IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 849 OF 2014

M/s.Sunil Mantri Realty Ltd. & Anr. ...Petitioners
vs
Shri Balaji Constructions ...Respondent

Mr.Uday Warunjikar I/b. Satish Raut for Petitioners.
Mr.Rakesh L. Singh with Laxmi Bussa I/b. M.V. Kini & Co. for Respondent.

CORAM : S.C.GUPTE, J.

DATE : 15 MARCH 2019

P.C. :

This arbitration petition challenges an award passed by a sole arbitrator in a reference arising out of a construction contract.

2 By a work order dated 9 April 2008, the Petitioners engaged the Respondent for tiling work at their housing project. By a subsequent order in the nature of an amendment to this work order (amendment dated 29 July 2008), plastering work of the project was also entrusted to the Respondent. The disputes between the parties arose as a result of non-payment of the Respondent's bill. The Respondent filed a company petition for winding up of the first Petitioner company. At the hearing of the petition, the disputes arising out of the work orders for carrying out plastering/tiling work were referred to the sole arbitration of the learned arbitrator herein. The arbitrator considered the Respondent's claims as also Petitioners' counter claims. By his impugned award dated 24 February 2014, the learned arbitrator awarded a sum of Rs.40,95,217/- with interest to the Respondent together with a further sum of Rs.1 lakh per month from

1 October 2008 till payment or realization also with interest and Rs.3 lakhs towards costs of arbitration. The arbitrator rejected the Petitioners' counter claim. This award has been challenged by the Petitioners on various grounds. During the pendency of this petition, the first Petitioner company was ordered to be wound up and a liquidator was appointed. After seeking an appropriate leave of the winding up court, the present petition is being prosecuted by the Official Liquidator.

3 The Respondent's claim for balance amount of their bill was based on measurement sheets. The arbitrator accepted the evidence of the measurement sheets holding that the sheets appeared to be natural and written during the course of the execution of the work. Though measurements contained in it were not joint, the arbitrator noticed that none of the Petitioners' personnel at site was examined to falsify the measurement sheets, the originals of which were in the custody of the Petitioners. The arbitrator noticed that practically there was no challenge to the testimony of the Respondent's proprietor and its witness on these measurements. The arbitrator also noticed that the total claim in a tabular form was sent along with the Respondent's letter dated 25 July 2009 to the Petitioners, requesting the latter to confirm the same but the Petitioners never cared to reply to this letter or confirm the balance. In other words, the Petitioners neither confirmed nor disputed the claim. The arbitrator noticed that the letter along with the statement of accounts showing the net balance payable to the Respondent was duly received in the office of the Petitioners. The arbitrator also noticed that details/contents of the same were independently supported or corroborated by five RA Bills sent by the Respondent to the Petitioners and which were admitted by the Petitioners. The arbitrator also considered in this behalf various balance

confirmation letters issued by the Petitioners themselves to the Respondent. After taking into account payment made by the Petitioners to the Respondent towards the contract work and referring to the testimony of the Petitioners' witnesses, the arbitrator accepted the Respondent's case on the outstanding amount of its bill. The arbitrator noticed that though the Petitioners had gone to the extent of even denying the legitimate claim of the contractor for work done, their own witness, Abhay Parab, Senior Manager, Accounts, who had honestly accepted the receipt of the letter along the statement of account disclosing the entire outstandings, could not depose anything about the contents of the letter. He feigned ignorance about whether even a reply was sent to the Respondent contractor by the Petitioners. So far as the balance payable to the Respondent was concerned, the witness gave evasive answers. His answers mostly were "I am not aware" or "I do not know". The arbitrator noticed that the other key witness of the Petitioners, one Aarti Sharma, simply denied each and every fact stated by the Respondent's witnesses but she had no personal knowledge and was not concerned with the field work. The arbitrator was of the view that she could not vouch for the tiling or plaster work done by the Respondent contractor. The arbitrator noticed that none of the personnel, who were directly concerned with the project, and were associated with the project site, was examined by the Petitioners either on quality of work or on the measurements. The arbitrator also noticed various pre-varifications in the Petitioners' case. At the end of a long discussion of these matters, the arbitrator rendered his findings and held that the Respondent contractor had proved its claim and was entitled to receive Rs.40,95,217.75

4 No infirmity can be found with respect to the assessment of

evidence by the arbitrator or the findings rendered by him after such assessment. These are all possible views on a fair and reasonable assessment of the evidence and construction of contract between the parties. The arbitrator's views are supported by evidence. They cannot be described as views, which are either based on no evidence or views which no fair or judiciously minded person could be expected to take or views that would shock the conscience of the court. Accordingly, there is no merit in the challenge to this aspect of the award under Section 34 of the Arbitration and Conciliation Act, 1996.

5 The arbitrator's conclusion, however, that the claimant, being a small time mason doing masonry work on contract and who, according to him, would have earned a sum of Rs.2 lakhs per month on an average and who was deprived wrongfully of this amount which he could have used for other work, deserved a solatium of Rs.1 lakh per month from the date the amount was due and till payment was made to him, cannot be supported by any evidence. This part of the award is based on nothing but *ipsi dixi* of the learned arbitrator. Solatium, such as this, has no place in law on the ground that legitimate dues were denied to a party. Non-payment of dues when due invite the relief of award of interest. The Respondent has already been awarded interest. There was no occasion for any further solatium to be awarded. This part of the award accordingly cannot be sustained. It has no basis either in law or in evidence.

6 Insofar as interest on the dues of the Respondent is concerned, there is practically no discussion why 18% interest has been awarded on the entire claim. The contract does not appear to support any particular rate of interest as pre-award interest. There is no notice under the Interest

Act placed before the arbitrator or the court to support any particular rate of interest. No doubt, Sub-section (7) of Section 31 of the Arbitration and Conciliation Act, 1996, as it stood then, gives power to the arbitral tribunal to include in any sum for which the award is made such interest as the arbitral tribunal deems reasonable. This, however, calls for some discussion and statement of reasons in the award. The award is wholly silent on this aspect. Considering the current rate of interest, this court is of the view that it would be reasonable to read down the award and provide for interest at the rate of 12% per annum. The award of interest on the principal amount of Rs.40,95,217/- deserves to be modified accordingly.

7 Accordingly, the arbitration petition is partly allowed by setting aside the award of compensation at the rate of Rs.1 lakh per month from 1 October 2008 with or without interest till payment or realization of the awarded principal sum, as provided in clause (b) of para 43 of the award, and restricting the interest provided in clause (a) of para 43 at the rate of 12% per annum. The rest of the award is sustained.

(S.C. GUPTE, J.)