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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 24th April, 2018

+ O.M.P. (COMM) 456/2017

SUNIL KUKREJA Petitioner
Through: Mr.Anil Kher, Sr. Adv. with Mr.D.R.
Bhatia, Mr.Kunal Kher and
Ms.Subiya Akbar Warsi, Advs.

versus

NORTH WEST SALES AND MARKETING LTD. Respondent
Through: Mr.Ramesh Singh, Ms.Manisha
Handa and Mr.Chirayu Jain, Advs.

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+ O.M.P. (COMM) 56/2018

NORTH WEST SALES & MARKETING LTD.THROUGH IT'S
AUTHORIZED SIGNATORY SH. BABRU BAHAN SAMAL
..... Petitioner
Through Mr.Ramesh Singh, Ms.Manisha
Handa and Mr.Chirayu Jain, Advs.

versus

SUNIL KUKREJA Respondent
Through: Mr.Anil Kher, Sr. Adv. with Mr.D.R.
Bhatia, Mr.Kunal Kher and
Ms.Subiya Akbar Warsi, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA
NAVIN CHAWLA, J. (Oral)

1. These petitions have been filed under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the Arbitral Award dated 22.08.2017

passed by the Sole Arbitrator. Sunil Kukreja shall be referred to as the petitioner and North West Sales and Marketing Ltd. shall be referred to as the respondent in the order.

2. The disputes between the parties arose in relation to the Memorandum of Understanding (MOU) dated 12.11.2009. Under the said MOU, the petitioner (Sunil Kukreja) agreed to purchase a space with super area of approximately 10,000 square feet and covered area of 5,000 square feet on the 5th floor of the building being constructed by the respondent (North West Sales And Marketing Ltd.) at plot bearing No.40, Community Centre, Block-A, Paschim Puri, Delhi-110063. The MOU records that the sale consideration for the said allotment is Rs.5 crores. The MOU further records that the respondent has received the entire sum of Rs.5 crores from the petitioner as total sale consideration.

3. It is the case of the petitioner that as the respondent failed to construct the building and especially the 5th floor of the same, the respondent agreed to pay to the petitioner a sum of Rs.5.10 crores as refund of the amount deposited by the petitioner along with token interest thereon. The petitioner claims that this amount was paid by way of two cheques; one for an amount of Rs.3 crores dated 22.08.2011 and the other for an amount of Rs.2.10 crores dated 28.09.2011. The petitioner claims that receipt of this amount was issued in the form of a letter dated 29.07.2011 which expressly recorded that in case the cheques are not honoured upon presentation, the terms of the MOU would be revived.

4. The petitioner further relied upon a letter dated 21.09.2011 issued by the Director of the respondent company requesting the petitioner to present the cheques on 22.10.2011 as the company was not able to pay the above

amount due to some reason. The letter further records that in case the said cheques are not cleared upon presentation, the respondent will be bound to allot the space allotted to the petitioner in terms of the MOU.

5. The petitioner further claims that as the cheques were returned dishonoured upon presentation, the MOU stood revived and the petitioner was entitled to the allotment of the space in terms of the MOU. It is the case of the petitioner that as the respondent was delaying the construction of the building, the respondent agreed to pay interest for such delay and accordingly paid a sum of Rs.3.25 crores to the petitioner by way of the following cheques: -

*“a) Rs.75,00,000/- was paid on 07.05.2013;
b) Rs.1,00,00,000/- was paid on 30.05.20 13; and
c) Rs.1,50,00,000/- was paid on 25.06.2013.”*

6. The petitioner claiming that the respondent had failed to discharge its liability to pay interest as also to allot the space in terms of the MOU, issued a legal notice dated 12.02.2015 to the respondent seeking appointment of an Arbitral Tribunal. As the respondent failed to respond to this notice, a Sole Arbitrator was appointed by this Court vide its Order dated 05.08.2015 passed in Arbitration Petition 174/2015.

7. The arbitration proceedings have resulted in the Impugned Award dated 22.08.2017, by which both parties are aggrieved and have filed their respective petitions under Section 34 of the Act.

8. The learned senior counsel for the petitioner submits that the Sole Arbitrator has completely ignored the evidence led by the parties before the Arbitrator. He submits that the MOU clearly recorded that the respondent has received the full sale consideration of Rs.5 crores and, therefore, the

Arbitrator has committed an error apparent on the face of the record by holding that the petitioner is in default of payment of the sale consideration. He further submits that the petitioner had filed his affidavit of evidence before the Sole Arbitrator clearly stating that an amount of Rs.4.05 crores was actually paid in terms of the MOU as the parties had agreed that there would be a discount of 19% granted to the petitioner on the sale consideration in case the petitioner was to make the payment by way of a lump-sum down payment. He submits that only the following cross-examination of the witness was conducted by the respondent:

*“My business is that of real estate and bearings of automobiles. The MOU dated 12.11.2009 was never modified. I deny the suggestion that the case put up by me is false and my deposition is also false.
The evidence of Claimant stands concluded.”*

9. He submits that therefore, there was effectually no cross-examination of the witness on this aspect and therefore, there was absolutely no reason for the Arbitrator to have disbelieved the case of the petitioner. He further draws my reference to the cross-examination of the witness of the respondent namely, Mr.Sunil Agarwal, Director of the respondent, wherein he admits that he has no knowledge that the amount of Rs.5 crores payable in instalments was reduced to Rs.4.05 crores on account of down payment made by the petitioner to the respondent. Question no.5 and its answer by the said witness is important and is reproduced hereinunder:

*“Q5: Are you aware of the fact that the consideration amount of Rs. 5 crore payable in instalments was reduced to 4.05 crores on account of down payment made by the Respondent to the Claimant?
A: I am not aware.”*

10. On this aspect, learned counsel for the respondent on the other hand, submits that admittedly, the petitioner had paid only Rs.4.05 crores at the time of entering into the MOU. He submits that the MOU does not contain any clause mentioning this alleged discount offered to the petitioner. He therefore submits that the Arbitrator has rightly disbelieved the petitioner on this theory of discount and this Court in exercise of its power under Section 34 of the Act cannot re-appreciate the evidence or go into the merits of the claim and counter claim of the parties in this regard.

11. Before I consider the submissions made by the counsels for the parties, I would first reproduce the relevant findings of the Sole Arbitrator in this regard:

“70. No dates have been mentioned on the cheques issued by the Claimant and no bank statements have been placed on the record by the Claimant, thus leading to the inference that if the dates of the cheques were given they would indicate that the cheques were given on different dates than those claimed by him. Significantly, all other cheques have been mentioned in the pleadings with specific dates. The non-mentioning of dates of the cheques in the Legal notice dated 12.02.2015 clearly shows that the Claimant has deliberately kept back this information and consequently his version of 19% discount on immediate down payment is unworthy of belief. As a Claimant, the burden of proof of the 19% discount for immediate down payment was on the Claimant and he has failed to discharge this burden. In fact there is no document or communication to this effect either pleaded or brought on record.

71. The Claimant had paid a sum of Rs. 4.05 crores towards the total sale consideration of Rs. 5 crores and the Claimant has himself admitted that the Respondent had paid a sum of Rs. 3.25 crores to the Claimant towards refund of the total sale consideration paid by him. The Respondent had

forfeited 20% of the amount paid by the Claimant towards total sale consideration i.e. 20% of Rs. 4.05 crores as the Claimant failed to pay the total sale consideration. The Claimant has failed to show any communication/document regarding the alleged discount of 19% by the Respondent leading the Claimant to arrive at the odd figure of Rs. 4.05 crores. Thus, in my view, the Claimant's plea regarding the amount of Rs. 3.25 crores paid back by the Respondent being towards interest has no merit.

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73. There is no document on record to show that the Respondent offered a discount of 19% on lump sum payment of the total sale consideration to the Claimant. In my view, the Claimant has stated that the discount of 19% was offered by the Respondent only to justify payment of Rs.4.05 crores towards the total sale consideration instead of Rs. 5 crores. The interest of 19% discount is an odd figure, seldom found in contracts.

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76. The plea of the Claimant that the sum of Rs. 3.25 crores was issued by the Respondent to the Claimant towards interest on the sale consideration paid by the Claimant cannot be accepted. There is no document on record to prove the said plea. In my view, the said plea of the Claimant is nothing but a mere afterthought so as to justify the figure of Rs. 3.25 crores by the Respondent as interest and not as return of the Principal amount. No rate of interest has been stated in the pleadings by the Claimant and it has not been shown how the figure of Rs. 3.87 crores shown as interest has been arrived at. Even this figure of Rs. 3.87 crores has not been mentioned in the pleadings but was mentioned during arguments. In fact it is not in dispute that the agreement between the parties was for Rs. 5 crores and the Claimant had only paid a sum of Rs.4.05 crores. Thus, the Claimant was clearly in default and has now created this fiction of 19% discount to cover up his default

in not paying the entire agreed amount of Rs. 5 crores. The Claimant has also obviously taken advantage of the change of ownership of the Respondent and ensuing confusion to secure 2 cheques totalling Rs. 5.10 crores. Significantly, except the bare word of the Claimant there is no consideration beyond the sum of Rs. 4.05 crores for the issue of the 2 cheques dated 22.08.2011 and 28.09.2011. However, the Claimant is certainly entitled to claim the difference between Rs. 4.05 crores paid by it towards part consideration of the contracted amount of Rs. 5 crores and Rs.3.25 crores received back by it as the promised property could not be delivered. The said amount is Rs. 80 lacs (Rs. 4.05 crores minus Rs. 3.25 crores).”

12. A bare reading of the above finding of the Arbitrator would clearly show that there is no mention about the admission by the respondent recorded in the MOU regarding the receipt of Rs.5 crores from the petitioner. Equally, there is no discussion on the oral testimony of the witness of the petitioner and the lack of cross-examination by the respondent and its effect. There is also no discussion on the effect of the answer to question no. 5 given by the witness produced by the respondent in support of its claim. In my view, this is a case of total absence of consideration of evidence led before the Arbitrator. It is not a case where an inference is to be drawn on the evidence led before the Arbitrator because in that case, the Court, in exercise of its powers under Section 34 of the Act, would not act as a Court of Appeal to re-appreciate such evidence. The present is the case of total lack of consideration of the evidence by the Arbitrator.

13. In ***Associate Builders vs. Delhi Development Authority*** (2015) 3 SCC 49, Supreme Court has held that where the Arbitrator based his finding on no evidence or ignores vital evidence in arriving at his decision, the said

decision would necessarily be perverse and is foul of the fundamental policy of Indian Law. Paragraph 31 of the judgment is instructive in this regard and is reproduced hereinbelow:-

“31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where-

- (i) a finding is based on no evidence, or*
- (ii) an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or*
- (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.”*

14. In ***Hindustan Lever Ltd. v. Shiv Khullar and Anr.***, 2008 SCC OnLine Del 424, this Court had underlined the difference between re-appreciating the evidence and considering where material evidence has been ignored. It was emphasized that whereas the former would be an activity prohibited while considering the objections under Section 34 of the Act, the latter would be an activity to find out whether the learned Arbitrator has acted within his mandate for the reason the mandate of the Arbitrator is to decide on facts after considering all the relevant facts and not ignoring the same. Paragraphs 17 and 20 of the judgment are important and are reproduced hereinbelow:-

“17. A commonly held belief that while considering objections under Section 34 of the Act the Court cannot look into the evidence before the arbitrator also needs to be clarified. There is a difference in re-appreciating evidence and considering whether material evidence has been ignored. Whereas the former would be an activity prohibited while considering objections under Section 34 of the Act for the reason an arbitrator is a chosen forum by the parties to

conclude rival issues of fact between the parties, the latter would be an activity to find out whether learned arbitrator has acted within his mandate for the reason the mandate of the arbitrator is to decide on facts after considering all the relevant facts and not ignoring the same.

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20. Even in the realm of evidence, no doubt the provisions of the Evidence Act, 1872 are not strictly applicable before an arbitral forum, but underlying principles thereof would certainly apply. For example, Section 21 of the Evidence Act, 1872 mandates that an admission made by a party is a relevant fact. The said section underlines a fundamental policy of the law that the best evidence of a party is the admission of the opponent. Suppose an arbitrator ignores an admission made by a party which has not been explained. Would not such an award be liable to be challenged on the plea that by ignoring a material evidence, a fundamental policy of law relating to evidence being violated by the arbitrator, the award is liable to be challenged? Surely, such an award would suffer from the mandate of the arbitrator being violated as also on the ground that the conclusions are perverse.”

15. The Arbitrator has further failed to appreciate that the respondent had admittedly issued two cheques totalling to an amount of Rs. 5.10 crores in favour of the petitioner in August/September, 2011. These were admittedly returned unpaid due to insufficiency of funds in October, 2011. It is not the case of the respondent that the payments of these cheques were stopped because of the fact that only Rs. 4.05 crores has been received from the petitioner. Even as per the submission made by counsel for the respondent today, this knowledge of only Rs. 4.05 crores being paid by the petitioner and not Rs.5 crore, dawned upon the respondent only in the year 2013, that

is two years after the issuance of the cheques and dishonour of the same. Thus, the Arbitrator failed to consider as to why these cheques were then issued for Rs. 5.10 crore and what is the effect of dishonour of these cheques at the relevant time.

16. As far as the claim of the petitioner that an amount of Rs.3.25 crores was paid as interest by the respondent, the petitioner has again relied upon the oral testimony of the petitioner and lack of cross-examination by the respondent in this regard. On the other hand, the case of the respondent is that in the year 2013, when the respondent realised that the petitioner had paid only a sum of Rs.4.05 crores and was therefore in default of payment of the balance sale consideration, the parties arrived at a settlement whereby the claim of the petitioner was settled at Rs.3.25 crores in full and final discharge, after forfeiting 20% of the amount paid by the petitioner to the respondent.

17. Admittedly, there is no written document recording such settlement even with the respondent. Therefore, it was the case of one oral assertion against the other. The respondent is claiming full and final discharge of its obligation. It would, as a company, have at least procured some written document in this regard from the petitioner, however, admittedly, has not done so. Equally, the fact of lack of cross-examination of the petitioner's witness would be a relevant circumstance. In the cross-examination of the witness of the respondent, he admitted that there is no document issued by the respondent informing the petitioner of any default in payment of the sale consideration. He also admitted that there is no document showing that the petitioner had agreed to the forfeiture of 20% of the amount paid by the petitioner while accepting Rs.3.25 crores from the respondent. The question

nos.8 and 12 and answers thereto by the witness are important and are reproduced hereinunder:

Q8: Can you show any document or communication or mail by which the Respondent informed the Claimant that they have defaulted in the payment of consideration?

A: There is no document/communication but it was conveyed verbally.

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Q12: Do you have any document correspondence or email stating or communicating wherein the Claimant agreed to forfeiture of 20% amount paid by them or accepting 3.25 crore as the refund of the consideration amount?

A: It was only oral and not in writing.”

18. In the entire Award there is no mention of the above fact by the Arbitrator. The Arbitrator has premised his Award only on one factor which is that the petitioner had not raised his claim after receiving the above amount of Rs.3.25 crores till the issuance of the legal notice dated 12.02.2015. This may have been one of the relevant circumstances to be taken note of by the Arbitrator, however, in view of the other evidence led by the parties before the Arbitrator, the Arbitrator could not have based his finding only on this inference, while ignoring the other evidence.

19. As noted above, it was the claim of the petitioner that it had been agreed between the parties that if the cheques of Rs.5.10 crores are dishonoured for any reason, the terms of the MOU shall revive. In this regard, the petitioner had also relied upon a letter dated 21.09.2011 purportedly issued by the Director of the respondent company to the petitioner. The Arbitrator in his Impugned Award has refused to rely upon

the said letter by stating that the signature of the Director on the said letter does not match with his signature on the declaration to the Registrar of Companies. The relevant finding in this regard is reproduced hereinbelow:

“75. Further, the Claimant has placed much reliance on the letter dated 21.09.2011. The onus of proving that the said letter was in fact issued by the Respondent was on the Claimant. In fact the signature of the Director of the Respondent Company, Mr.Madan Mohan Gupta, on the alleged letter dated 21.09.2011 does not match with his signature on the Declaration of Registrar of Companies. This may have lead the Tribunal to believe that the letter dated 21.09.2011 was a self-serving document. However, since there is no cross examination of the Claimant's witness on this issue, the issue cannot be looked into further.”

20. On being questioned, learned counsel for the respondent admits that the respondent had not challenged the genuineness of the signature of the Director on the said letter. The only challenge of the respondent was to the authority of the Director to issue such letter. Clearly the Arbitrator has completely misdirected himself in answering an issue which is not raised by the respondent and disbelieving the case of the petitioner on this ground.

21. Another important aspect in this entire case is that admittedly, the amount had been paid by the petitioner for allotment of a space on the 5th floor of the building being constructed by the respondent. Admittedly, the said floor was never constructed by the respondent. Therefore, there was a complete failure of consideration by the respondent. The effect of the same had a material bearing on the relief to be granted to the parties. The Arbitrator has held that though the petitioner was entitled to a refund of Rs.80 lacs, at the same time, the respondent shall be entitled to forfeit some

portion of the said amount due to failure of the petitioner to pay the balance sale consideration. Once it is admitted that the 5th floor was never constructed, the question of failure of the petitioner to pay the balance sale consideration would not arise. The respondent cannot take advantage of its own wrong. While on one hand it admits that it was not possible to honour the terms of the agreement, on the other hand, claiming that the petitioner had defaulted in honouring the same, it seeks to forfeit the amount payable and that too, based on said oral understanding. This certainly was to be considered by the Arbitrator in a proper perspective.

22. The Arbitrator has also disbelieved the case of the petitioner with respect to Rs. 3.25 crore being paid by the respondent as interest due to its delay in handing over the possession of the allotted space, on the ground that there is no document on record proving that such interest was agreed to be paid. However, the learned Arbitrator has failed to appreciate that admittedly in August/September, 2011, the respondent had paid Rs. 10 lakhs at least as interest to the petitioner. If the amount paid by the petitioner is taken as Rs. 4.05 crore only, interest paid was Rs. 1.05 crore. Even this interest was paid without any document stipulating for such interest. This letter, in fact, proved that the respondent had agreed to pay interest to the petitioner. Therefore, the case set up by the petitioner could not have been discarded on this lone reason.

23. Learned counsel for the respondent submits that the objections to the Award filed by the respondent are being pressed, limited only to the aspect that the respondent should have been held entitled to forfeit the entire 20% of the amount on the basis of this oral understanding between the parties. I find from the Award that the Arbitrator has not given any finding on this

oral understanding claimed by the respondent. Therefore, even as per the case of the respondent, the Arbitrator has not considered the case set up by the respondent in this regard.

24. In view of the above, the Impugned Award cannot be sustained and is liable to be set aside. It is ordered accordingly.

25. I may only notice that at the outset itself I put it to the counsel for the respondent that the Impugned Award does not consider the evidence led by the parties before the Arbitrator and this is the case of the respondent itself in its objection petition and therefore, the Award can be set aside by consent and the parties can be relegated to fresh arbitration. However, the learned counsel for the respondent insisted on a speaking order to be passed and took me through the entire paper book. The respondent shall pay a cost of Rs.50,000/- to the petitioner for these proceedings.

26. The parties shall be at liberty to initiate appropriate legal remedy for redressal of their claims in accordance with the law and in such proceedings, would be entitled to take the benefit of Section 43(4) of the Act.

NAVIN CHAWLA, J

APRIL 24, 2018/Arya