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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **FAO(OS) (COMM) 325/2019**
M/S HURRYSON ENTERPRISES Appellant
Through: Mr. Arjun Bhaskar, Advocate

versus

GOVT OF NCT OF DELHI Respondent
Through: Mr. Ramesh Singh, SC, GNCTD with
Ms. Sanjay Dewan and Mr. Ishan
Agrawal, Advocates

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MS. JUSTICE ASHA MENON

ORDER
% **19.11.2019**

1. This is an appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 (in short 'the Act'), against the judgment dated 18.12.2018, passed by the learned Single Judge, partly setting aside the Award dated 29.05.2008.

2. The brief facts as are relevant for the disposal of the present appeal are that in the year 1990, the respondent/Public Works Department, Government of NCT of Delhi, had floated a tender of construction work valuing a sum of Rs.3,64,83,830/-, for which the appellant/M/s. Hurryson Enterprises had been declared a successful bidder. The work awarded was for "*Proposed Improvement Scheme for Yamuna Bazar Intersection – Construction of a Flyover along with Widening/Improvements to lower level roads including dismantling of Monkey Bridge*". The work was to commence on 08.12.1990 and be completed by 07.12.1992. On account of

the delay in completion of the work, disputes and differences arose between the parties. According to the respondent/PWD, the fault lay with the appellant/contractor and consequently it issued a Show Cause Notice dated 07.09.1992 to the contractor, under Clause-3 of the Agreement, followed by rescission of the work on 29.01.1993. Thereafter, the respondent/PWD invoked the arbitration clause and filed 7 claims before the Arbitral Tribunal. On its part, the appellant/contractor filed 25 counter claims. The learned Arbitrator awarded a sum of Rs.3,37,424/- to the respondent/PWD with interest @10% per annum w.e.f. 12.07.1994, till the date of realization/adjustment against the counter claims. As regards the counter claims filed by the appellant/contractor, the learned Arbitrator awarded a sum of Rs.24,54,298.80 with simple interest @10% per annum w.e.f. 26.12.1995, till the date of payment.

3. This Award was challenged by the respondent/PWD in the Section 34 petition filed by it, limited to two amounts viz. Rs.9,74,676/- awarded in favour of the appellant/contractor in respect of Counter Claim no. 19, on account of work withdrawn and Rs.9,42,525/- in respect of Counter Claims nos. 3, 4, 5, 8, 10, 11, 14, 16, 17, 18 & 23 relating to overhead expenditure for the performance of the contract. The learned Single Judge gave a finding that the learned Arbitrator had ignored the material evidence and had rendered a one sided decision. The court was of the opinion that besides the amounts awarded in respect of Counter claims No.1, 2, 13, 6, 9 & 21, no other amount could have been awarded in favour of the appellant/contractor as claimed by it on account of infrastructure expenses incurred, payment of staff, additional labour, idle staff etc. without any evidence produced in

support thereof. Loss of profit as awarded to the appellant/contractor was also disallowed by the learned Single Judge. The Award was accordingly set aside to the aforesaid extent and the objections filed by the respondent/PWD under Section 34 of the Act were partly allowed by the learned Single Judge. Aggrieved thereby, the present appeal has been filed by the appellant/contractor.

4. Mr. Bhaskar, learned counsel for the appellant/contractor contends that the learned Single Judge has misdirected herself by setting aside the Award. According to him, the contract had been wrongly rescinded by the respondent/PWD, inasmuch as the subsequent contractor, who was awarded the work, had not completed the balance work within 18 months, but had taken 48 months to do so, after rescission of the contract with the appellant/contractor. He submits that if such an accommodation has been shown by the respondent/PWD to the subsequently appointed contractor, it was clear that time was not the essence of the contract and on parity, similar treatment ought to have been meted out to the appellant/contractor for completing the work. Therefore, rescission of the contract by the respondent/PWD was wrong and hasty and the appellant/contractor is entitled to claim loss of profit as well as the overheads, as per the Counter Claims that were allowed by the learned Arbitrator and have been wrongly disallowed by the learned Single Judge.

5. We have heard the arguments advanced by learned counsel for the appellant/contractor and the learned counsel for the respondent/GNCTD, considered the material on record and perused the impugned judgment.

6. At the outset, we may delineate the scope of interference in a Section 37 petition, as discussed by us in a recent judgment in **FAO (OS) (COMM) 296/2019, Ministry of Youth Affairs & Sports vs. Swiss Timing Ltd.**, reported as **2019 SCC Online Del. 10934** the relevant paras whereof are reproduced herein below:-

“19. We are also mindful of the law on interference by the courts in respect of findings of facts based on appreciation of evidence, returned by the Arbitral Tribunal. In Sutlej Construction Limited Vs. Union Territory of Chandigarh reported as (2018) 1 SCC 718 the Supreme Court has held as follows: -

*“11. It has been opined by this Court that when it comes to setting aside of an award under the public policy ground, it would mean that the award should shock the conscience of the Court and would not include what the Court thinks is unjust on the facts of the case seeking to substitute its view for that of the arbitrator to do what it considers to be “justice”. **Associate Builders v. DDA, (2015) 3 SCC 49.***

*12. The approach adopted by the learned Additional District Judge, Chandigarh was, thus, correct in not getting into the act of reappreciating the evidence as the first appellate court from a trial court decree. An arbitrator is a chosen Judge by the parties and it is on limited parameters can the award be interfered with. **(Sudarsan Trading Co. v. State of Kerala [Sudarsan Trading Co. v. State of Kerala, (1989) 2 SCC 38; Harish Chandra & Co. v. State of U.P., (2016) 9 SCC 478 and Swan Gold Mining Ltd. v. Hindustan Copper Ltd., (2015) 5 SCC 739.***

13. The learned Single Judge ought to have restrained himself from getting into the meanderings of evidence appreciation and acting like a second appellate court.

In fact, even in second appeals, only questions of law are to be determined while the first appellate court is the final court on facts. In the present case, the learned Single Judge has, thus, acted in the first appeal against objections dismissed as if it was the first appellate court against a decree passed by the trial court.”

20. In Ssangyong Engineering Construction Co. Ltd. vs. National Highways Authority of India reported as **2019 SCCOnline SC 677**, the Supreme Court has reiterated the aforesaid view in the following words: -

35. What is clear, therefore, is that the expression “public policy of India”, whether contained in Section 34 or in Section 48, would now mean the “fundamental policy of Indian law” as explained in paragraphs 18 and 27 of Associate Builders (supra), i.e., the fundamental policy of Indian law would be relegated to the “Renusagar” understanding of this expression. This would necessarily mean that the Western Geco (supra) expansion has been done away with. In short, Western Geco (supra), as explained in paragraphs 28 and 29 of Associate Builders (supra), would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of Associate Builders (supra).

36. It is important to notice that the ground for interference insofar as it concerns “interest of India” has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or

morality is now to be understood as a conflict with the “most basic notions of morality or justice”. This again would be in line with paragraphs 36 to 39 of Associate Builders (supra), as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

37. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of Associate Builders (supra), or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of Associate Builders (supra). Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco (supra), as understood in Associate Builders (supra), and paragraphs 28 and 29 in particular, is now done away with.

38. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.”

21. Reliance is also placed on a recent judgment dated 18.10.2019 passed by the Supreme Court in SLP No.13117/2019, The State of Jharkhand and Ors. vs. M/s HSS Integrated SDN and

Anr., wherein it has been emphasised that the Award passed by an Arbitral Tribunal can be interfered with in proceedings under Sections 34 and 37 of the A&C Act only in a case where the finding is perverse and/or contrary to the evidence and/or the same is against public policy. In the instant case, none of the above circumstances exist for interference.”

7. Thus a scrutiny conducted under Section 37 of the Act is more in the nature of a judicial review only to consider as to whether the learned Single Judge in exercise of powers under Section 34 of the Act has overlooked any patent error that may have crept in the Award or has taken a glaringly preposterous and legally unsustainable view, which would call for interference.

8. We may now proceed to examine the correctness of the impugned judgment within the parameters prescribed in the judicial dicta cited above. For the sake of convenience, the claims and counter claims of the parties as reproduced in the impugned judgment, are enumerated below: -

“CLAIM NO.1: Rs.2,75,00,000/- on account of extra expenditure being incurred for completion of the balance work at the risk and cost of M/s Hurryson Enterprises – **Nil award.**

CLAIM NO.2: Rs.10,00,000/- on account of compensation levied on M/s. Hurryson Enterprises for non-submission and finalization of design and drawings of all the components of the flyover as per terms of the contract – **Nil award.**

CLAIM NO.3: Rs.50,000/- on account of compensation levied on M/s. Hurryson Enterprises for non-submission of the model of the work as per the contract – **Nil award.**

CLAIM NO.4: Rs.4,11,771/- on account of uncovered amount of interest on mobilization advance of Rs.25.00 lacs

given to M/s Hurryson Enterprises and which had accumulated till the date of encashment of bank guarantees – **Nil award.**

CLAIM NO.5: Rs.6,65,539/- on account of quantity of steel (for reinforcement) not returned by M/s Hurryson Enterprises out of total quantity issued to them. – **Rs.3,30,714/- awarded to the Petitioner**

CLAIM NO.6: Rs.6,896/- on account of shortage in quantity of fabricated M.S. liner returned by M/s. Hurryson Enterprises on which the secured advance was released to the contractor.

(Modified to Rs. 6,710/- in the Statement of Facts) – **Rs.6,710/- awarded to the Petitioner.**

CLAIM NO.7: Interest on the above amounts and on other amounts due from M/s Hurryson Enterprises @ 18% p.a. w.e.f. the date of amount became due till the date of actual payment thereof – pre-suit interest was nil.”

“COUNTER CLAIM NO.1: Rs.1,99,290.80 – Piling done by contractor balance amount – **Rs.1,99,290/- awarded.**

COUNTER CLAIM NO.2: Rs.1,05,196/- on account of MS Line at site, balance payment – **Rs.54,000/- awarded.**

COUNTER CLAIM NO.6: Rs.2,00,000 – On account of depreciated cost of barricading & its maintenance.

AND

COUNTER CLAIM NO.13: Rs.40,833 – On account of 272.2 M of barricade handed over to the department – **Rs.27,222/- awarded.**

COUNTER CLAIM NO.7: Rs.3,21,710 – On account of short payment including escalation in respect of retaining wall – **Nil award**

COUNTER CLAIM NO.9: Rs.15,000 – on account of advance paid for electrometer bearing and 24% interest. – **Rs.10,000/-.**

COUNTER CLAIM NO.12: Rs.15134 – on account of extra concreting in pile caps due to shift, after adjustments for the payments made at the stage of 9th R/A bill. – **Nil award**

COUNTER CLAIMS NO. 3,4,5,8,10,11,14,16,17,18,22 – The total counterclaims on various items listed was to the tune of Rs.40,96,641/- **Rs.9,42,525/- awarded.**

COUNTER CLAIM NO.19 - The claim of expected profits on account of withdrawn work – **Rs.9,74,676/- awarded.**

COUNTER CLAIM NO.20 - Rs. 41,85,900/- on account of escalation under clause 10CC– **Nil award**

COUNTER CLAIM NO.21 - Refund of security deposit - **Rs.1,00,000/- awarded.**

COUNTER CLAIM NO.23 – Declaration granted

COUNTER CLAIM NO.25 AND CLAIM NO.9 – Costs of arbitration proceedings and cost of reference – **Nil**

9. Interest was awarded by the learned Arbitrator in the following manner: -

“CLAIMS NO.7 AND 8 AND COUNTER CLAIM NO.24 –

“Keeping in view overall circumstances of the case, I consider reasonable and award: (a) Simple interest @ 10% per annum on Rs.337424/- to the claimants w.e.f.12.7.94 till date of realization/adjustment against the payment of award of counter claims. (b) I also award simple interest @ 10% per annum on Rs.2454298.80 to the respondents w.e.f. 26.12.95 till the date of payment.”

10. The respondent/PWD had raised objections to a sum of Rs.9,42,525/- awarded in favour of the appellant/contractor in respect of Counter Claims - 3,4,5,8,10,11,14,16,17,18,22 & 19 taken together. The basic objection raised

was that out of the total contracted amount of Rs.3,08,86,850/-, the work done by the appellant/contractor, was only worth Rs.38 lakhs, which was less than 10% of the tendered amount and therefore, the loss of profits and overheads expenditure could not have been awarded on the entire contractual sum. The stand of the appellant/contractor was that the delay was caused by the respondent/PWD due to its own breaches and a reasonable amount of 2.5% of the unexecuted work was taken towards loss of profit and since the breach was held to be on account of the respondent/PWD, the appellant/contractor was automatically entitled to compensation/loss of profit.

11. The learned Single Judge has rejected the above arguments advanced by the learned counsel for the appellant/contractor on the following grounds:-

- a) The learned Arbitrator has relied only on letters written by the appellant/contractor to conclude that the respondent/PWD was responsible for the delay and hence could not have rescinded the work, whereas the record reveals that there were several other important documents including clauses of the contract that had been completely ignored by the learned Arbitrator.
- b) The Notice Inviting Tender was very clear as to the location of the work and the contractor had been given a period of 18 months to execute the contract.
- c) The appellant/contractor's letter dated 06.04.1990, proclaiming that it had enormous experience in building bridges, read with Clause 4.4 of the Tender Documents went to show that it was well aware of the location where the work was to be executed and prevalent condition.
- d) The appellant/contractor had belatedly submitted drawings for

approval.

- e) The appellant/contractor had not submitted for approval, the final diversion plan for traffic till 31.07.1991.
- f) The respondent/PWD had written several letters to the appellant/contractor pointing out the lack of progress in the work and the extra-ordinary delay in completion of the work despite the site being made available from the very beginning, with repeated requests for acceleration and resumption of work immediately. These letters were ignored by the learned Arbitrator while letters written by the appellant/contractor were considered at great length.
- g) Under Clause 10.5, time was the essence of the contract and even after a period of 25 months, the appellant/contractor had carried out work worth only Rs.38 lakhs.
- h) As the contract was finally rescinded by the respondent/PWD on 29.01.1993, more than two years after it was awarded to the appellant/contractor whereas the total period fixed for completion of the work was only 18 months, it cannot be said that the respondent/PWD had acted in haste.”

12. On the basis of the above, the learned Single Judge concluded that the learned Arbitrator was not justified in holding that the appellant/contractor was not responsible for the delay or that time was not the essence of the contract or that on a wrongful rescission of the contract, the appellant/contractor was entitled to various claims, particularly claims towards compensation/loss of profit.

13. With regard to the award of sums in respect of the Counter Claims 3, 4, 5, 8, 10, 11, 14, 16, 17, 18, 22 which were clubbed together for a total sum of Rs.40,96,641/-, a sum of Rs.9,42,525/- was awarded by the learned Arbitrator although the appellant/contractor did not prove that it had incurred

an expenditure of Rs.40,96,641/- towards the overheads for the work by producing documentary evidence. The learned Single Judge found the reasoning of the learned Arbitrator as inherently faulty, in arriving at a conclusion that the appellant/contractor was entitled for Rs.9,42,525/-. It has been held that while on the one hand, the learned Arbitrator noted that the appellant/contractor had not established the expenditure incurred, on the other hand, he went ahead and applied a whimsical formula to award the said sum in its favour. To quote from the impugned judgment :

“The entire award has been made without any documentary evidence having been filed by the contractor. The observation that since the contract was rescinded and the Contractor is entitled to loss of profits, the overheads are liable to be granted – does not appear logical. In effect the arbitrator seems to suggest that the rescission being unlawful, the Contractor should be given the loss of profits claim as also on a fictional basis the overheads which he would have otherwise incurred if the contract had been continued. Thus, apart from loss of profits the Ld. Arbitrator holds that the contractor is entitled to overheads on an estimated basis, without actually incurring the said expenditure. The Arbitrator has taken whimsical amounts towards overheads and profits, divided them equally, and out of 5% overhead expenditure has awarded 3.5%. The deployment of infrastructure, additional labour, idle staff and payment to dealers are all expenses which ought to have been proved with proper documentary evidence. The manner in which the Arbitrator has awarded the entire sum, without any documentary evidence having been filed, is rather surprising. The Arbitrator has arrived at this amount without a tenable basis. The Arbitrator has taken profits and expenditure to be equal and simply awarded the said amount by deducting claims already awarded in counter claims no.2, 6, 13 and 9. While the award in respect of counter claims no.2, 6, 13 and 9 is not being interfered with, the award of this amount on account of infrastructure expenses incurred, payments to staff, additional

labour, idle staff, could not have been awarded without any evidence. The award is accordingly set aside.”

We do not find any error in the aforesaid reasoning given in the impugned judgment.

14. As regards loss of profit, the learned Single Judge had held that it could not be speculative in nature. While holding that loss of profit can be awarded by the learned Arbitrator against the party in breach, the court observed that for award of loss of profit, injury has to be established and in the light of the fact that in the present case, the appellant/contractor had executed less than 10% of the contract value and that too in a period of 25 months, award of loss of profit was wholly unjustified, more so in the absence of any evidence being led in this regard. On this aspect, a Co-ordinate Bench of this court in Ahluwalia Contract (India) Limited Vs. UOI, FAO (OS) (COMM) 143/2017, decided on 17.10.2017, had observed as follows:

“10. That in arbitration proceedings, just as in civil cases, an injured party can claim damages, does not necessarily translate into an award for damages towards loss of profits unless some diligence is exercised by the party (in the present case, Ahluwalia claiming it). In other words, a claim for damages (general or special) in the proceedings, cannot as a matter of course, result in an award, without proof of having suffered injury”.

15. The abovesaid view is only a reiteration of the view expressed by the Supreme Court in Associate Builders v. DDA, (2015) 3 SCC 49.

16. The conclusions of the learned Single Judge as above, cannot be faulted. Merely because, the subsequent contractor who completed the work took 48 months to do so, cannot be a ground to hold that the

respondent/PWD had rescinded the contract in haste, thereby justifying the award of loss of profit and overheads in favour of the appellant/contractor as done by the learned Arbitrator.

17. The appellant/contractor had entered into the contract after familiarising itself as to the location of the site, the requirement of the work to be executed including the necessity of traffic diversion, as well as the layout of the land. If after inspection, the appellant/contractor had found some difficulties, these should have been sorted out before embarking on the work. The letters addressed by the respondent/PWD to the appellant/contractor, bring out that the work was not moving at all, leave aside at a snail's pace. The respondent/PWD had been requesting the appellant/contractor to send labour force and to start work at the site immediately. In the above circumstances, rescission of the contract by the respondent/PWD cannot be faulted. Furthermore, in the absence of any breach on the part of the respondent/PWD, there was no question of granting any amount to the appellant/contractor on account of loss of profit and overheads. We are in agreement with the learned Single Judge that award of loss of profit and overheads by the learned Arbitrator was whimsical and had no foundation.

18. Finally, the observations made in para-33 of the impugned judgment that the learned Arbitrator had simply lifted the submissions made by the appellant/contractor in parts of the award are found to be justified, and are not only disturbing, they are sufficient to shock the conscience of the court. For this reason too, the impugned judgment does not warrant any interference.

19. In the light of the forgoing discussion, the present appeal is dismissed in *limine*, with no orders as to costs.

HIMA KOHLI, J

ASHA MENON, J

NOVEMBER 19, 2019
MK/pkb