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

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Judgment delivered on: 16.01.2018

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FAO 21/2018

NIRMAL SINGH & ORS.

..... Appellants

Through: Mr. R. K. Kapoor and Ms. Rekha
Giri, Advocates.

Versus

YASHWANT JAIN & ANR.

..... Respondents

Through: Mr. Lalit Gupta and Mr. Siddharth A.,
Advocates.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J (Oral)

CAV 26/2018

1. Counsel for the caveator/ respondents enters appearance. Caveat stands discharged.

FAO 21/2018 & CM APPL. 1584-1586/2018

2. This is an appeal under Section 37 of the Arbitration & Conciliation Act, 1996 (in short the Act) against the order dated 25.09.2017 passed by the learned Additional District Judge (South District), Saket Courts, New Delhi, in Arb. Petition No.20706/16 filed under section 34 of the Act, which had challenged the Award dated 23.12.2015.

3. The order is impugned under section 37(1) of the Act, on the ground that the counter-claim of the appellant was not considered and, therefore,

there is perversity in the Award. The additional grounds are that the agreement dated 13.04.2005 does not reflect the real and true terms and conditions of the understanding between appellant no.1 and respondent no.1; the said document is forged; the signatures of appellant no.1 on various other documents too are forged; the appellant is an uneducated person, does not understand *Gurumukhi* or English and has been a victim of fraud and misrepresentation committed by respondent no.1 and his associates; the cash receipts produced by respondent no.1, purportedly showing the payment of large sums of monies to appellant no.1, are fictitious; that the appellant has been paid only Rs. 5.50 lakhs in cash and Rs. 1.5 lakhs in cheque; that the arbitral award is also bad and the impugned order is perverse because there was nothing on record to show that agreement dated 13.04.2005 was cancelled and then three subsequent agreements dated 01.07.2005 were executed, both agreements cannot co-exist; the hand writing expert opining that the signatures on the aforesaid documents was of appellant no.1 was erroneous and unsubstantiated because, other than his mere opinion, no corroborative or other independent evidence or material was adduced to reach an indisputable conclusion that the said signature was of the appellant no. 1; the impugned order is contrary to the dicta of the Supreme Court, that where Award/ order/ decree is based on concealment of material facts or based on fraudulent documents, they are likely to be set aside.

4. The facts of the case are that appellant no.1 is the owner of property in Green Park Extension, New Delhi. He entered into an agreement with respondent no.2 on 13.04.2005 to construct three floors in the said property which were sold to respondent no.1 for Rs. 69 lakhs. Two of these flats i.e. first and second floor flats have been delivered to the purchasers and sale

deed apropos them have been executed pursuant to directions of this Court in earlier proceedings. A dispute arose between the parties over non-execution of the sale deed by appellant no.1 regarding the upper ground floor in favour of respondent no.1. A suit for specific performance was filed against the appellant no.1. He invoked the arbitration clause in the aforesaid agreement. The case reached this Court which appointed an arbitrator with mutual consent. The parties participated in the arbitral proceedings, an Award was passed, which was challenged and was partly allowed by the impugned order.

5. The Award had directed execution of the sale deed by appellant no.1 in favour of the respondent regarding upper ground floor; making available space for parking of one big car to the respondent, resultant removal of constructions/structures that may be, for the provision of the said car parking, a cost of Rs. 4.85 lakhs with interest at the rate of 12% per annum commencing from 04.09.2006 was imposed for the loss of area of 20 sq. yds. to respondent no.1; half of the arbitral fee of Rs. 2.65 lakhs too was imposed along with damages of Rs. 10 lakhs. The impugned order found that the award of the aforesaid monetary amounts were unwarranted and no case was made out for grant of the same. Hence it set aside the award of Rs. 3.10 lakhs with interest as being against public policy, and the damages of Rs. 10 lakhs and Arbitral Fee of Rs. 2.65 lakhs as perverse, because respondent no.1 had only sought specific performance of contract which was granted. The impugned order held that simply because the appellant's claim for unpaid dues was rejected it would not warrant imputation of unlawful or malafide intention on him, to warrant award of punitive damages against him; it further held that such damages could be awarded only if the

agreement contained a clause for damages and/or a specified time for registration of the sale deed. Since time was not of the essence of the contract, therefore, the award of damages for non-performance of the contract could not have been granted. Regarding the reduced area of 20 sq. yds. the impugned order reasoned that respondent no.1 knew all along that the area in which the construction was to be done had been reduced to 100 sq. yds. from 120 sq. yds.; and lastly the cost of arbitral fee was found perverse, on account of the fact that simply because appellant no.1's counter claim had been rejected that by itself would not be enough to conclude that it was a defaulting party and responsible for the litigation cost.

6. The impugned order has reasoned that it is no longer *res integra* that the Court cannot sit as an appellate court to re-appreciate the facts as mentioned in an Award. It noted that the arbitrator had observed that illiteracy of the person or lack of understanding of the terms and conditions of the agreement dated 13.04.2005 and 01.07.2005 was not credible because the appellant had admitted to execution of both the agreements. Indeed he had invoked them in his section 8 application in a suit filed by respondent no.1. Having invoked the arbitration clause, he could not question its contents. The appellant's contention that various blank spaces in the agreement had been filled by respondent no.1 and he had interpolated the same regarding three individual car parkings in the ground floor, was found to be untenable because the issue of three individual car parking was typed and not hand written. Therefore, there was no scope for interpolation or manipulation of the agreement; it mentioned "individual space for three car parking in the ground floor".

7. The arbitrator also noted that nowhere in his pleadings in the suit i.e.

in the application under section 8 of the Act and his replication thereto, had appellant no.1 even whispered that he was a victim of forgery or fabrication apropos the said agreement. Therefore, it could be concluded that he had indirectly admitted the execution of the agreement. Having considered the deposition of appellant no.1 and his exhaustive cross-examination, the arbitrator came to the conclusion that appellant no.1 was not illiterate and understood the consequences of all documents which he had signed. It was noted that appellant no.1 made no efforts to prove through the CFSL or FSL reports or even filed a complaint before the police, that his signatures had been forged on the agreements and documents relied upon by respondent no.1, nor did he examine any witness who could establish or prove that the signatures on the said documents were not of his. With respect to payment of the sale proceeds the arbitrator had concluded that no money was due on 05.12.2009 apropos the upper ground floor as the sale deed had been executed on that day itself in favour of the claimant (respondent). It was only logical to conclude that a person would sign or execute a sale deed or put his thumb impression or concurrence to any such document of conveyance recording payment of full consideration only, if the said consideration had been paid.

8. The impugned order was conscious of the judgment of the Supreme Court in ***Associates Builders vs Delhi Development Authority AIR 2015 SC 620*** which held that the phrase “public policy of India” as in the context of section 35 of the Act, required to be given a wide meaning. It held as under:

“..... It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public

interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renuagar case [1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be - award could be set aside if it is contrary to:

- (a) Fundamental policy of Indian law; or*
- (b) The interest of India; or*
- (c) Justice or morality, or*
- (d) in addition, if it is patently illegal.*

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

103. Such patent illegality, however, must go to the root of the matter. The public policy, indisputably, should be unfair and unreasonable so as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act."

35. Without meaning to exhaustively enumerate the purport of the expression "fundamental policy of Indian law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law.

The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a "judicial approach" in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

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-

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

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."

It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score.

A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act.

The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law. An award can be said to be against justice only when it shocks the conscience of the court. An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs. 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be

liable to be set aside on the ground that it is contrary to "justice".

If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award.

The Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding....."

9. In support of this appeal the learned counsel for the appellant also relies upon ***Associates Builders*** (supra) to contend that the impugned order is appealable and ought to be set aside since it suffers from perversity. The respondent, however, contends that the ground of denial of the counter-claim cannot be considered in this appeal under Section 37 of the Act since the issue was never raised nor argued before the learned ADJ in the Section 34 proceedings. Hence the grievance in counter-claim cannot be raised at

this stage. This contention is refuted by the appellant who argues that the objections to the Award implicitly include a challenge to the denial of the appellant's counter claim. The Court finds the said argument untenable because the grounds of challenge or objection to the award have to be specifically spelt out and there cannot be any omnibus statement challenging the entire Award on the ground of being against 'public policy'. The said expression is of wide amplitude, but its breach has to be specifically articulated and substantiated. The respondent relies upon the decision of this Court in ***Delhi State Industrial & Infrastructure Development Corporation Ltd vs. M/s Rama Construction Company through its Partner R. N. Gupta, 2014 (5) RAJ 321 (Del)***, to contend that where a petition under section 34 of the Act does not make out any ground whatsoever, hence, it being without merit ought to be dismissed. He refers to the following paragraphs of the said judgment:-

"8. We are unable to agree. We have recently in our judgment dated 2nd July, 2014 in FAO(OS) No.242/2014 titled State Trading Corporation of India Ltd. Vs. M/s Toepfer International Asia Pte Ltd [reported as 2014(5) R.A.J. 301], relying on Thyssen Krupp Werkstoffe Vs. Steel Authority of India MANU/DE/1853/2011:2010(6) R.A.J. 5 and Shree Vinayak Cement Clearing Agency Vs. Cement Corporation of India 147 (2007) DLT 385:2007(4) R.A.J. 253 held that the scope of appeal under Section 37 is even more restricted than the scope of interference under Section 34 of the Act with the award. With respect to the scope of interference with the arbitral award, under Section 34 of the Act, we inter alia held:

"6.A Section 34 proceeding, which in essence is the remedy of annulment, cannot be used by one party to convert the same into a remedy of appeal. In our view, mere erroneous/wrong finding of fact by the Arbitral Tribunal or even an erroneous interpretation of

documents/evidence, is non-interferable under Section 34 and if such interference is done by the Court, the same will set at naught the whole purpose of amendment of the Arbitration Act.

7. Arbitration is intended to be a faster and less expensive alternative to the courts. If this is one's motivation and expectation, then the finality of the arbitral award is very important. The remedy provided in Section 34 against an arbitral award is in no sense an appeal. The legislative intent in Section 34 was to make the result of the annulment procedure prescribed therein potentially different from that in an appeal. In appeal, the decision under review not only may be confirmed, but may also be modified. In annulment, on the other hand, the decision under review may either be invalidated in whole or in part or be left to stand if the plea for annulment is rejected. Annulment operates to negate a decision, in whole or in part, thereby depriving the portion negated of legal force and returning the parties, as to that portion, to their original litigating positions. Annulment can void, while appeal can modify. Section 34 is found to provide for annulment only on the grounds affecting legitimacy of the process of decision as distinct from substantive correctness of the contents of the decision. A remedy of appeal focuses upon both legitimacy of the process of decision and the substantive correctness of the decision. Annulment, in the case of arbitration focuses not on the correctness of decision but rather more narrowly considers whether, regardless of errors in application of law or determination of facts, the decision resulted from a legitimate process.

8. In the case of arbitration, the parties through their agreement create an entirely different situation because regardless of how complex or simple a dispute resolution mechanism they create, they almost always

agree that the resultant award will be final and binding upon them. In other words, regardless of whether there are errors of application of law or ascertainment of fact, the parties agree that the award will be regarded as substantively correct. Yet, although the content of the award is thus final, parties may still challenge the legitimacy of the decision-making process leading to the award. In essence, parties are always free to argue that they are not bound by a given "award" because what was labeled an award is the result of an illegitimate process of decision.

9. This is the core of the notion of annulment in arbitration. In a sense, annulment is all that doctrinally survives the parties' agreement to regard the award as final and binding. Given the agreement of the parties, annulment requires a challenge to the legitimacy of the process of decision, rather than the substantive correctness of the award.

11.A perusal of the various grounds enunciated in Section 34 will show that the same are procedural in nature i.e. concerning legitimacy of the process of decision....

17. The Supreme Court in Rashtriya Ispat Nigam Ltd. Vs. Dewan Chand Ram Saran (2012) 5 SCC 306 refused to set aside an arbitral award, under the 1996 Act on the ground that the view taken by the Arbitral Tribunal was against the terms of the contract and held that it could not be said that the Arbitral Tribunal had travelled outside its jurisdiction and the Court could not substitute its view in place of the interpretation accepted by the Arbitral Tribunal. It was reiterated that the Arbitral Tribunal is legitimately entitled to take the view which it holds to be correct one after considering the material before it and after interpreting the provisions of the Agreement and if the

Arbitral Tribunal does so, its decision has to be accepted as final and binding. Reliance in this regard was placed on Sumitomo Heavy Industries Ltd. Vs. ONGC Ltd. (2010) 11 SCC 296: 2010(5) R.A.J. 80 and on Kwaliti MFG. Corporation Vs. Central Warehousing Corporation (2009) 5 SCC 142: 2009(2) R.A.J. 224. Similarly, in P.R. Shah, Shares & Stock Broker (P) Ltd. V. B.H.H. Securities (P) Ltd. (2012) 1 SCC 594: 2011(6) R.A.K. 27 it was held that a Court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating evidence and an award can be challenged only under the grounds mentioned in Section 34(2) and in the absence of any such ground it is not possible to reexamine the facts to find out whether a different decision can be arrived at. A Division Bench of this Court also recently in National Highways Authority of India Vs. M/s. Lanco Infratech Ltd. MANU/DE/0609/2014: 2014(4) R.A.J.115 held that an interpretation placed on the contract is a matter within the jurisdiction of the Arbitral Tribunal and even if an error exists, this is an error of fact within jurisdiction, which cannot be reappreciated by the Court under Section 34 of the Act. The Supreme Court in Steel Authority of India Ltd. Vs. Gupta Brother Steel Tubes Ltd. (2009) 10 SCC 63: 2009(4) R.A.J. 172 even while dealing with a challenge to an arbitral award under the 1940 Act reiterated that an error by the Arbitrator relatable to interpretation of contract is an error within his jurisdiction and is not an error on the face of the award and is not amenable to correction by the Courts. It was further held that the legal position is no more res integra that the Arbitrator having been made the final Arbiter of resolution of dispute between the parties, the award is not open to challenge on the ground that Arbitrator has reached at a wrong conclusion."

9. We may further add that the parties, by agreeing to be bound by the arbitral award and by declaring it to be final,

agree to be bound also by a wrong interpretation or an erroneous application of law by the Arbitral Tribunal and once the parties have so agreed, they cannot apply for setting aside of the arbitral award on the said ground. Even under the 1940 Act where the scope of interference with the award was much more, the Apex Court in Tarapore and Co. Vs. Cochin Shipyard Ltd., Cochin (1984) 2 SCC 680 and U.P. Hotels Vs. U.P. State Electricity Board, (1989) 1 SCC 359 held that the arbitrator's decision on a question of law is also binding even if erroneous. Similarly, in N. Chellappan Vs. Secretary, Kerala State Electricity Board (1975) 1 SCC 289 it was held that even if the umpire committed an error of law in granting amount, it cannot be said to be a ground for challenging the validity of the award; the mistake may be a mistake of fact or of law.”

10. What emerges from the aforesaid discussion is that each of the objections raised by the appellant were duly considered in the impugned order and rejected and the Award was modified wherever it was found to be against public policy or otherwise perverse. Apropos the award of specific performance i.e. registration of sale deed, the impugned order found nothing legally irregular or against public policy of India. Denial of the appellant's claim would per se not render the award perverse. There is reasoning in allowing the respondent's claim. The view taken by the arbitrator is a plausible and valid view. The Court would not interfere with the conclusion. Similarly, the impugned order setting aside of the financial liability of Rs. 15,75,000/- imposed on the appellant in the award cannot be faulted.

11. Considering the limited ground of challenge under Section 37 of the Act, the arguments raised in this appeal are neither substantiated nor are the grounds of challenge made out. The appeal is without merit. There is no reason to interfere with the arbitral Award. Accordingly, the appeal is dismissed with costs of Rs.25,000/- to be deposited with the Delhi High

Court Mediation and Conciliation Centre within six weeks of the receipt of this order.

NAJMI WAZIRI, J.

JANUARY 16, 2018

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