 7.11.2011. He also

admitted that Shri Prem Bhatt received the undisputed letters.

22. Now I again turn to work order dated 19.11.2005. Its first very line states "Please refer to your letter and further discussions with Mr. Mohit Singh". Counsel for the respondent was asked to produce that letter. He admitted that letter is dated 10.11.2005 only which was said to be a forged one. The story put forward by the claimant does not just stack up. They have made namby-pamby pleas. They made an attempt to keep the real facts under the hat and gave evasive reply. The purpose was to procrastinate this case. Consequently, I hereby dismiss the application moved by the respondent for Forensic Examination of certain documents These documents are admissible in evidence and are genuine"

31. Shipra did not produce any forensic expert, to contend that the letters it denied were forged. Interestingly, the above findings were reiterated in the final award; Shipra's objections under Section 34 did not contain any specific ground against those pointed factual findings. Its generic challenge was premised on the absence of an arbitration agreement and that the letter containing the arbitration clause was not genuine. However, its admissions, through the depositions of its witnesses with regard to having received the letters denied by it later, as well as its conduct in denying even the arbitration agreement, were all circumstances which led the tribunal to conclude that its plea was untrustworthy.

32. In the present case, the single judge's findings assume that the correspondence between Bajaj and Shipra (whereby the former kept

demanding amounts for the work in terms of the items) were not based on the work and rather that the written contract alone subsisted between the parties. However, what was crucial is that the tribunal had the benefit of considering the entire record, the depositions of witnesses and the circumstances of the case. These include the demeanor of the witnesses who deposed before it and their trustworthiness- aspects that are within the legitimate domain of the fact-finding tribunal, i.e the arbitrator. Given that the findings were with respect to factual matters, the scope of interference by a court under Section 34 of the Act was minimal.

33. In *Associate Builders v Delhi Development Authority* (2015) 3 SCC 49, the Supreme Court cautioned that courts, in exercise of their power under Section 34 of the Act, would not be competent to set aside an arbitral award merely because they do not agree with the interpretation of the agreement given by the Arbitrator. If such interpretation of the agreement by the Arbitrator is plausible, the Award has to be upheld. It was also held in respect of findings of fact that:

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

34. Given these settled parameters, this court is of the considered opinion that the single judge's conclusion that oral evidence could not prevail over the written terms of the contract, especially in the context of the finding that the denial of the arbitration agreement was not tenable, interferes with factual findings. Those findings are pursuant to a process of reasoning, which discussed the evidence led before the tribunal. The weight to be attached to a position taken by a party by the tribunal, is ultimately a factual one based not only on the written terms of the contract, but also on the attendant circumstances. The arbitrator

in this case cannot also be said to have made an unreasoned award; in fact the findings are based on a discussion and analysis of the evidence and documents produced by the parties. Consequently, the single judge could not have justly interfered with the findings.

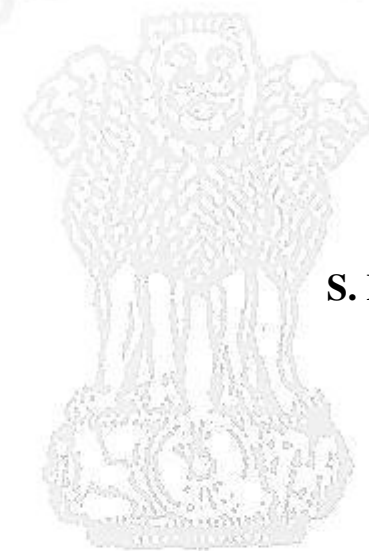
35. In view of the above discussion, it is held that the impugned judgment cannot be sustained; it is hereby set aside. The award is, consequently upheld. The appeal is allowed in these terms. No costs.

A. K. CHAWLA, J

S. RAVINDRA BHAT, J

DECEMBER 14, 2018

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