

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

Reserved on: 5th July, 2019

Pronounced on: 3rd September, 2019

+ **O.M.P. (COMM) 252/2019, I.A. 8852/2019 & I.A. 8853/2019**

INDIA TOURISM DEVELOPMENT CORPORATION Petitioner

Through: Mr. Sangram Patnaik, Advocate for
Mr. Ratish Kumar, Advocate.

versus

M/S CP & ASSOCIATE PVT. LTD & ORS. Respondents

Through: Mr. Sayant Lodha, Advocate with Ms.
Sanjana Saddy, Advocate for
Respondent Nos. 1 and 2.
Mr. Pawan Mathur, Standing Counsel
for DDA.

Reserved on: 9th July, 2019

Pronounced on: 3rd September, 2019

+ **O.M.P. (COMM) 257/2019, I.A. 9054/2019 & I.A. 9053/2019**

INDIA TOURISM DEVELOPMENT CORPORATION Petitioner

Through: Mr. Sangram Patnaik
Ms. Swyamsidha, Mr. Rajiv Gupta
and Mr. Jayant Goyal, Advs. along
with Mr. Manjit Singh and Mr. Anil,
ARs of Petitioner.

versus

M/S CP & ASSOCIATES & ORS. Respondents

Through: Mr. Sanjay Lodha and Ms. Sanjana
Saddy, Advs. for R-1 & 2.
Mr. Pawan Mathur, Adv. for Standing
Counsel for DDA.

CORAM: JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J

1. These petitions have been filed by the petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') challenging the Arbitral Award dated 6th February 2019 in OMP (Comm) 257/2019 and the Arbitral Award dated 5th February 2019 in OMP (Comm) No. 252/2019.

2. The facts and questions of law raised in both the petitions are nearly identical, with few material differences as shown in the following table:

Basis	OMP (Comm) 257/2019	OMP (Comm) 252/2019
1. Details of Letter of Intent.	LOI No. GM (Engg.)/ CWG/VK-MIG/10, dated, 12 th February 2010, for an amount of Rs. 2,46,92,500/-	LOI No. GM (Engg.)/ CWG/VK-HIG/10, dated, 12 th February 2010, for an amount of Rs. 3,14,52,445/-
2. Details of Work Order.	Work Order No. GM (Engg.)/ CWG/VK-MIG/10, dated, 19 th February 2010, for an amount of Rs. 2,46,92,500/-	Work Order No. GM (Engg.)/ CWG/VK-HIG/10, dated, 19 th February 2010, for an amount of Rs. 3,14,52,445/-
Date of the Award.	6 th February 2019	5 th February 2019.

Looking into the commonality in facts and grounds of challenge a common order is being passed.

Brief Facts [Common]:

3. Petitioner- ITDC, is a Government of India undertaking inter alia involved in the progressive development, promotion and expansion of tourism in India. Respondent No.1- M/s C.P. & Associates Pvt. Ltd. is a company carrying on the business of Real Estate development and manufacturing furniture. Respondent No. 2- M/s India Export Today (IET), is also engaged in the business of manufacturing and supply of furniture and Respondent No. 3 is the Delhi Development Authority (DDA).

4. During the Commonwealth Games 2010, DDA assigned the work of furnishing flats at Vasant Kunj, to the Petitioner vide Memorandum of Understanding (MoU) dated 14th July 2010. The Petitioner, in turn, issued a Notice Inviting Tender (NIT) for 'Supplying Furniture for DDA Mega Housing Project, Behind Pocket D6 and Pocket - D6 Vasant Kunj, Akshardham, New Delhi (For Commonwealth Games 2010). Respondent No.1 bid for the tender and on being declared the successful bidder was awarded the abovementioned Work Order dated 19th February 2010. Before issuance of the Work Order, a Letter of Intent dated 12th February 2010 was also issued to Respondent No.1. The formal agreement dated 6th July 2010, was executed between the parties with a stipulation that the NIT, Letter of Intent and the Work Order along with certain other documents shall be read and construed as part of this agreement. As per the terms and conditions of Work Order, the work was to be completed on 18th July 2010.

5. Due to certain issues between the parties, Respondent No.1 could not supply the furniture within the period stipulated in the contract in order to facilitate the Respondent to complete the contract, Petitioner granted an extension and permitted Respondent No. 1 to sub-contract the work in favour of Respondent No. 2. MoUs dated 31st July 2010 and 7th August 2010 to this effect were executed between Respondent No. 1 and 2 which were witnessed by one of the officer of Petitioner. Petitioner, vide letter dated 10th August 2010, granted an extension of time, to Respondent Nos. 1 and 2 for completion of contract up to 31st August 2010. In terms of the aforesaid understanding between the parties, they continued to supply goods to the Petitioner. However, vide letter dated 3rd September 2010, Petitioner informed the Respondent Nos. 1 and 2 that it would not accept the goods beyond 15th September 2010. Respondent No. 1 tried to conciliate and convince the Petitioner to accept further supply of the furniture, but the Petitioner did not agree. As a result, Respondent No. 1 sent a legal notice dated 27th August 2012, invoking the arbitration clause. In compliance thereof, Petitioner appointed Sh. A.K. Singhal, DG(W), CPWD (Retd.) as the Sole Arbitrator (hereinafter 'the Arbitrator'), for adjudication of disputes between the parties.

6. On 28th September 2012, learned Arbitrator entered upon reference. Petitioner urged before the Arbitrator that since Respondent No. 2 is a party to the MoU, he should also be made a party to the proceedings. On 24th October 2013, Respondent No. 2 filed an application for impleadment and the same was allowed. During the arbitral proceedings, Petitioner objected to separate Statement of Claims being filed by Respondent No. 1 and 2. The objection was

sustained and the Learned Arbitrator directed Respondent No. 2 to file a joint Statement of Claim along with Respondent No. 1. On the basis of Pleadings of the parties, learned Arbitrator summarized the issues for adjudicating the disputes between the parties, as noted in the impugned award. The same reads as follows: -

"(A) Recovery of liquidated damages due to delay in supply of furniture.

(B) The Obligation of the Respondent towards the MoU (Memorandum of Understanding) dated 07.07.2010 & dated 31.07.2010 which were entered into between M/s C. P. Associates (the Claimant) through its Managing Director Sh. Chander Pal Singh Sisodia and M/s IET (M/ s India Exports Today) through Sh. Rajiv Kumar Saxena proprietor of M.s India Exports Today in the presence of the officers of ITDC (India Tourism Development Corporation Ltd.)

(C) Payment of the material (including the rent of the warehouses, their watch & ward, expenditure on insurance etc.) which is lying in the warehouses at Nangal Dewat adjoining the project site at Vasant Kunj New Delhi. "

7. All the issues were decided in favour of the Respondent Nos. 1 and 2 and on the basis of the findings on the aforesaid issues, the Arbitrator partly allowed the claims of the Respondent Nos. 1 and 2. The Petitioner has challenged the findings of the Arbitrator on issue nos. 1 and 2, on the grounds discussed

hereinafter.

Issue No. 1: Recovery of Liquidated Damages Due to Delay in Supply of Furniture

Case of the Petitioner:

8. Petitioner was entitled to impose liquidated damages for the delay in supply of material, as the tender was floated with a condition that time was the essence of the contract. The supply of material was to commence after three months and was to be completed within three to five months. The period of three months, for the start of delivery was kept knowing fully well that the materials to be supplied may require time for procurement and manufacturing. Respondent No. 1 failed to adhere to the time schedule stipulated under Clause 45 of the NIT and supplied the material only on 8th June 2010. The supply was incomplete and many of the items mentioned in the tender were still awaited. Several letters were written by the Petitioner highlighting delay in supply. Since Respondent No. 1 was lagging behind the delivery schedule, it entered into a MoU with Respondent No. 2 for the supply of furniture. However, despite outsourcing/sub-contracting the work, Respondent No. 1 failed to deliver the material as per the terms of the agreement.

9. Petitioner refutes the allegation of Respondent No. 1 regarding the fixing of responsibility on the Petitioner for the delay caused. It is contended that since commonwealth games were in the offing, the date of 3rd September 2010 was kept as the cutoff date for supply of the material, which was

categorically intimated to Respondent No. 1, with the condition that furniture which is not dispatched by the said date would not be accepted by the Petitioner at the site. Counsel for the Petitioner contends that the deductions on account of delay were legal and justified. In support of this submission, he relied upon Section 73 and 74 of the Contract Act and argued that in consonance with the law laid down by the Supreme Court in *ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705*, Petitioner was not required to prove any loss to claim the liquidated damages.

Analysis and Findings on Issue No. 1:

10. Before dealing with the contentions of the Petitioner, it is necessary to note clauses of the NIT that are relevant to decide Petitioner's contentions, the same are reproduced hereunder:

“Cl.2 (NIT). The supply is to be completed within 3 to 5 months but delivery should commence after third month. The commencement date of supply will be reckoned from the 7th day after the day on which the Project Engineer issues the written order to commence the work which includes supply of Furniture and installation in individual flats of DDA in respective tower and floors/flats in commonwealth Games Village near Akshardham, Delhi.

Cl.18 (NIT). Compensation for delay Compensation for delay shall be 2% of the value of Furniture delayed for the first week and 3% for the subsequent week subject to maximum of 15% of the total value of work.”

11. In addition to the above, there are certain terms of the work order which are also relevant and are reproduced hereunder:

“Completion: The supply is to be completed within 3 to 5 months but delivery should commence after third month. The commencement date of order will be reckoned from the 7th day after the day on which the Project Engineer issues the written order i.e. dated 12/02/2010 to commence the work which includes supply of Furniture and installation in individual flats of DDA in respective tower and floors/ flats/ in Common Wealth Games village near Akshardham, Delhi.

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Phasing of work: The Corporation may require the work to be executed in phases as may be indicated nothing extra shall be payable for supply/execution the work in phased as required and should the exigencies of business demand temporary stoppage of work, the supplier would not be allowed any increase in cost thereof. The site may be handed over in phases. Nothing extra shall be payable on this account. The completion period of work will remain the same.

The contractor/supplier shall be solely responsible for complying with all provisions of EPF and mise provision Act, ESI Act other extent labour laws including obtaining requisite labour licenses, related to manpower engaged for this contract and in event of any Liability on ITDC by virtue of its being principal employer due to failure of the contractor/ supplier to comply with the said Acts, the contractor shall indemnify and reimburse the amount payable by ITDC on this account.

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Compensation for delay: Compensation for delay shall be 2% of the value of Furniture delayed for the first week and 3% for the subsequent week subject to maximum of 15% of the total value of work.”

12. The relevant observations of the learned Arbitrator on the question of delay are as under:

“33. I find that there is some ambiguity in the interpretation of the clauses starting from the date of commencement. According to the clause relating to the completion of supply/ work given in the LOI, these two words i.e. work & supply are synonymous and convey the same meaning and include the supply of Furniture and installation of the same in individual flats of DDA in respective MIG flats in Vasant Kunj new Delhi. Therefore the

work which was assigned to the Claimant by Respondent was relating to the supply of Furniture installation of the same in individual flats of DDA in respective towers of HIG flats in Vasant Kunj New Delhi. Five months period was given for completion of work.

34. Regarding the date of compensation of work it was specified in the LOI I work order I NIT that the Commencement date will be reckoned from the 7th day after the date on which the Project Engineer issues written orders to commence the work. Incidentally in this case first of all the Respondent issued letter of Intent (LOI) vide its letter dated 12.02.2010 (Exh. R-1 page 13 of CSF). After the issue of the LOI the Respondent issued work order dated 19.02.2010 (Exh. R-1 page 4 of CSF). But it has been observed that the Respondent i.e. Project Engineer did not issue any letter regarding commencement of work. The claimant submitted that at the most the date of issue of work order can be considered as the date of issue of commencement letter and accordingly 19.02.2010 should be the stipulated date of start & 18.07.2010 should be the stipulated of completion. After perusal of LOI letter dated 12.02.2010 & work order dated 19.02.2010. I find that in work order under the subhead “completion” (page 5 of CSF) the date of issuance of LOI i.e. 12.02.2010 has been mentioned as the date of written order by Project Engineer to commence the work. Therefore, I consider & decide that as per the contract as per the contract 12.02.2010 should be considered as date of issuance of letter of commencement and accordingly 19.02.2010 & 18.07.2010 should be the stipulated dates of start of work & completion of work respectively. ”

13. On the interpretation of Clauses, relevant observation of the Arbitrator on this issue is as under:

“36. I also find that clause 45 of NIT prima facie cannot be considered an independent clause in isolation to levy compensation under clause 18 of NIT for any delay in not following the schedule of supply of furniture specified in

clause 45 of NIT because there may be a case when the Claimant fails to adhere to the prescribed schedule specified in clause 45 of NIT but completes the work by 18.07.2010. In such an eventuality the Respondent will not be in a position to levy compensation for delay in not following the prescribed schedule mentioned in clause 45 of NIT because the Claimant has fulfilled the provisions of clause 2 of the NIT and has completed the work within the stipulated period. Similarly there can be another case where the Claimant has followed the schedule of supply of furniture prescribed in clause 45 of NIT but fails to complete the work by stipulated date of completion. In such an eventuality the Claimant will be liable for compensation for delay under Clause 2 of the NIT for not completing the work within stipulated period. Therefore it will be seen that clause 45 of NIT is not an independent clause & is related to clause 2 of NIT. The decision to levy compensation or not to levy compensation for not completing the work in time could be taken under clause 2 of the NIT only and the amount of compensation could be decided under Clause 18 of the NIT. However, while arriving at the decision under clause 2 of NIT, the performance of the Claimant under clause 45 of NIT could be considered by the competent authority of the Respondent. It seems that Respondent was also of the same view while deciding extension of the time (EOT) and levying Compensation/penalty/liquidated damages @ 15% of the total contract value. If the note dated 03.11.2011, vide which officials of ITDC decided to grant EOT to all the vendors with levy compensation/ penalty/ liquidated damages @ 15% of the total contract value, is perused, it would be seen that there is no mention of clause 45 of NIT in the entire note. The compensation/ penalty/ liquidated damages @ 15% of the total value under clause 18 of NIT have been levied referring to clause 2 of the NIT only. **Therefore the contention of the Respondent that the compensation/ penalty/ liquidated damages @ 15 % of the total contract value has been levied by referring to clause 45 of NIT is incorrect and is simply after the Respondent."**

14. Learned Arbitrator has considered the aforementioned clauses of the NIT and concluded that Clause 45 is not an independent clause to levy compensation for delay. Clause 2 of NIT is directly connected with Clause 18 because Clause 2 covers the total period of five months as the delivery of furniture was to commence after three months and was to be completed within three to five months. On the premise of the aforementioned discussion and after due consideration of the documents brought on record in the nature of letters, correspondence, office notes, reports etc., the Arbitrator concluded that the Petitioner was responsible for delay as it had failed to provide the site i.e. the flats in various towers and without providing the same, the work of installation of furniture could not have been carried out by the Respondents. The learned Arbitrator has held that the levy of damages/compensation by the Petitioner was illegal as the Petitioner has not strictly adhered to the schedule as provided in the contract. From the reading of the aforesaid observations, it becomes evident that the learned Arbitrator has considered the evidence led by the parties on the question of delay and has concluded that it was the Petitioner who was responsible for the delay due to failure in handing over of flats on time to the Respondent. This is a pure finding of fact which is based on evidence and cannot be said to be unreasonable or perverse and ought not be interfered by this Court under Section 34 of the Act. Moreover, Petitioner also could not prove that it has suffered any damages due to delay in completion of work, which is the sine qua non for claiming damages. In this context it is relevant to refer to the observations of the learned arbitrator:

"Further during the oral argument & in its written submission the Claimant has alleged that irrespective of the fact whether the word used in the relevant clause i.e. clause. 18 of NIT of the agreement is penalty or compensation or liquidated damages, as a precondition precedent for imposition & recovery of any damages thereof, the party seeking to impose/recover i.e. Respondent has to plead the nature of loss suffered in its pleadings and evidence. Assuming though denied that it was a genuine pre-estimate of the damages provided in clause 18 of NIT as alleged by the Respondent though denied by the Claimant, even then the Respondent has to plead and show as how and on what account the amount stipulated in clause 18 of NIT was a genuine pre-estimate of damages. This has not been done by the Respondent. Thus the alleged levy is not sustainable legally also.

After perusal of arguments & submissions made by the parties, I find that in this case time was the essence of contract. The work was to be completed as per clause 2 of NIT and in case of failure to adhere to the time schedule there was a provision of calculation of compensation under clause 18 of NIT. In other words the clause 18 of NIT provided for pre-estimate of compensation in case of delay in completion of work. After going through the judgments quoted by both the parties, I find that first of all if any delay had taken place in the completion of work, it was necessary for the Respondent to establish that the Claimant was solely responsible for the delay After it was established that Claimant was responsible for the delay then the Respondent was to prove that it had suffered damages due to alleged delay and only after the above two conditions were fulfilled, the Respondent was entitled to claim damages which were pre-estimated under clause 18 of NIT. I agree that in a case where there is pre-estimate of damages, it is not essential for the Respondent to prove the extent of damages actually suffered and claimed."

15. Further, reference may be made to the judgment of Supreme Court in ***Kailash Nath Associates v. DDA, (2015) 4 SCC 136***, relevant portion of

which reads as under:

“43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:

43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.

43.2. Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

43.3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section.

43.4. The section applies whether a person is a plaintiff or a defendant in a suit.

43.5. The sum spoken of may already be paid or be payable in future.

43.6. The expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.”

Issue No. 2: Obligation of the Petitioner under the MoU dated 7th July 2010 and 31st July 2010 executed between the Respondent Nos. 1 and 2

16. The Petitioner challenges the findings of the arbitral award on the above issue by contending that the MoU executed between Respondent Nos. 1 and 2 is a bipartite agreement. The Arbitrator despite taking note of the above contention wrongly fixed the liabilities arising under the said MoU on the Petitioner. He submits that the Petitioner's official signed the document only as a witness, in their personal capacity and the same are not binding on the Petitioner. Merely, witnessing an agreement by an officer does not render Petitioner liable for the rights and obligations arising therefrom. Petitioner also relies upon the judgment of the Supreme Court in *Balkrishna S. Dalwale (dead) By Lrs v. Vitabai C. Rathod (dead) by Lrs, (2010) 13 SCC 291*, to contend that merely because an officer of the Petitioner has signed the MoU as a witness, it would not make the Petitioner a party to the MoU.

Analysis and Findings on Issue No. 2:

17. The learned Arbitrator has held that the Co-Claimant/Respondent No. 2 should be paid as per the rates contained in the agreement between Petitioner and Respondent No. 1 so that Respondent No. 2 is not affected.

18. The contentions raised by the Petitioner, are contrary to the stand taken before the arbitral proceedings. During the arbitral proceedings, Respondent No. 1 contended that the MoU between Respondent No. 1 and 2 (dated 7th July 2010 and 31st July 2010) were executed at the instance of the Petitioner and in the presence of its official. The MoU was also signed by the official of the Petitioner and in terms of Clause (b), Respondent No. 2 was

authorized to receive payment from Petitioner for the supply on behalf of Respondent No. 1. Further, under Clause (c) of the MoU, Respondent No. 2 was to ensure the supply of items within a scheduled period as per the specifications contained in the supply order dated 31st July 2010. No such objection was raised before the Arbitrator and on the contrary, Respondent No. 2 was impleaded in the arbitral proceedings as a Co-Claimant, at the instance of the Petitioner. Thus, it transpires that Petitioner had in fact consented to the inclusion of Respondent No. 2 in the arbitral proceedings, which is evident from the pleadings filed by the Petitioner. In para 2 of the preliminary objection/submissions of the reply filed by the Petitioner before the Arbitral Tribunal, an objection was taken regarding non-joinder of parties on the ground that Respondent No. 2 is a necessary and a proper party. Besides, it has also been noted in the award that the Competent Authority of the Petitioner had written letters dated 28th December 2012 seeking inclusion of Respondent No. 2 in the arbitral proceedings. In this regard, the following documents are necessary to be noted:

“Para 2 of the preliminary objections/ submissions in the reply filed by the petitioner herein to the claim filed by the Respondent No.1 herein before the Ld. Arbitrator wherein while objections to the claim of the respondent No. 1, it was submitted on behalf of the petitioner herein that the said claim was bad for the non-joinder of parties as much as India Exports (Respondent No.2 herein) had not been made a party despite the fact that claimant has entered into MOUs dated 31.07.2010 with India Exports Today and India Exports Today had filed claim before the Arbitrator claiming the amounts in this regard. [Pg. 77 @ 78, Index IV, Petition 1 and Pg. 79 @ 80, Index IV, Petition 2]

Recitals to the awards dated 05.02.2019 and 06.02.2019, that

clearly record that the competent authority of the petitioner herein had written letters as far back as on 28.12.2012 seeking inclusion of the Respondent No.2 in the arbitral proceedings as a party to the same [illustratively Pg. 108-111, Index IV, Petition 1 and Pg. 110-113, Index IV, Petition 2]”

19. It is also apposite to note that in a judgment passed by the Co-ordinate Bench of this Court in **India Tourism Development Corporation v. CP Associates Pvt. Ltd.**, OMP (COMM) 39/2019 & OMP (COMM) 40/2019 dated 13th March 2019, dealing with the challenge to an arbitral award between the same parties as in the present case, a similar objection was considered and rejected.

20. There is another reason why the contention of the Petitioner is without any merit. Section 7 of the Act reads as under:

“7. Arbitration agreement.—(1) In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication [including communication through electronic means] which provide a record of the agreement;

or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.”

21. An Arbitration Agreement means an agreement in writing if it is contained in an exchange of letters, telex, telegrams or other means of telecommunications which provides a record of the Agreement. It can also be by way of an exchange of statement of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other. The present case would fall within the ambit of Section 7 (4) (b) and (c) of the Act. During the course of the arbitration proceedings held on 30th August 2016, Respondent Nos. 1 and 2 submitted a consent letter dated 16th July 2016 for Arbitration of disputes regarding payment regarding CWG Contract/Work Orders of Respondent No. 1 and MoU with Respondent No. 2. Vide this letter, both the parties declared and agreed that Respondent No. 2 can pursue its claims against the MoU, purchase order and authorization letters with Petitioner. The said consent letter was taken on record by the learned Arbitrator. Then, during the hearing held on 1st May 2017, it was decided with the consent of the Respondent Nos. 1 and 2 and the Petitioner that as the contract agreement was only with Respondent No. 1, both the Respondents shall submit a “joint statement of claims” by both the parties. However, the claims of Respondent Nos. 1 and 2 were treated as separate claims to be pleaded by each party individually. Therefore, the objection of Petitioner that Respondent No. 2 could not have pursued its claims before the arbitral proceedings for the work orders of Respondent No. 1 is not sustainable. Petitioner had consented to the same and had given

unconditional and unqualified acceptance to the proceedings dated 30th August 2016 and did not also raise any objection to the consent letter dated 16th July 2016. The learned Arbitrator taking note of the aforesaid stand of the parties, determined the obligations of the Petitioner under the MoU dated 7th July 2010 and 31st July 2010. The learned Arbitrator has also considered the documents and concluded that the senior officers of Petitioner were involved in the signing of the agreement between the Respondents. Further, Petitioner made payments directly to Respondent No. 2 on behalf of Respondent No. 1, which exhibits the understanding between the parties which is binding and subsisting. I therefore, do not find any ground or reason to interfere with the aforesaid findings.

22. Before parting, I would also like to deal with the contention raised by the learned counsel for the Petitioner that since the furniture was purchased for Delhi Development Authority (DDA), it was necessary to implead them as a party to the arbitration proceedings. I do not find any merit in the said submission. The MoU between Petitioner and DDA specifically records as under:

“11. Any dispute between ITDC, suppliers/contractors shall be resolved by ITDC by employing a resilient mechanism, if same is not resolved, this can be referred to arbitrator for arbitration. ITDC shall defend the dispute properly before the arbitrator.”

23. The dispute between parties was independent of the dispute between Petitioner and DDA. The agreement between Petitioner and Respondents contains an independent Arbitration Agreement, in terms of Clause 23 of the NIT, which reads as under:

“23. Arbitration and Laws

Arbitration

Except where otherwise provided for in the Contract all questions and disputes relating to the meaning of the specifications. Designs, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the Work or as to any other question, claim right, matter or thing whatsoever in any way arising out of or relating to the Contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the Works, or execution or failure to execute the same whether arising during the progress of the Work or after the completion or abandonment thereof shall be referred to the sole arbitration of the Chairman & Managing Director of the India Tourism Development Corporation or any other person appointed by him. There will be no objection if the arbitrator so appointed is an employee of India Tourism Development Corporation and that he had to deal with the matters to which the Contract relates and that in the course of his duties as such he had expressed views on all of the matters in dispute or difference. The arbitrator to whom the matter is originally referred being transferred or vacating this office or being unable to act for any reason, the Chairman & Managing Director shall appoint another person to act as arbitrator in accordance with the terms of the Contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this Contract that no person other than a person appointed by the Chairman & Managing Director, as aforesaid should act as Arbitrator and if for any reason that is not possible the matter is not to be referred to Arbitration at all. In all cases where the amount of the claim in dispute is Rs.50,000 (Rupees fifty thousand) and above, the Arbitrator shall give reasons for the award.”

24. Therefore, the DDA was not a necessary party in the arbitral proceedings between Petitioner and Respondent Nos. 1 and 2. The challenge to the award

on this ground is untenable. This contention is therefore devoid of merit and liable to be rejected. It is also pertinent to note that no such objection was raised before the Arbitrator and Petitioner cannot now be permitted to raise the same under Section 34 of the Act.

25. In the present petition, again DDA has been impleaded as a co-respondent. Since the arbitral award has not been passed against DDA it is not privy to the proceedings and thus, I am unable to understand, how the Petitioner has sought to implead DDA as a party to the present proceeding, without the leave of the court. The same is completely misconceived and untenable and accordingly, Respondent No. 3 is deleted from the array of parties and a Cost of Rs. 25,000/- is also imposed on the Petitioner, which shall be paid to Delhi Development Authority within week from today in both the petition.

26. Lastly, it needs to be noted that none of the grounds raised by the Petitioner in the present petition or the note of submissions falls within the scope of Section 34 of the Act. Its trite law that, Courts do not sit in appeal over the findings given by the Arbitrator in an Arbitral Award. The scope of interference by the Court has been well defined and has to be within contours of Section 34 of the Act read with the judicial pronouncements of the Supreme Court in *Associate Builders v Delhi Development Authority* (2015) 3 SCC 49, *WishwaMitter Bajaj v Shipra Estate Ltd.* (2019) 256 DLT 42 (DB), *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181, *P.C.L Suncon (JV) v N.H.A.I.*, 2015 SCC Online Del 13192, *P.R. Shah Shares and Stock Brokers Pvt. Ltd. v B.H.H. Securities*

***Pvt Ltd.*, 2012 (1) SCC 594, *Navodaya Mass Entertainment Limited v J.M. Combines* (2015) 5 SCC 698**, outlining the scope of interference. In the present case, the grounds urged do not call for any interference as the same would amount to reviewing the merits of the disputes between the parties. The findings of the Arbitrator cannot be said to be arbitrary, capricious or perverse or patently illegal or such that would shock the conscience of the Court. On this issue, the observation of the Supreme Court in ***Associate Builder v. DDA* 2015 3 SCC 49** are relevant, which read as under:

“33. It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score [Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows: “General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong”. It is very important to bear this in mind when awards of lay arbitrators are challenged]. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In *P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.* [(2012) 1 SCC 594: (2012) 1 SCC (Civ) 342], this Court held: (SCC pp. 601-02, para 21)

“21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.”

...

36. The third ground of public policy is if an award is against justice or morality. These are two different concepts in law. An award can be said to be against justice only when it shocks the conscience of the court. An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him Rs 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be liable to be set aside on the ground that it is contrary to “justice”.

...

56. As has been held above, the expression “justice” when it comes to setting aside an award under the public policy ground can only mean that an award shocks the conscience of the court. It cannot possibly include what the court thinks is unjust on the facts of a case for which it then seeks to substitute its view for

the arbitrator's view and does what it considers to be “justice”. With great respect to the Division Bench, the whole approach to setting aside arbitral awards is incorrect. The Division Bench has lost sight of the fact that it is not a first appellate court and cannot interfere with errors of fact.”

27. For the foregoing reasons, I do not find merit in the present petitions and the same are dismissed with a cost of Rs. 25,000/- to be paid to Delhi State Legal Services Authority in both the petitions. This cost is in addition to the cost, to be paid to DDA for impleading them as a party.

28. Both the petitions are disposed of in the above terms.

September 03, 2019

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SANJEEV NARULA, J.