

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

+ **OMP (COMM) 7/2018**

Reserved on: 9th January, 2018,
Date of decision: 5th February, 2018

UDAY ESTATE PVT. LTD. & ANR. Petitioners
Through: Mr.Sanat Kumar, Sr.Adv. with
Mr.Anish Chawla, Adv.

Versus

SCHINDLER INDIA PVT. LTD. Respondent
Through: Mr.Aslam Ahmad and
Ms.Shraddha Chaudhary, Advs.
along with Mr.Sandeep Srivastava,
AR in person.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 24.08.2017 passed by the Sole Arbitrator in case Ref. No. DAC/605/8-14 in the matter of arbitration between M/s Schindler India Pvt. Ltd. Vs. M/s Uday Estate Pvt. Ltd. Anr. (hereinafter referred to as the 'Impugned Award')
2. Briefly stated, the facts giving rise to the present petition are that the petitioner no. 1 was constructing a five star hotel namely Hotel De-Aqua at Shastri Park, Delhi. After negotiations between the parties, an Agreement dated 28.12.2009 was entered into between the parties for delivery, installation and commissioning of five elevators at the hotel site. The total contract price for the five elevators was Rs.98 Lakhs

payable in three installments i.e. 23.5% advance upon signing of the Agreement; 65% upon intimation from the respondent that the material was available at their warehouse; and balance 11.5% was payable on physical completion of installation of the elevators. The material was to be dispatched within ten weeks' from the approval of layout and technical specifications. The physical installation was to be completed in ten weeks' from the date of start of installation work at the Site.

3. In term of the above Agreement, the petitioner paid 23.5% of the Contract value i.e. Rs. 23 Lakhs to the respondent.

4. The parties thereafter agreed to a change in specification of the elevators vide letter dated 15.06.2010. The schedule for supply was also changed, while specifically recording that all other terms and conditions of the original Contract shall remain the same and unchanged.

5. Yet another change was made in the Contract on 05.01.11 wherein again there was a change made in the specifications of the elevators as also the delivery schedule. The total value of the Contract was also revised to Rs. 96.90 Lakhs.

6. That on 07.02.2011, the respondent sent the layout of the drawings for approval to the petitioner. The same was approved by the petitioner on 07.03.2011.

7. It is the case of the petitioner that as the respondent had failed to supply the material within the agreed time, the petitioner vide its letter dated 18.04.2011, had brought out the failures on the part of the respondent. There is some controversy on this letter as the postal receipt shows that the said letter was posted only on 20.04.2011. The Arbitrator, in his Impugned Award also holds that the petitioner is guilty of anti-

dating this letter. This fact is necessary to be recorded as on 19.04.2011, the respondent had written a letter to the petitioner pointing out that the site is not ready and calling upon the petitioner to complete the pending activities which were delaying the final handing over of the elevators to the petitioner. By this letter, the respondent had further called upon the petitioner to give a proper room for material storage. Therefore, by anti-dating the letter dated 18.04.2011, the petitioner wanted to convey an impression as if the respondent's letter was an afterthought and aimed to hide its default, while, in fact, it was the other way around; it was the petitioner who wanted to hide its default and pass the blame on the respondent.

8. On 25.04.2011 the petitioner addressed a letter to the respondent making reference to its letter dated 18.04.2011 and further making a grievance that no guidance/consultation is forth coming from the end of the respondent. It was stated that on supply of the elevators, the petitioner shall release the payments immediately.

9. It is the case of the petitioner that in spite of this letter, the respondent did not supply the material and therefore, was in breach of the Agreement as far as the timelines are concerned.

10. On the other hand, it was the case of the respondent that the site was not ready and as soon as the storage room was made available by the petitioner, the material was supplied by the respondent to the petitioner in terms of the Agreement on 11.08.2011, 19.08.2011 and 20.08.2011. It is the further case of the respondent that on supply of such material, it made repeated request to the petitioner for the release of 65% of the Contract amount to the respondent in terms of the Contract; however, the

petitioner kept delaying the same by making false promises to get the Site ready and make the payments at the earliest as possible.

10. The respondent contends that on 03.12.2011 its representatives had visited the site to inspect the material and the Site and to again request for the release of the outstanding payments, however, the director of the petitioner called these representatives inside the meeting room and illegally confined them where they were physically assaulted and their mobile phones were snatched. They were also threatened of dire consequences.

11. The respondent, vide its legal notice dated 06.12.2011, made a grievance regarding the said incident to the petitioner, terminated the Contract and demanded Rs. 48,32,500/- along with interest at the rate of 18% per annum from the petitioner. The respondent also filed a complaint with the police in this regard.

12. It is the further case of the respondent that after the receipt of the above notice, the director of the petitioner contacted the respondent's representatives and apologized for the unlawful action and further asked respondent to continue with the work. The respondent claimed that it was on this assurance that further material was supplied to the petitioner's Site on 22.02.2012.

13. The respondent claimed that as the Site was not ready thereafter and even the payments had not been released by the petitioner in terms of the Contract, a notice dated 19.11.2013 was sent to the petitioner claiming a sum of Rs. 55,15,376/-. The respondent thereafter filed an application before this Court under Section 9 of the Act being OMP No. 863/2013, wherein this Court directed the petitioner to disclose the details

and specifications of the material lying at the site, however, no such details were filed by the petitioner even before the Arbitrator. As the disputes persisted, the respondent filed an application before this Court under Section 11 of the Act being ARB. P. No.166/2014 on which this Court appointed the Sole Arbitrator for adjudicating the disputes that had arisen between the parties.

14. The Sole Arbitrator vide its Impugned Award has directed the petitioner to pay a sum of Rs. 38,98,729/- alongwith interest at the rate of 12% per annum from December, 2013.

15. The learned senior counsel for the petitioner submits that the Impugned Award is liable to be set aside by this Court in as much as it failed to consider that the Contract was one for delivery, installation and commissioning of the elevators and not merely for supply of material. The respondent having not installed the elevators, was not entitled to any payments under the Contract. It is submitted that the Arbitrator has wrongly relied upon Section 42 of the Sale of Goods Act as the present was not a Contract for Sale of Goods as defined in Section 4 of the Sale of Goods Act, 1930. Further, relying upon Clause 10 of the “Commercial Terms and Conditions”, it was submitted that the Contract itself provides that in case the petitioner fails to make the payments in terms of the Contract, the respondent shall have the right to take back/re-claim the possession of the material. It is submitted that the respondent, therefore, should have claimed back the material, but was not entitled to the price of the same. It is further submitted that the respondent was clearly in breach of the Agreement in terms of the timelines agreed upon between the parties in the revised Agreement dated 05.01.2011 and, therefore, as a

party in breach, was not entitled to any relief in the Arbitration. It is submitted that the petitioner having terminated the Agreement vide its legal notice dated 06.12.2011, made further supply of material on 22.02.2012 at its own peril and was not entitled to claim any amount against this supply.

16. I have considered the submissions made by the learned senior counsel for the petitioner, however, I find no merit in the same. As far as the question of breach is concerned, the Sole Arbitrator has extensively dealt with the correspondence exchanged between the parties during the relevant period as also the oral evidence led before him to conclude that the site was not ready for PULL and shafts were not ready for installation. The Arbitrator has further noted that the petitioner has not written any letter informing the respondent that the shafts were ready for installation of the lifts. The Arbitrator further holds that it was the petitioner who was unable to finalize the details of the lifts and it was only in order to shift the blame on to the respondent that the petitioner fabricated the letter dated 18.04.2011 by anti-dating it. I agree with the findings of the Arbitrator. In any case, in exercise of my powers under Section 34 of the Act, this Court cannot act as a Court of Appeal to re-examine the Arbitral Award by re-assessing / re-appreciating the evidence. The Arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his Arbitral Award and such findings of fact are final, (*Associates Builder v. DDA (2015) 3 SCC 49*).

17. Once it is held that the petitioner was in breach of the Agreement, the question whether the Contract was one of Sale of Goods or Works

Contract, is of no significance. It is not the case of the petitioner that upon supply of the material, the respondent failed to install the lifts. In fact, as held by the Arbitrator, the Site was not ready even till 2016 and therefore, the elevators could not be installed.

18. As far as the delivery of the material is concerned, the petitioner had taken a totally fallacious stand that as it had not checked the material because it was delivered late at night, it cannot be treated to have accepted the same so as to make it liable for making payment against such delivery. This plea was on the face of it fallacious as the material was delivered in four installments i.e. on 11.08.2011, 19.08.2011, 20.08.2011 and 22.02.2012. It cannot therefore, be accepted that the petitioner was unaware of the said supply or that the said supply was forced upon the petitioner. It is also relevant to note here that admittedly, the petitioner did not write any letter to the respondent protesting about the delivery of the material after the expiry of the contractual period. In fact, no response to the legal notice dated 06.12.2011 from the respondent to the petitioner was sent. In view of the same, whether the reliance of the Arbitrator on Section 42 of the Sales of Goods Act was correct or incorrect, pales into insignificance. The goods having remained in the custody of the petitioner, would be deemed to have been accepted by it.

19. It is also relevant that this Court, on a Petition under Section 9 of the Act filed by the respondent, had directed the petitioner to disclose the details of all the material lying at the Site. Here again, the petitioner refused to comply with the said order on a flimsy excuse that as the material was lying in a packed condition, it would not give such details.

This false pretext is relevant as the respondent had contended that the petitioner had not only utilized the material that had been supplied to it but had also sold some part of it to third party.

20. Reliance of the petitioner on Clause 10 of the “Commercial Terms of Conditions” is also fallacious. Clause 10 is reproduced herein below”-

“10. Ownership of material

Till the final payment is made by you under this contract you cannot claim right of lien over the material. Our company shall have the right to take back/reclaim the possession in the same or any part thereof at your cost. In case the payment is not made as per the terms of contract we have the right to dismantle our elevator/escalator and take the material supplied back in our possession. This will be without prejudice to our right to recover the unpaid amount and interest by any means or process of proceedings whatsoever. We shall be entitled to recover from you legal expenses incurred in collecting payments hereunder. We shall be entitled to recover from you cost incurred in dismantling the elevator/escalator, logistics-cost of moving the same, labour cost arising with such dismantling/moving and all the applicable taxes/duties cess. We are not bound to furnish any document in support of such recoveries. The depreciation in the value of the material/resale value shall also be taken into account.

In the event this clause is applied, it is agreed between the parties to this contract that all the dispatched material and installed parts hereunder shall be removed without any material damage to the property to which it is attached and our company will retain the title of thereto until the final payment is made by you under the contract.

Any unutilized material, packing material etc. remaining after completion of job shall remain our property. We have the right to take such material supplied back into our possession.”

(emphasis supplied)

21. The above said Clause clearly indicates that the right of the respondent to take back/re-claim the possession of the material is in the

nature of an additional right and is without prejudice to its right to recover the unpaid amount and interest from the petitioner. The Arbitrator has come to the conclusion that these elevators were specially designed for the petitioner and could not be used elsewhere for the respondent. The very fact that the original specifications were changed by the amendment on 15.06.2010 and 05.01.2011 shows that the elevators were according to the special specifications of the petitioner. In any case, it cannot be accepted that the only remedy available with the respondent upon breach of the Contract, was one to take back the material and not to claim money for the same.

22. In this regard the payment term under the “Commercial Terms and Conditions for Contracts” is also important and the same is reproduced herein below:-

*“1. Payment Terms
23.5% advance with your acceptance.
65% on receipt on intimation from us that material is at warehouse.
11.5% on physical completion of installation.
Irrespective of any delay in building completion, availability of permanent power supply or by any cause beyond our control, the final 10% will be due to us within 180 days from the date of our intimation that material is at warehouse.”*

23. Reading of the above shows that 65% of the contract payment was to be made “on intimation” that the material is at warehouse. The said payment was therefore, the right of the respondent upon delivery of the material to the petitioner.

24. As far as the contention, that the respondent is not entitled to receive any payment for the supply made after its termination notice

dated 06.12.2011, the same is liable to be rejected. Here again, it is not denied that the said material has been duly delivered by the respondent to the Site of the petitioner. It is also not contended that any protest was made against such supply. The contention of the respondent that the supply was made after the Director of the petitioner had assured the respondent that the due payments shall be made, deserves acceptance.

25. In view of the above, I find no merit in the present petition and the same is accordingly dismissed, with no order as to costs.

NAVIN CHAWLA, J

FEBRUARY 05, 2018/rv



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