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

ARBITRATION PETITION NO.148 OF 2018.

Shree Mangirish CHS Ltd.	...	Petitioner
V/s.		
V. A. Shetty and shetty	...	Respondents

- Mrs. Indrayani M. Koparkar, for the Petitioner.
- Mr. Akshay Petkar, for respondent

CORAM : G. S. KULKARNI, J.

DATE : 22nd APRIL, 2019.

P.C. :

1] Heard learned counsel for the petitioner and learned counsel for the respondent.

2] This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, "ACA"), whereby the petitioner/ respondent before the arbitral tribunal, challenges the award dated 1st July 2017, passed by the learned sole arbitrator. By the impugned award, the claims as made by the respondent-claimant are allowed by the arbitral tribunal in the following terms:-

"A. Claim of the Claimant allowed as detailed hereinbelow:-

I. **Claim No.1:** The respondent society shall pay to the claimant and the claimant shall recover from the respondent society, Rs.8,19,267.68 with interest thereon @ 12% p.a. from the date of final bill that is 24.9.2004, till the date of this Award.

II. **Claim No.2** - The respondent society shall pay to the claimant and the claimant shall recover from the respondent society Rs.2,85,619.12 (Retention Money) with interest thereon @ 12% p.a. from the date of final bill that is 24.9.2004, till the date of this Award.

III. **Claim No.3** - The respondent society shall pay to the claimant and the claimant shall recover from the respondent society Rs.8,20,068.54 (for extra work) with interest thereon @ 12% p.a. from the date of bill that is 24.9.2004, till the date of this Award.

IV. **Claim No.4-** Disallowed in toto.

V. **Claim No.5** - The respondent society shall pay to the claimant and the claimant shall recover from the respondent society Rs.5,24,150/- with interest thereon @ 12% p.a. from the date of bill that is 03.03.2004, till the date of this award.

B. The claimant shall be entitled to the future interest @ 8% per annum of the total awarded sum (that is Principal sum plus interest till the date of Award) till realization in full and final)

C. The claimant shall be entitled to recover cost from the respondent Society and the respondent society shall pay the same quantified in the sum of Rs.25,00,000/- and shall bear their own cost. Order accordingly".

(emphasis supplied)

3] The challenge of the petitioner as argued by the learned counsel for the petitioner is in regard to award of claim No.3 and claim No.5.

4] Facts:-

The petitioner, which is a Co-operative Housing Society had invited tenders to undertake civil work of the premises of the petitioner society.

Respondent was selected to be appointed as a Civil Contractor. Consequently an agreement dated 12th April, 2002 was entered between the petitioner and respondent setting out the terms and conditions for executing the contractual works. Disputes and differences arose between the parties. Respondent had approached this Court by filing petition under Section 11 of the ACA, praying for appointment of an arbitral tribunal to adjudicate the disputes and differences between the parties. By an order dated 3.3.2006, passed by the learned Single Judge, in Arbitration Application No.174 of 2005, these disputes were referred for adjudication by an arbitral tribunal.

5] The respondent/claimant filed it's statement of claim. The petitioner also filed statement of defence. The arbitral tribunal granted complete opportunity to the parties to place on record their respective evidence as also a expert/commissioner was appointed to ascertain the work undertaken by the respondent under the various invoices as raised by the respondent. Taking into consideration the evidence on record and the terms and conditions of the contract as also the correspondence exchanged between the parties in regard to the work as executed by the respondent/claimant, the arbitral tribunal pronounced the impugned award.

6] Learned counsel for the petitioner while assailing the impugned

award has limited submissions. At the outset it is contended that the grievance of the petitioner to the impugned award is to the extent claim No.3 has been partly allowed for an amount of Rs.8,20,068.54 from a total claim of Rs.17,95,068.54 as made by the respondent. The submission of the learned counsel for the petitioner is that this amount as awarded for the extra work is falling outside the terms and conditions of the said contract as executed between the parties, inasmuch as the learned arbitrator ought to have treated the contract as a lump-sum contract. It is also her contention that the award of these amounts would amount to making this payment twice in respect of the items for which respondent was already paid by the petitioner. Learned counsel for the petitioner contends that the arbitral tribunal has also misinterpreted the terms under the contract in awarding the said amount.

7] The second grievance as made by the learned counsel for the petitioner is in regard to award of Rs.5,24,150/-, in terms of claim No.5, which was also for the works of extra amenities, provided by the respondent claimant in the individual flats of the members of the society. The case of the petitioner is that the said work was beyond the scope of the contractual work and no claim in this regard could have been made by the respondent against the society. It is submitted that the finding as recorded by the

arbitral tribunal while allowing this claim is required to be considered as perverse and contrary to the contractual terms and conditions. It is, thus, submitted that on both these grounds the award is required to be quashed and set aside. There is no other argument as advanced on behalf of learned counsel for the petitioner on any other issues.

8] On the other hand, learned counsel for respondent would submit that the arbitral tribunal has taken into consideration the terms and conditions of the contract, the evidence on record which included the correspondence ensued between the parties, in regard to the scope of the work and which was at the insistence of the society, that the said extra work be carried out by the respondent/claimant for which payment was due and being not paid. It is, thus, submitted that it would not be correct for the petitioner to contend that an amount of Rs.8,20,068.54 as awarded by the arbitral tribunal is awarded beyond the terms and conditions of the contract. Learned counsel for the respondent also drew the attention of the Court to the finding recorded by the learned arbitrator to claim No.3 and claim No.5 which is in respect of works undertaken by the respondent in the individual flats of the members. It is submitted that the evidence in the nature of correspondence in that regard was placed by the parties before arbitral tribunal and from this evidence, it was clear that the petitioner society

wanted the works qua some of the flats of the members be undertaken. It is submitted that it is clear from the evidence that the society was to recover the amount which the respondent/claimant expended, from the individual members of the society. It is submitted that the findings recorded by the learned arbitral tribunal in no manner can be said to be perverse requiring any interference on any ground under Section 34 of the ACA.

9] Having heard the learned counsel for both the parties and having perused the record as also the impugned award, I am not persuaded to accept the submissions as made on behalf of the petitioner, on both the above counts. As rightly argued on behalf of the respondent, the arbitral tribunal has taken into consideration the contractual terms and conditions and as also the evidence as placed on record in awarding claim No.3 and claim No.5, to record findings of fact, as clearly seen from the well reasoned award.

10] The arbitral tribunal while interpreting the terms and conditions of the contract which include the general conditions of the contract has recorded a finding that the contract was not a lump sum contract. The arbitral tribunal has recorded this finding considering all the terms and conditions for the contract, the correspondence between the parties and has

commented as to what was the real intention between the parties in regard to work in question. The learned sole arbitrator from a cumulative reading of the documents having held that the contract was not a lumpsum contract held that the amounts as claimed by the respondent to the extent awarded were due and payable to the respondent. The findings in that regard can be clearly seen in the discussion as made in the finding recorded on claim No.3. The observations as made by the learned sole arbitrator in this context, are required to be noted, which reads thus :-

"Having said so, the agreement of contract dated 12th April, 2002 (Exhibit C4), in paragraph 3 thereof, specifically, refers and states that after some correspondence between the society and the contractor, some items of the said tender were modified and tender was finally accepted subject to such modifications by the society and the contractor/claimant, while making reference to certain documents as forming part of the said agreement (as if they were incorporated in the said agreement), nowhere it makes a reference to the "technical Specifications and Estimated Quantity of work" (Schedule I). It was rightly so done because the rates were Lump Sum and not Item Rate qua each item.

Thus, the submission advanced by the respondent society that the extra works, for which the separate bill has been raised by the claimant, were part of Annexure I and, therefore, the Society need not pay the same separately needs to be rejected.

Having held that the claimant is entitled to claim for extra work it is not in dispute that extra works are executed by the claimant as indicated in the item Nos. 1 to 9 and 12 shown in the Schedule incorporated in claim No.3 above.

It is not a case of the Respondent society that the aforesaid items of works were not executed by the claimant or that the claimant has overcharged them vis-a-vis those items.

The execution of the aforesaid items are also corroborated by the Commissioner/Expert in his report. The simple defence of the Respondent society throughout was that the extra work was covered in the lumpsum rate and therefore the claimant could not have charged

them separately for the extra works executed by it. This simple defence has already been rejected. Hence the claim in relation to item No.1 to 9 and 12 are liable to be allowed.

Having allowed the claims of the claimants for aforesaid 10 items, two more items as reflected at Sr.Nos. 10 and 11 shown in the Table in respect of claim No.3 need consideration. These items relate to the idle labour and material charges for the period during which there were no construction activities because of "stop work" Notice by BMC.

There is no independent evidence produced by the claimant in support of these claims. The claimant ought to have produced Account Books with all material, facts and particulars as to what was the labour force engaged by it, for how many days that labour force was sitting idle, what steps were taken to mitigate the cost. No such material is to be found on record. Apart from this, the Tribunal is also at a loss to understand the claim of claimant in relation to the material when there were no construction activities. The material, if any, cannot go waste even if there was no work in progress. The very same material must have been used by the claimant when the work was resumed. The construction material cannot go waste for want of construction activities for a limited period. The claimant has merely raised a bill on the society and produced the same in the present proceedings without corroborating any evidence in support thereof. In this view of the matter, the claim on these two items, vide item Nos. 10 and 11, for Rs.3,50,000/- and Rs.6,25,000/- respectively are liable to be rejected. Thus, the total claim in the sum of Rs.9,75,000/- from Claim No.3 is rejected. So far as Claim No.3 is concerned, Claim of the Claimant is allowed only in the sum of Rs.8,20,068.54.

Considering the above findings as recorded by the arbitral tribunal, the submission as urged on behalf of the petitioner that the award on claim No.3 to the extent of Rs.8,20,068.54 is beyond the scope of the contract cannot be accepted.

11] In so far as the petitioner's contention in regard to extra work as carried out in regard to the individual flats of the members, it can be seen as

set out in the award that it was the petitioner who asked the respondent/claimant to undertake such works for the individual members and the petitioner was to recover the amounts qua such works from the individual members. It is only at the insistence of the petitioner, the respondent had undertaken the said work. The findings of fact as recorded by the learned arbitrator on this issue, are based on evidence which includes the agreement between the parties, a resolution of the petitioner in a Special General Body meeting called under notice dated 17.1.2003 which would clearly show that this extra work for the individual members of the petitioner society was undertaken by the respondent, at the insistence of the society and the amounts were to be recovered from its members. It is, thus, a finding of fact that such works were intended to be covered under the works being executed under the contract and therefore, the respondent/claimant had become entitled to receive the said amount of Rs.5,24,150/- under claim No.5 from the society and not from the individual members.

12] Accepting the submission as urged on behalf of the petitioner would be in the realm of re-appreciation of evidence and recording a fresh finding which cannot be the scope of the Court's jurisdiction under Section 34 of the ACA.

13] As a sequel to the above discussion, I find no perversity in the findings as recorded by the arbitral tribunal. The view taken by the arbitral tribunal is a plausible view. There is, thus, no merit in this petition to set aside the award in the limited jurisdiction as available to the Court under Section 34 of the ACA. The petition is accordingly rejected. No cost.

[G. S. KULKARNI, J]