

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

ARBITRATION PETITION NO.558 OF 2015

Vaishali Niketan Co-Op. Hsg. Society Ltd.	Petitioner
vs	
M/s. Buildtech India	...Respondent

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Mr. Mayur Khandeparkar, i/b. Mr. Nitin S. Parkhe, for the Petitioner.

Mr. Mihir Govilkar, i/b. Govilkar & Associates LLP, for the Respondent.

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CORAM : S.C. GUPTE, J.

DATED: 13 MARCH 2019

P.C.:

. This arbitration petition challenges an award passed by an arbitral tribunal of three arbitrators. The arbitration reference was in the matter of disputes between the parties arising out of a civil engineering contract. The Petitioner, through its consultant and structural engineer, had floated a tender for structural repairs/restoration work, plumbing and painting work in respect of the Petitioner's building known as 'Vaishali Niketan'. In response to the Respondent's tender, a letter of intent was issued by the Petitioner to the Respondent. The parties entered into a formal agreement on 24 November 2009. It is not in dispute that the work was completed by the Respondent-contractor. The disputes between the parties *inter alia* concern non-payment of the Respondent's final bill. The Respondent's final bill was duly certified by the consultant engineer. Since the bill was not paid, the Respondent invoked the arbitration agreement between the parties and applied to the consultant for entering upon arbitration. Since the consultant

tendered his resignation and refused to act as an arbitrator, the matter was carried by the Respondent before this Court in an application under Section 11 of the Arbitration and Conciliation Act, 1996 ('Act'). At the hearing of the application, this Court referred the parties to an arbitral tribunal of two arbitrators, one nominated by the Appellant and the other by the Respondent, and directed the two arbitrators to constitute a tribunal in accordance with law. The two named arbitrators, accordingly, appointed the third arbitrator and that is how the tribunal was constituted and it adjudicated the disputes between the parties.

2. The award of the arbitral tribunal is challenged by the Petitioner on two grounds. Firstly, it is submitted that the disputes concerning non-payment of the final bill was not an arbitrable dispute. Secondly, it is submitted that on the merits of the claim, the impugned award is practically devoid of any reasons and must, accordingly, be set aside, since it involves a patent illegality appearing on the face of the award. There is no merit in either of these two contentions, as is noticed below.

3. On the jurisdiction of the arbitrators, learned Counsel for the Petitioner invites my attention to clause 34 of the agreement between the parties. The clause contemplates that any decision, opinion, direction and/or certificate of the consultant, as regards the quality and quantity of the work, shall be final with agreement of the society's repairing committee and conclusive and binding on the parties. All disputes regarding termination of contract by either parties, abandonment of the work by the contractor and/or any question relating

to damage shall be referred to the consultant, who shall act as an arbitrator and state his decision. In case the consultant fails to give his decision, or the society or contractor is dissatisfied with his decision, the clause provides for reference of the matter to arbitration in accordance with the provisions of the Act. Admittedly, the dispute concerning non-payment of its final bill, despite its certification by the consultant, was sought to be referred by the Respondent to the consultant for his arbitration. It is also not in dispute that the consultant resigned and refused to act as an arbitrator. Since the consultant failed to give any decision, the arbitration clause was rightly invoked by the Respondent-contractor. The submission of learned Counsel for the Petitioner is that such a dispute did not involve any question relating to damages. Learned Counsel submits that the dispute, if at all, pertained to non-payment for the contract work, or, in other words, non-payment of consideration fixed under the contract. Learned Counsel submits that this dispute cannot be termed as a dispute relating to damages within the meaning of clause 34. Non-payment of final bill in accordance with the contract between the parties is nothing but breach of contract on the part of the employer. If such breach entailed an injury to the contractor, he was certainly entitled to payment of damages under Section 73 of the Contract Act. It is difficult to see how this claim cannot be subsumed, within the expression "any question relating to damage" within the meaning of clause 34. The arbitrators have correctly held in the impugned award (as part of their decision under Section 16 of the Act) that the contract providing for arbitration, if looked in the right perspective, included a money claim under the contract. There is, accordingly, no valid objection to the arbitrators' jurisdiction.

4. Coming now to the merits of the impugned award, the award cannot be said to be devoid of reasons in any sense. In the award, the arbitrators have considered Claim No.1 of the Respondent, which was for non-payment of certified amount of final bill. The arbitrators noted that the consultant, vide his final certificate dated 14 May 2011 certifying a total sum of Rs.14,29,113.64 (inclusive of retention amount), had declared having checked the measurements of 13th final bill. This exercise, which was called for at the stage of the final bill, had gone unchallenged. The arbitrators noted that the final bill was an elaborate document of about 103 items; these had been checked and certified by the consultant Nanak Shah; and, at no time, the society had disputed the certification by their own consultant. The arbitrators, accordingly, upheld the claim, subject to the counter-claim adjudicated by them. The arbitrators, having adjudicated and allowed the Petitioner's counter-claim in the sum of Rs.2,67,380/-, awarded the net sum of Rs.11,61,733/- to the Respondent-contractor. These reasons indicated by the arbitral tribunal satisfy the mandate of having to give reasons in accordance with sub-section (3) of Section 31 of the Act and no infirmity can be found in the impugned award on this score within the framework of Section 34 of the Act.

5. Accordingly, there is no merit in the challenge to the impugned award. The arbitration petition is dismissed. There shall be no order as to costs.

(S.C. GUPTE, J.)