

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

% *Date of decision: 16th January, 2019*

+ FAO(OS) 07/2019 & CM. No. 1695/2019 and 1696/2019

M/S MATRIX INFOSOFT PVT LTD Appellant

Through: Mr. Pramod B. Agarwala, Adv. with
Mr. Anuj P. Agarwala, Adv.

versus

M/S PLANMAN TECHNOLOGIES (INDIA) PVT
LTD Respondent

Through:

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

CM. No. 1695/2019

Exemption allowed subject to all just exceptions.

Application stands disposed of.

FAO(OS) 07/2019

1. This appeal has been filed under Section 37 of the Arbitration & Conciliation Act, 1996 (for short 'Act') challenging the order dated November 28, 2018 of the learned Single Judge dismissing the petition under Section 34 of the Act challenging the Award dated October 08, 2015.

2. The brief facts are, the appellant, who, is the owner of the premises described as: Plot Nos. A-4 and A-29, Sector – 9, Noida, admeasuring 1600 square meters, which includes a building constructed thereupon, admeasuring 38,000 sq.ft., had entered into a Memorandum of Understanding ('MoU' for short) dated June 20, 2007 with the respondent. As per the terms of the MoU, respondent was required to pay a sum of ₹28 lakhs per month in respect of the subject property. Furthermore, the respondent was also required to deposit a sum of ₹1.40 Crores towards security. The tenure of the MoU was five years with a leeway of extending it by another four years. The MoU, however, provided for a lock-in period of sixty months. A default clause was also provided in the MoU, which stipulated that in case the petitioner failed to discharge its obligations before the deadline, it would refund not only the initial consideration of ₹28 lakhs, but would also have to pay an equivalent sum by way of penalty. Thus, two obligations were cast upon the appellant; (i) the appellant shall hand over the building, complete in all respects along with the requisite permissions, such as Completion Certificate, by July 15, 2007; and (ii) the burden to execute a lease deed. The appellant failed to meet the deadline, and

accordingly, vide communication dated August 13, 2007 sought extension of time till September 15, 2007. The appellant could not meet the extended deadline and therefore, wrote to the respondent on September 15, 2007 proposing two options (i) that the MoU could be kept alive and the subject property could be handed over to the respondent by the appellant as and when it obtained the Completion Certificate and all permissions in terms of the MoU; (ii) that the MoU could be called off; in other words, terminated. In order to show its bona fide with respect to the second option, the appellant enclosed a cheque in the sum of ₹28 lakhs in favour of the respondent. The purpose being that if the first option of keeping the MOU alive was not acceptable, the MoU could be brought to an end and the cheque could be encashed. It is noted that the respondent chose the first option given by the appellant. This was conveyed by the respondent vide communication dated September 17, 2007 and accordingly, the cheque for ₹28 lakhs was returned to the appellant.

3. It also appears that the appellant could not able to obtain necessary permissions, especially the completion certificate. Accordingly, the respondent vide an e-mail dated October 30, 2007, informed the appellant that its management had taken a decision not

to continue with the MoU. The respondent also sought refund of ₹28 lakhs given to the appellant at the time of execution of the MoU. It is also noted from the record that an e-mail dated November 23, 2007 was addressed by one Mr. Sushil Jain on behalf of the appellant to Mr. Sudhir Gupta, employed with the respondent. The e-mail was sent at 2.52 p.m. and the appellant obtained a revert to the same at 2.59 p.m. from Mr. Sudhir Gupta, carrying the following pithy message, *"Thanks for your mail. We are still with you"*. Subsequently, correspondences were exchanged between the parties.

4. It is the case of the appellant that for the first time, on March 07, 2008, the respondent conveyed to appellant that it wished to discontinue the deal for the reason that it had found an alternate premise. The respondent appears to have communicated that this step was taken as there was delay in closing the transaction in issue. Accordingly, the respondent through a notice sought refund of ₹28 lakhs given at the time of execution of the MoU. The appellant gave a notice dated March 31, 2008. Vide this notice, the appellant demanded under various heads a sum of ₹9,23,70,854/- from the respondent. The matter was referred to arbitration in a petition

under Section 11 of the Act before this Court. The learned Arbitrator rendered the impugned Award.

5. Five submissions were made by the learned counsel for the appellant before the learned Single Judge, which are reproduced as under:-

“(i) Firstly, the finding returned by the learned Arbitral Tribunal that the termination of the MOU was valid was erroneous for the reason that the time was not of the essence when the parties had first executed the same. Furthermore, even if, it is assumed that it was of the essence to begin with, it ceased to be so, as was evident upon perusal of communications dated 15.9.2007 and 17.9.2007.

(i)(a) The communication dated 15.9.2007 gave two options to the respondent: firstly, to continue with the MOU and secondly, to bring the MOU to an end and to encash the cheque in the sum of Rs.28 lakhs, which represented the money that the respondent had paid at the time of the execution of the MOU. The respondent chose to continue with the MOU and thereby, agreed to the condition put forth by the petitioner, which is that, the possession of the subject property would be given by the petitioner as and when it received the relevant permissions. The petitioner, in lieu thereof, had agreed not to engage with other prospective tenants. The aforesaid circumstances, as also, the step taken by the respondent of returning the cheque in the sum of Rs.28 lakhs demonstrated that time was not of the essence of contract. In this behalf, reliance was placed on the judgment of the Supreme Court in Hind Construction Contractors vs. State of Maharashtra, (1979) 2 SCC 70 as well as Associate Builders vs. Delhi Development Authority, (2015) 3 SCC 49.

(ii) Secondly, though the respondent vide its communication dated 30.10.2007, had communicated its intention to terminate the MOU, its later communication dated 23.11.2007, conveyed to the petitioner that the respondent was desirous of continuing with the MOU. Based on this representation of the respondent, the petitioner continued with its efforts to obtain a Completion Certificate and necessary permissions for leasing out the subject property. In support of this contention, reliance was placed on the communications dated: 11.12.2007, 22.2.2008, 27.2.2008, 3.3.2008, 4.3.2008, 5.3.2008 and 6.3.2008.

(iii) Thirdly, the stand taken by the respondent that the petitioner's communication dated 23.11.2007 was with a person who was not authorized to make a commitment on behalf of the respondent was not correct as was demonstrable from the testimony of, one, Mr. Naveen Chamoli, that is, the sole witness of the respondent. The argument advanced on behalf of the respondent that the communication, purportedly, had by the petitioner with the representative of the respondent could not be relied upon, as those communications were in fact exchanged with an unauthorized person – was a flawed submission, for the reason that though those persons were in the employment of the respondent, they were not produced for cross examination by the respondent. In other words, the respondent had held back the best evidence warranting an adverse inference being drawn against the respondent by the Arbitral Tribunal.

(iv) Fourthly, the respondent erroneously relied upon the sole testimony of Mr. Naveen Chamoli (C.W. 1) in support of its case, who, admittedly had no personal knowledge of the subject transaction. The evidence was, therefore, wholly inadmissible on account of the same being in the nature of hearsay evidence. The Arbitral Tribunal had failed to notice this aspect of the

matter as also the case law cited in support of this submission.

(v) Fifthly, the Arbitral Tribunal had failed to deal with the contentions raised by the petitioner. The award is, therefore, unreasoned and, hence, falls foul of Section 39 (3) of the 1996 Act. The Arbitral Tribunal had failed to adopt a judicial approach and thereby had committed a serious irregularity in dealing with substantial issues. The award deserved to be set aside for this reason alone. In this behalf, the provisions of Section 68 of the United Kingdom Arbitration Act were relied upon; in particular, emphasis was laid down on the fact that as per the United Kingdom Arbitration Act, an award can be set aside on the ground of failure of the Arbitral Tribunal to deal with all issues put before it. This, according to the learned counsel, ought to be treated as a serious irregularity. The learned counsel urged the Court to adopt the same test and if found to be applicable in the facts of the instant case, to set aside the award on this singular ground.”

6. The Court while rejecting all the submissions, gave the following reasonings:-

“21. I have heard the learned counsel for the parties and perused the record. What emerges therefrom and over which there is, largely, no dispute is as follows:

(i) Firstly, the parties had entered into an MOU on 20.6.2007. At the time of entering into the MOU, the respondent paid a sum of Rs.28 lakhs to the petitioner.

(ii) Secondly, as per the terms of the MOU, it was the petitioner's burden to obtain the Completion Certificate and all other permissions from the Authority on or before 15.7.2007 (See Clause 21(c) of the MOU). (iii) Thirdly, the subject property could not be occupied till such time the petitioner had obtained the Completion Certificate, the Occupation Certificate

and the approval of the Authority for entering into a lease transaction.

(iii) (a) Inferentially, the aforesaid also brings forth the circumstance that the subject building was incomplete and/or not fit for occupation at the time when the MOU was executed.

(iv) Fourthly, the fact that the petitioner sought time is evident upon a perusal of the communication dated 13.8.2007 and 15.9.2007, addressed by the petitioner to the respondent.

(v) Fifthly, the respondent, in fact, based on an earlier communication dated letter 13.8.2007, extended the timeline till 15.09.2007 to enable the petitioner to discharge its obligations under the MOU. In fact, the respondent made it clear that if there was a default, the petitioner would be liable to pay a penalty in the sum of Rs.28 lakhs.

(v) (a) This communication, in fact, demonstrated that as between the parties, time was of the essence.

(vi) Sixthly, the petitioner, realizing that it was not in a position to discharge its obligations by 15.9.2007, on 15.9.2007, gave an option to the respondent to dissolve the MOU and receive back the sum of Rs.28 lakhs, which had been remitted to it at the time of execution of the MOU.

(vi) (a) The respondent on its part, chose to grant further leeway by writing to the petitioner that it would keep the MOU alive, provided it obtained the necessary permissions at the earliest. It is in this context that the respondent returned the cheque in the sum of Rs.28 lakhs.

(vii) Clearly, since the petitioner was not able to make any progress in the matter, despite nearly six(6) weeks having elapsed, on 30.10.2007, the respondent decided to terminate the MOU.

(viii) This decision was, accordingly, communicated to the petitioner and as a consequence, the respondent demanded the return of Rs.28 lakhs, which it had paid to the petitioner at the time of execution of the MOU.

22. To my mind, if the aforesaid facts and circumstances are taken into account that there is no doubt that time was of the essence when parties had entered into the MOU and it continued to remain so even thereafter, as the respondent persisted to demonstrate urgency in the matter by calling upon the petitioner to close the transaction as early as possible with the added threat that if it failed to do so, it would be liable to pay a penalty in the sum of Rs.28 lakhs.

22.1 Therefore, the argument advanced by Mr. Agarwala, to the contrary, which is, that time was not of the essence is clearly untenable.

23. The alternate argument advanced by Mr. Agarwala, which is, that time ceased to be of essence, is an argument, which is based essentially on the contents of e-mail dated 23.11.2007 and the communication exchanged thereafter between the parties i.e. communication dated 11.12.2007, 22.2.2008, 26.2.2008, 27.2.2008, 3.3.2008, two letters of even date, i.e., 3.3.2008, 4.3.2008, 5.3.2008 and 6.3.2008.

23.1 Based on the aforesaid communications, it was sought to be argued on behalf of the petitioner that time ceased to be of essence. Interestingly, the stand of the respondent in respect of aforesaid communications is that these communications were addressed by the petitioner to persons who were not authorized to act on behalf of the respondent.

23.2 This argument, to my mind, needs to be tested. To test the argument, one would have to go back in time and look at the manner in which the parties engaged between themselves prior to 30.10.2007. In this behalf,

one needs to look at the MOU, and the letter dated 15.9.2007, issued by the petitioner to the respondent.

23.3 Clauses (1) and (2) of the MOU read with Clause 21(d) would show that the correspondence between the parties could be exchanged only between authorized signatories. As per Clause (2) of the MOU, clearly, Mr. Naveen Chamoli was the authorized signatory of the respondent. Therefore, any communication of significance, which had an impact on the MOU ought to have been addressed by the petitioner to the respondent via Mr. Naveen Chamoli.

23.4 The petitioner being cognizant of this fact, on 15.9.2007 addressed a letter to the respondent for extension of time via Mr. Naveen Chamoli. Likewise, the respondent's e-mail dated 30.10.2007, whereby, it conveyed its Management's decision to terminate the MOU was addressed to the petitioner's authorized representative, that is, one, Mr. Sushil Jain.

23.5 However, the correspondence exchanged between the parties after 30.10.2007, to which I have made a reference above, is addressed to Mr. Sudhir Gupta and not Mr. Naveen Chamoli, the designated authorized signatory of the respondent under the MOU. The MOU, admittedly, was executed by Mr. Naveen Chamoli on behalf of the respondent, and likewise, on behalf of the petitioner, by one, Mr. Sushil Jain.

23.6 It is because of this reason that on 30.10.2007, when, the respondent decided to convey its Management's decision to not pursue the MOU and seek refund of Rs.28 lakhs given to the petitioner by the respondent at the time of execution of MOU, the said communication was addressed by Mr. Naveen Chamoli on behalf of the respondent to Mr. Sushil Jain, who was as indicated above, the authorized signatory of the petitioner.

23.7 Therefore, the correspondence which, according to the petitioner, extended the time for discharge of its

obligation as per the MOU ought to have been addressed to Mr. Naveen Chamoli and not Mr. Sudhir Gupta.

23.8 I must, at this stage, point out that, once, prior to 30.10.2007, the petitioner had, on 13.8.2007, written to the respondent, to extend the original deadline fixed to obtain the Completion Certificate by 14.8.2007, albeit, via Mr. Sudhir Gupta. Importantly, the request made, though not in line with terms of the MOU obtained ratification as it was responded to on behalf of the respondent by its authorized signatory, that is, Mr. Naveen Chamoli. On 14.8.2007, Mr. Naveen Chamoli extended the deadline as requested by the petitioner till 15.9.2007. Pertinently, this communication was addressed by Mr. Naveen Chamoli on behalf of the respondent to Mr. Sushil Jain, who, as indicated above, was the authorized signatory of the petitioner.

23.9 Therefore, the argument that time ceased to be of the essence, in my view, is a submission, which is erroneous and hence was rightly rejected by the Arbitral Tribunal.

24. It is in this context that the Arbitral Tribunal, correctly, drew an inference that after the termination of the MOU on 30.10.2007, the petitioner's communication dated 23.11.2007 even though addressed to Mr. Naveen Chamoli, the authorized signatory of the respondent was within seven minutes, replied to by Mr. Sudhir Gupta via an email of even date, who had no authority to rescind the termination letter dated 30.10.2007.

25. The petitioner, it appears, somehow, through an unauthorized personnel, though employed with the respondent, kept the matter in play till such time it obtained the Completion Certificate and all necessary permissions to lease out the subject property. The ploy, it appears, did not work as on 20.3.2008, even Mr. Sudhir Gupta on behalf of the respondent reiterated the

decision taken on 30.10.2007, which was to terminate the MOU.

26. Given these circumstances, I find no difficulty in accepting the findings returned by the Arbitral Tribunal that the petitioner was in breach of its obligation under the MOU, which led to its termination.

26.1 Therefore, the necessary consequences of the same would be, which is that the Arbitral Tribunal did, was to direct the petitioner to return the sum of Rs.28 lakhs to the respondent alongwith interest. The Arbitral Tribunal proceeded to grant interest on the sum of Rs.28 lakhs at the rate of 12% from the date of filing of the statement of claim till the date of the award and thereafter, future interest at the rate of 18% per annum till the date of realization.

7. Insofar as the judgments relied upon by the learned counsel for the appellant is concerned, the learned Single Judge has held that the same have no applicability to the facts and circumstances of the case.

8. Mr. Pramod B. Agarwala, learned counsel for the appellant submits that the learned Arbitrator has erred in not considering the submissions as advanced on behalf of the appellant. We are afraid that such a submission is not borne out from the record. In fact, the learned Single Judge has in para 27 held as under:-

“27. The other submissions advanced on behalf of the petitioner by Mr. Agarwala, which is, that the Arbitral Tribunal failed to consider its counter claim and

dismissed the same in limine, to my mind, are also unsustainable.

27.1 The counter claims lodged by the petitioner were predicated on the stand taken by the petitioner that time was not of the essence, in that the respondent by its conduct, which was reflected in the communication exchanged between the parties had conveyed to it that it would wait till such time, the petitioner was able to obtain the Completion Certificate and requisite permissions for leasing out the subject property.

27.2 However, as noticed above, since the Arbitral Tribunal had come to the conclusion that the time continued to be of the essence and that the petitioner was in the breach of the obligations as stipulated in the MOU, there was no reason for the Arbitral Tribunal to discuss in detail the counter claims lodged by the petitioner since it would have been an empty formality.”

9. We also find that the learned Single Judge has rightly noted that the scope of jurisdiction under Section 34 of the Act is very limited, under which proceedings are not in the nature of an appeal. The scope is limited to the grounds mentioned in Section 34 of the Act. No submission has been made by Mr. Agarwala that the Award is liable to be interfered under Section 34 of the Act. If that be so, the Supreme Court in the case reported as **(2015) 3 SCC 49 Associate Builders v. Delhi Development Authority** has in para 28 held as under:-

“28. In a recent judgment, *ONGC Ltd. v. Western Geco International Ltd.* MANU/SC/0772/2014 : 2014

(9) SCC 263, this Court added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Court held-

35. What then would constitute the "fundamental policy of Indian law" is the question. The decision in ONGC [ONGC Ltd. v. Saw Pipes Ltd. MANU/SC/0314/2003 : (2003) 5 SCC 705] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. 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.

38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated audi alteram partem rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle [Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation MANU/UKWA/0001/1947 : (1948) 1 KB 223: (1947) 2 All ER 680 (CA)] of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest.." (emphasis in original)

10. The learned Single Judge has rightly dismissed the petition preferred under Section 34 of the Act. There is no reason for us to interfere with the impugned order in an appeal under Section 37 of the Act. The appeal stands dismissed. No costs.

CM. No. 1696/2019 (for stay)

Dismissed as infructuous.

V. KAMESWAR RAO, J

CHIEF JUSTICE

JANUARY 16, 2019/ak