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

Reserved on : 25.09.2019

Date of decision: 14.11.2019

+ **FAO (OS)(COMM) 211/2019**

M/S PRESTRESS WIRE INDUSTRIES Appellant/Non-claimant
Through: **Mr. R.K. Sanghi, Mr. Satyendra**
Kumar & Mr. Anugrah Niraj Ekka,
Advs.

versus

M/S UPPAL BUILDERS PVT. LTD. Respondent/Claimant
Through **Mr. L.B. Rai, Ms. Disha Singh &**
Ms. Aishwarya Tyagi, Advs.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI, J.

1. By way of the present appeal filed under Section 37 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the Act) the appellant/non-claimant impugns order dated 09.02.2018 made by the learned Single Judge in O.M.P. No.1588/2014, which was a petition under Section 34 of the Act, whereby the Award dated 17.04.2014 rendered by the Sole Arbitrator has been upheld.

2. M/s Prestress Wire Industries/non-claimant (hereinafter referred to as Prestress) and M/s Uppal Builders Pvt. Ltd (hereinafter referred to as Uppal Builders or contractor) entered into agreement dated 24.01.2009 whereby Prestress awarded to Uppal Builders work of construction of a factory building at Bajpur.

3. An important aspect of the transaction was, that to begin with, Uppal Builders was not the lowest bidder in the tender. However, Uppal Builders reduced its quote and gave a discount of 6.7%, which offer was accepted by reason of discount. The total value of the contract was Rs. 2.28 crores; the date of commencement of work was 21.1.2009; and the date of completion was 3.8.2009. According to Prestress, Uppal Builders was unable to complete the work within time; and therefore Prestress had to hire a third party to complete the project. It is Prestress's contention that Uppal Builders abandoned the site on 22.7.2010.

4. Uppal Builders raised a running bill of Rs. 2,15,80,666/- which included the discount of 6.7 % and this running bill was paid by Prestress, though under protest. Uppal Builders raised another bill of Rs. 26,20,730/- which bill, according to Prestress, was not certified by the architect and Uppal Builders was therefore not entitled to receive the said money. This bill, according to Prestress, was also in respect to work that had been carried-out and completed by the third party. In the circumstances, it is Prestress's case that it had overpaid Uppal Builders to the tune of Rs. 4,72,000/- which Uppal Builders was liable to refund to Prestress.

5. In this background, disputes arose between the parties; arbitration was invoked ; and the disputes were referred to arbitration by the High Court

appointing a sole arbitrator at the instance of Uppal Builders. On point of fact, Prestress also preferred counter-claims before the arbitrator.

6. It is in these circumstances, that arbitral award dated 17.4.2014 was rendered, whereby the arbitrator has awarded a sum of Rs. 19,28,303/- in favour of Uppal Builders.

7. The arbitral award led to filing of a petition under section 34 of the Act, seeking to set-aside the award. By way of impugned order dated 9.2.2018, the single Judge has dismissed the section 34 petition and has upheld the arbitral award.

8. The statement of claim filed by Uppal Builders set-out 9 claims; and Prestress laid 4 counter-claims. The manner in which the arbitrator dealt with the claims and counter-claims is set-out in the table appearing below :

S. No.	Claim	Award (whether allowed/disallowed/for how much in Rs.)
1	Rs. 26,20, 730/- as payment of work done (excluding 6.7% rebate) towards Final bill including Security Deposit	Allowed for Rs. 5,12,172/-
2	Rs. 4,63,550 on account of miscellaneous work	Allowed for Rs. 1,15,000/-
3	Rs. 2,17,000 on account of idling of labour	Disallowed. Claim not substantiated.
4	Rs.1,20,000/- on account of laying extra length of pipeline for water	Disallowed. Claim not substantiated.
5	Rs. 14,00,000/- on account of compensation towards increase in the price during the extended period of construction	Allowed for Rs. 9,94,370/-

S. No.	Claim	Award (whether allowed/disallowed/for how much in Rs.)
6	Rs. 22,36,118/- on account of 24% interest on delayed payments on bills	Allowed for Rs. 3,06,761/-
7	Rs. 35,00,000/- towards loss of profit/overheads due to prolongation of contract	Disallowed. Claim not substantiated.
8	Towards interest on amount of award	Allowed. Claimant entitled to 12% simple interest on Rs. 19,28,303/-
9	Cost	Allowed for Rs. 1,00,000/-
S. No.	Counter-claim	Award
1	Rs. 50,000/- towards extra cost incurred in completing the balance work	Appellant did not press this claim
2	Rs. 12,00,000/- towards Liquidated Damages (LD) for delay in completion of work	Appellant did not press this claim
3	Towards interest on amount of award	Disallowed
4	Cost	Disallowed

9. On the well-worn principles and scope of an appeal under section 37 of the Act, this court is to look only at the legal fallacies, if any, in the order made by the single Judge in the impugned order made under section 34; and this court will not delve into the merits of the arbitral award. Furthermore on the well accepted principles on the scope of the appeal under section 34, the single Judge is not required to substitute his own opinion in place of the view taken by the arbitrator on the merits of the claims and counter-claims ;

but only needs to ensure that the award is a reasoned award, based on evidence in record, and the inferences drawn are not illegal or perverse and are such that a reasonable person could reach those inferences on the basis of the evidence and material on record. These principles have been reiterated in the recent case of M/s L.G. Electronics India (P) Ltd. vs. Dinesh Kalra reported as 2018 SCC OnLine Del 8367, wherein the Division Bench of this Court held as under:

“15. The position of law stands crystallized today, that findings, of fact as well as of law, of the arbitrator/Arbitral Tribunal are ordinarily not amenable to interference either under Sections 34 or Section 37 of the Act. The scope of interference is only where the finding of the tribunal is either contrary to the terms of the contract between the parties, or, ex facie, perverse, that interference, by this Court, is absolutely necessary. The Arbitrator/Tribunal is the final arbiter on facts as well as in law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Sections 34 or 37 of the Act.

16. The scope of judicial scrutiny and interference by an appellate court under Section 37 of the Act is even more restricted, while deciding a petition under Section 34 of the Act. The Hon'ble Supreme Court in the case of McDermott International Inc. v. Burn Standard Co. Ltd. and Ors, MANU/SC/8177/2006 : (2006) 11 SCC 181 held as under:

"52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award

leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."

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21. This Court, time and again has emphasized on the narrow scope of section 37. In the case of MTNL v. Fujitshu India Private Limited, reported at MANU/DE/0459/2015 : 2015(2) ARBLR 332 (Delhi), the division bench held as under:

"The law is settled that where the Arbitrator has assessed the material and evidence placed before him in detail, the court while considering the objections under Section 34 of the said Act does not sit as a court of appeal and is not expected to re- appreciate the entire evidence and reassess the case of the parties. The jurisdiction under section 34 is not appellate in nature and an award passed by an Arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the court to interfere with the award merely because in the opinion of the court, another view is possible. The duty of the court in these circumstances is to see whether the view taken by the Arbitrator is a plausible view on the facts, pleadings and evidence before the Arbitrator. Even if on the assessment of material, the court while considering the objections under section 34 is of the view that there are two views possible and the Arbitral Tribunal has taken one of the possible views which could have been taken on the material before it, the court would be reluctant to interfere. The court is not to substitute its view with the view of the Arbitrator if the view taken by the

Arbitrator is reasonable and plausible Jhang Cooperative Group Housing Society v. P.T Munshi Ram & Associates Private limited: MANU/DE/1282/2013 : 202(2013) DLT 218.

The extent of judicial scrutiny under section 34 of the Act is limited and scope of interference is narrow. Under section 37, the extent of judicial scrutiny and scope of interference is further narrower. An appeal under section 37 is like a second appeal, the first appeal being to the court by way of objections under section 34. Where there are concurrent findings of facts and law, first by the Arbitral Tribunal which are then confirmed by the court while dealing with objections under section 34, in an appeal under section 37, the Appellate Court would be very cautious and reluctant to interfere in the findings returned in the award by the Arbitral Tribunal and confirmed by the court under section 34."

22. The abovementioned view was further upheld by the division bench in Mahanagar Telephone Nigam Ltd. v. Finolex Cables Limited FAO(OS) 227/2017 reported at MANU/DE/2818/2017 : 2017 (166) DRJ 1, stated as follows:-

"It is apparent, therefore, that, while interference by court, with arbitral awards, is limited and circumscribed, an award which is patently illegal, on account of it being injudicious, contrary to the law settled by the Supreme Court, or vitiated by an apparently untenable interpretation of the terms of the contract, requires to be eviscerated. In view thereof, the decision of the ld. Single Judge that reasoning of the arbitral award in this regard was based on no material and was contrary to the contract, cannot be said to be deserving of any interference at our hands under Section 37 of the Act. In a pronouncement reported at MANU/DE/0459/2015, MTNL v. Fujitsu India Pvt. Ltd. (FAO(OS) No. 63/2015), the Division Bench of this court has held that "an appeal under Section 37 is

like a second appeal, the first appeal being to the court by way of objections under Section 34". Being in the nature of a second appeal, this court would be hesitant to interfere, with the decision of the learned Single Judge, unless it is shown to be palpably erroneous on facts or in law, or manifestly perverse. "

These aforesaid principles have also been reiterated in the recent case of **MMTC Ltd. Vs. Vedanta Ltd.** reported as AIR 2019 SC 1168, wherein the Supreme Court held as under:

"12. As far as interference with an order made Under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference Under Section 37 cannot travel beyond the restrictions laid down Under Section 34. In other words, the Court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the Court Under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the Court Under Section 34 and by the Court in an appeal Under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings."

10. Counsel for the parties have reiterated the contentions raised before the Arbitrator and before the learned Single Judge ; and have referred to various provisions of agreement dated 24.01.2009 from which the claims and counter-claims arise. However it is not the scope or purport of proceedings under Section 37 to dissect every contractual provision or to delve minutely into the arithmetic of each claim or counter-claim.

11. The paragraphs of the impugned order on which the single Judge's decision turns are extracted below :

"6. Though it was argued by the petitioner rebate of 6.7% ought to have been allowed on the extra work, but since this

work was never included in the scope of the agreement hence there was no illegality in not allowing rebate on such extra items. The extra work was done at the instance of the petitioner and the amount was based on actual, as certified by the architect of the respondent, hence learned arbitrator not erred in allowing claim No. 1.”

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“9. Now, I come to the claim No. 5 which was on account of the compensation towards the increase in the price during the construction period. This claim was duly certified by the architect of the respondent. Though it is argued by the learned counsel for the petitioner the time was an essence of the contract but admittedly the work of construction prolonged beyond 180 days and was never objected to by the respondent and rather they allowed the petitioner to complete the project. The claimant alleges that there was a delay in issue of layout drawing of the project and it was decided to provide files in foundation instead of ordinary foundation for which reinforcement details were provided on 19.03.2009. because of the additional work the total quantum of work was increased by over 50% of the contract value and also there were occasional interruptions on account of irregular supply of cement and heavy down pour every now and then. It increased the cost of labour and material. However, petitioner rely on clause 25 of the agreement which says no enhancement of the rates would be entertained. It runs as under :

“25. Escalation No enhancement of rates would be entertained in case of escalation in price of raw-material, transportation, labour etc. “No escalation.”

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“11. Clause 25 though say the escalation of price would not be entertained but the learned arbitrator rightly held such escalation of course was limited to the period of contract and not beyond it. Since the work extended over beyond the period of contract the claimant was certainly entitle for escalation of price of the work executed as per the tender items. The work executed as extra was already based on market rates and did call for escalation. Such details, as submitted, were duly certified by the architect and per whole sale price index the amount of escalation was worked to Rs. 9,94,370/-. The learned arbitrator rightly held the time though was an essence but as the contract was spilled over to further 12 months, the essence part lost its importance. The bills of the work were duly certified by the architect of the petitioner taking into consideration the wholesale price index.”

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“14. The learned counsel for the respondent though referred to State of Haryana and Others vs. S.L. Arora and Company (2010) 3 SCC 690 wherein 18% pa post award interest was awarded. Further in Bhag Kathuria Engineers (P) Ltd. vs. Delhi Development Authority and Another 1997 (Suppl) Arb. LR 157, yet again 18% pa simple interest was found to be reasonable. Further, in Aditya Mass Communications (P) Ltd vs APSRTC (2003) 11 SCC 17 where the High Court had reduced the interest from 12% to 9%, the Supreme Court said it was not correct.”

“15. Thus, in view of above submissions, there is nothing to interfere with the impugned award. As per settled law a court would not sit in appeal over the award of an arbitral tribunal by re-assessing or re-appreciating the evidence. An award can be challenged only on the grounds mentioned in section 34(2) of the Act. In the absence of such grounds under section 34(2) of the

Act, it is not possible to re-examine the facts to find if a different conclusion can be arrived at.”

12. In view of the above discussion, this court finds that the single Judge has correctly appreciated the scope and power of section 34 of the Act. Applying the correct principles, the single Judge has opined that the arbitral award is a reasoned award, based upon the contract between the parties; and that there is no warrant to re-assess or re-appreciate the evidence or to re-examine facts to see if a different conclusion can be arrived at by the single Judge.

13. We therefore find no infirmity in the impugned order, which we accordingly uphold.

14. The present appeal is accordingly dismissed, without however, any order as to cost.

15. Pending applications, if any, also stand disposed of.

ANUP JAIRAM BHAMBHANI, J.

G.S.SISTANI, J.

NOVEMBER 14, 2019/j/uj