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

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Date of decision: 27.11.2019

+ **ARB. A. (COMM.) 34/2019**

M/S UMAXE PROJECTS PVT. LTD.

..... Petitioner

Through: **Mr. Sunil K. Mittal, Advocate with
Mr. Sameer Dawar, Mr. Anshul
Mittal & Mr. Harshit Vashisht,
Advocates**

versus

AIR FORCE NAVAL HOUSING BOARD

..... Respondent

Through: **Mr. Yoginder Handoo, Ms. Maya &
Ms. Aditi, Advocates**

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J. (ORAL)

1. This is an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (Act) read with Section 13 of the Commercial Courts Act impugning an order dated 20.10.2019 passed by the learned sole Arbitrator on an application filed by the appellant under Section 17 of the Act.

2. The brief facts which need to be narrated for the present controversy are that the respondent herein launched a Housing Scheme at Shatabdi Nagar, Meerut in the year 2010 consisting of 545 flats of different categories. The contract for the said work was awarded to M/s. Omaxe Infrastructures & Contraction Ltd. in May 2010. The work however could not be completed within the stipulated time and was terminated by the respondent on 27.10.2017.

3. It is a case of the appellant that the respondent thereafter floated a Tender inviting bids for execution of the balance work with an estimated cost of Rs.38,33,44,000/- vide a Notice Inviting Tender (NIT) dated 17.10.2017. The stipulated date for completion of work was 10.12.2018.

4. In response to the NIT, the appellant submitted his tender and being the lowest, the work was awarded to the appellant vide a Letter of Acceptance dated 30.11.2017. It was notified in the said letter to the appellant that the period of 12 months for completion of work would be calculated with effect from 10 days from the date of letter of acceptance i.e. 30.11.2017. A formal Agreement dated 17.01.2018 was executed between the parties with an Arbitration Clause being clause no.22.

5. After receiving the LOA, the appellant requested the respondent to hand over the site and issued architectural and structural designs so that the work could be started immediately. It is a case of the appellant that it engaged all its resources and workers alongwith machinery and plants for execution of the work within the time schedule. It is the further case of the appellant that the work was delayed due to reasons solely attributable to the respondent as during the execution of the work, there were several hindrances which are enumerated in detail in the appeal herein. The appellant also claims to have communicated the various hindrances that it faced vide its letter dated 21.11.2018 to the respondent and requested for extension of time.

6. In respect of the work executed from time to time, the appellant submitted various running account bills. 13th RA Bill for Rs.54.21 Lakh was submitted to the respondent on 09.05.2019 for material advance and regular

13th RA Bill dated 12.06.2019 for Rs. 3,66,65,475.94/- was submitted on 14.06.2019. The appellant avers that it requested the respondent several times to record correct measurements, but the respondent took no action.

7. Though the appellant continued to do its work despite all hindrances, yet to its utter shock, the respondent unilaterally terminated the agreement without any cause and also failed to make the payments against the work done. The respondent also prohibited the entry of the appellant's representative, Site Engineer and staff at the project site, on account of which the material and the machinery of the appellant is still in the custody of the respondent.

8. The respondent has started executing the balance work and according to the appellant there is a possibility that it has recorded the measurements of the work executed by the appellant wrongly so as to deny the legitimate dues of the appellant.

9. The respondent has invoked the arbitration clause and appointed Sh. V.K. Maheshwari, as a sole arbitrator.

10. The case of the appellant is that in the said arbitration proceedings where the respondent is the claimant, the primary dispute to be adjudicated is whether the termination of the contract by the respondent was justified or not and as to what work was executed at site and what remained to be executed. Thus, according to the appellant it is necessary that correct measurements of the work executed by it are brought before the arbitrator. Since the project site is in exclusive control of the respondent with no access to the appellant, the appellant apprehended that the records would be manipulated and the

measurements that would be presented by the respondent will not contain the correct figures. Based on this apprehension, the appellant filed an application under Section 17 of the Act seeking the following reliefs :

“a) Direction to the Respondent to conduct a Joint Measurement of the work done at the site by the Applicant / Respondent by allowing both the parties to appoint ONE (1) Representative each to carry out the Joint Measurement of the work executed at the site including hidden measurements as per the drawings/Site order book / Letter of respondent/Letter of Respondent and also to record the measurement of the Work executed by the Appellant but not measured by the Respondent;

b) Direction to the Respondent to preserve all the relevant records pertaining to the Execution of work under the Contract between the parties and to produce the same at the time of Joint Measurement for being jointly attested by the Representative of the parties;

c) Restrain the Respondent Department from carrying out any construction at the site till the time the exercise of joint measurement is completed between the parties;”

11. The respondent thereafter filed its reply to the application and opposed the relief sought on two grounds as under :-

“a) Undisputed Joint Measurements have already been undertaken by a BOO (Board of Officers) appointed by AFNHB.

b) Staying the execution of work by AFNHB will be prejudicial to the allottees of the Project.”

12. After hearing the oral submissions of the parties, the arbitrator vide order dated 19.09.2019, granted liberty to the parties to file their written

submissions. Finally, vide order dated 20.10.2019, the Arbitrator dismissed the application under Section 17 of the Act and it is this order which is impugned before this court in the present appeal.

13. The case of the appellant before the arbitrator was that the appellant despite all hindrances on account of the respondent executed the work at site, after mobilizing all its manpower and tool and machinery. The delay caused in the work was solely attributable to the obstructions and delays caused by the respondent which was brought to its notice by letter dated 21.11.2018. The appellant requested the respondent to record correct measurements in the measurement book so that no dispute arose in future, but despite this the needful was not done by the respondent. It was also argued that the respondent is now executing the balance work on its own and therefore it should be restrained from carrying out any fresh construction at the site till the process of joint measurements is completed with regard to the earlier work. This would rule out any ambiguity with regard to the actual work executed by the appellant on the site. If such measurements are not carried out, the appellant will not be able to prove the actual quantity and the value of work executed by it.

14. The respondent in its detailed reply to the application submitted that there was no merit in the application because after the termination of the contract on 22.06.2019, a Board of Officers (BOO) was constituted by the respondent to jointly measure / assess the value of work done, defective work and taking stock of the material and equipment at the site. Copy of the letter dated 26.06.2019 convening the BOO was sent to the appellant who, in turn, deputed Mr. Tushar Tyagi and Mr. Vijay Garg, to assess the value of

13th RA Bill and participate in the BOO. The representatives attended the proceedings and in this regard various documents have been signed by them. The representatives have not only signed the joint measurements but also the inventory of the material lying at the site. However, when the summary of the BOO proceeding was to be signed at the last stage, both the representatives refused to sign the proceedings. The respondents placed on record before the arbitrator the relevant documents including those signed by the representatives of the appellant. It was further submitted by the respondent that RA Bill nos.1 to 12 were verified by the Architect and Project Director at site and all payments had been released to the appellant. The 13th RA Bill for the work done till 12.06.2019 was highly inflated. The same was verified by the Project Director and the Architect as well as the representatives of the appellant and after assessing the total work done at site the net value was assessed to be Rs.29,56,779.15/- only. Since a large sum of advance had been paid to the appellant and the work was not completed, the same had to be recovered and thus the demand for Rs.41.26 Lakhs was not met with.

15. The learned Tribunal after hearing the parties, observed that it was an admitted case of both the parties that after the joint measurements undertaken by the BOO the respondent had started construction work to complete the balance work at the earliest and further work has in fact been executed at the site, in addition to the work executed by the appellant. In these circumstances, the view of the Tribunal was that any direction for fresh joint measurement will not give the correct picture and would complicate the matter further. The Tribunal also observed that after the appellant submitted its 13th RA Bill on 14.06.2019, the measurements were carried out by the

BOO between 27.06.2019 to 27.07.2019, in which the two representatives of the appellant had participated and had signed all the proceedings, except the summary proceedings of BOO, towards the fag end. The Tribunal was thus also of the opinion that a direction for conducting joint measurements at this stage would amount to rejection of the joint measurement conducted by the BOO, though there is no evidence to reject the report of the BOO. Relevant part of the order is extracted hereinunder :-

18. In my view the short controversy, to be decided, in this application moved under section 17 of the act is, whether a joint measurement of the work done at the site by the Applicant by allowing both the parties to appoint one representative each to carry out the joint measurement of the work, executed at the site including hidden measurements as per the drawing/site order book/letter of Applicant/Letter of Claimant and to record the measurement of work executed by the Applicant but allegedly not measured by the claimant, can be ordered at this stage or not. Applicant has submitted its RA Bill 13th on 14.06.2019 after its own measurements. Thereafter measurements were carried out by the BOO from 27.06.2019 to 27.07.2019 in which the representatives of Applicant, Mr. Tushar Tyagi and Mr. Vijay Garg has participated and also signed all the proceedings except the summary proceedings of BOO.

19. It is the admitted case of the parties that now the Claimant is carrying out the work itself at the site. Claimant in para no.5 of preliminary objection in its reply in this regard submitted as follows:

"It is humbly submitted that this project has been delayed for more than 6 years and the allottees have approached RERA Court wherein the Claimant has been directed to hand over flats to individual allottees along with compensation for delay. In order to avoid further delay and reduce the quantum of

compensation payable to allottees, the Claimant Board, post Joint-Measurement as mentioned above, started execution of balance work in the project"

Even the Applicant in para no. 5 of the application in this regard pleaded as under:

"That furthermore, the Claimant has now started executing the balance work on its own and it is strongly apprehended by the Applicant that in order to deny the Applicant/Respondent its legitimate dues".

20. The contract was terminated on 22.06.2019. The BOO started conducting Joint-Measurement from 27.06.2019 and concluded on 27.07.2019. Present application under section 17 of the act has been moved, on 14.08.2019. The case is at initial stage. The directions for conducting Joint-Measurement, at this stage, will amount to rejection of the joint measurement already conducted by BOO. There is no evidence on the file to out rightly rejected report of BOO at this stage. In my view, without any substantive evidence on the file, such conclusion cannot be arrived at this stage.

21. This tribunal has also gone through the interim orders relied upon on behalf of Applicant, these orders have been passed according to the peculiar facts and circumstances of the. respective cases. As discussed above the facts and circumstances of the case in hand are entirely different. It is admitted case of both parties that after the termination of the contract and after the joint measurement undertaken by BOO, Claimant has started construction work to complete the Project at the earliest in view of the various proceedings initiated by the allottees and penalty imposed on the claimant by the RERA. In these circumstances it is established on the record that after termination of the contract of the applicant on 22.06.2019 further work has. been executed at the site by the Claimant in addition to the work executed by the Applicant. However, it is not clear, as to how much additional work has been executed by

the Claimant,. thus the facts of the case in hand are different. In these circumstances the direction for fresh joint measurement will not give the correct picture rather it will further complicate the matter.

22. In view of above discussion this arbitral tribunal is of opinion that at this stage parties cannot be directed to conduct a fresh joint measurement as claimed in prayer (a) of this application under section 17 prayer (b) and (c) are supplementary to the prayer (a) are also declined in view of my finding qua the prayer (a). Accordingly the present application is dismissed.”

16. The application was dismissed by the Tribunal.

17. Learned counsel for the appellant has contended before this Court that it completed the work upto the 13th RA Bill, yet the outstanding dues have not been paid. The delay in work, if any, was on account of the hindrances created by the respondent and the termination was thus illegal. The main plank of the argument is that the arbitrator is seized of the controversy as to whether the termination was illegal and the extent of work done by the appellant and thus it is imperative that the correct joint measurements for the work executed by the appellant be brought before the arbitrator.

18. Learned counsel for the appellant contended that the balance work is being executed by the respondent on its own. The appellant is not given access to the site and all the records are in the custody of the respondent. If at this stage the appellant is not permitted to take joint measurements and the balance work is executed any further, it would be impossible to work out the actual work done and the value of the work executed by the appellant. Learned counsel further submits that the appellant has a serious

apprehension that the measurement so recorded in the measurement books do not reflect the true measurements for the work actually executed at the site and the respondent may have manipulated the measurements.

19. Learned counsel next contends that the finding of the arbitrator that a Board of Officers was constituted for the purposes of recording the joint measurement is neither here nor there, since a bare perusal of the Convening Order of the BOO would show that it was convened only for the purpose of taking stock of the material lying in the stores of the appellant and not for the purposes of joint measurements. It is also contended that in so far as the representatives sent by the appellant are concerned, they never actually participated in the joint measurements and this is indicated from the fact that the minutes of the BOO and its summary does not bear their signature. In so far as their signatures on the proceedings are concerned, it is argued that they were coerced into signing on these proceedings. It is further submitted that Mr. Tushar Tyagi was not the authorized person or representative of the appellant for carrying out any measurements. Even the earlier Bills were signed by Mr. Vipul Aggarwal, who continued to be the notified Project Manager. Mr. Tyagi had no expertise to assist in joint measurements and in fact he has left the employment of the appellant and has joined the instant project alongwith the respondent. Thus, according to the appellant the veracity of the joint measurements is completely doubtful.

20. It is next argued that even the constitution of the BOO was outside the purview of the agreement between the parties. The constitution of the Board is purportedly under clause 7 of the contract, but a bare perusal of the clause shows that it does not enable the constitution of any BOO.

21. Learned counsel next contends that a perusal of the report of BOO would show that proper measurements were not undertaken by the Board. As per the 13th RA Bill, the gross work done till 24.06.2019 was Rs.18,87,82,923.28/- whereas as per the Report, the gross value of work done is Rs.18,65,40,652.40/-.

22. Learned counsel for the respondent on the other hand arguing to the contrary, submits that on 18.06.2019 the respondent had sent a communication to the appellant requesting it to depute its representative for verification of 13th RA bill, followed by a reminder on 21.06.2019. On 24.06.2019, during the course of hearing of a petition under Section 9 filed by the appellant, the respondent had submitted that the appellant had failed to depute its representatives for assessment of the work done and the counsel for the appellant had orally consented to depute a representative. The consent of the counsel is mentioned in the communication dated 25.06.2019. On 26.06.2019, the respondent again reminded the appellant to depute the representative to participate in the assessment of the work done and taking stock of the inventory by BOO and it was also intimated that the Board would assemble on 27.06.2019 at 9.30 a.m. The appellant was also requested for joint videography of the work done and the material lying at the site. The appellant deputed two representatives and as per clause 17 of the contract, joint measurements were carried out in the presence of the representatives of the appellant, the Architect and the Project Director. The process continued between 27.06.2019 and 27.07.2019. The representatives participated in the joint measurements and this was duly videographed. They also signed on the sheets recording the joint measurements and the inventory. However, they stopped coming from 27.07.2019, when the

summary report was to be signed. In these circumstances, it is vehemently opposed that no further joint measurements should be permitted to be carried out.

23. Learned counsel for the respondent further contends that because of the non-execution of the project in time, the allottees are suffering and the respondent has had to suffer complaints in RERA Tribunal at Noida and Lucknow. Faced with these circumstances, the respondent resumed the construction work on its own and the work has proceeded to a great extent. At this stage, permitting the joint measurements would cause a hindrance to the work of construction, besides the same would not entail any result as it would be difficult to segregate the work executed by the appellant, from the present work, at site.

24. I have heard the learned counsels for the parties and examined their contentions.

25. The sum and substance of the argument of the appellant is that there is an apprehension that the joint measurements carried out may have been manipulated the respondent and may not reflect the actual work executed at the site. Thus, before the arbitration proceeds further, the appellant should be permitted to carry out joint measurements again, so that the exact value and volume of work is known. Per contra, the argument of the respondent is that measurements had been recorded by the BOO as per the contract, in the presence of the representatives of the appellant, who have signed on the proceeding sheet and there is no provision in the contract or any other law, under which this exercise should be undertaken again. A practical difficulty

has also been expressed on account of the construction being underway for completing the balance work.

26. Having examined the contentions and the impugned order, I am of the view that there is no error in the order passed by the Arbitral Tribunal. The BOO was convened for taking stock of the material lying at the site as also for taking joint measurement. The appellant is not right in its contention that the BOO was not tasked with carrying out the onsite work assessment or the joint measurements. Learned counsel for the respondent during the course of the hearing, handed over a compilation, with a copy to the appellant, which contains a Convening Order by which the BOO was constituted and it also has the 'terms of reference' for the BOO. The respondent is right in its contention that the terms of reference were very detailed and included on site work assessment as well as recording joint measurements of the work executed by the appellant. Respondent has also shown various documents to the Court, which are proceedings of onsite measurements. Thus, it cannot be said that the BOO did not undertake the task of joint measurements.

27. A perusal of the measurement sheets clearly reflects the signatures of the representatives of the appellant and there is no doubt in the mind of this Court that the representatives duly participated in carrying out the joint measurements. It is not understood nor explained by the appellant as to why towards the fag end, the representatives chose not to sign the summary / report of the BOO. The argument of the appellant at this stage, that the representatives were not authorized to participate in the joint measurements or did not have the necessary skill or expertise for the task, only deserves to be rejected. If the representatives were not authorized, one does not

understand in what capacity and for what reason, they were participating in the proceedings and under whose authority. If they did not have the necessary expertise or authority, the appellant should not have deputed them at the initial stage itself. Once the measurements have been recorded and signed, in the opinion of the Court this argument is nothing but an after-thought to wriggle out of the measurements recorded by the BOO and only merits rejection.

28. The Arbitral Tribunal, in my opinion, is also right in observing that once the balance work has now started on site and the construction is in full swing, it is practically impossible to segregate the work and carry out measurements of the work executed earlier by the appellant. The project relates to construction of flats allotted to the Armed Forces personnel who are in need of the flats. The work has already been delayed and any such exercise for conducting joint measurements would further delay the project and cause hindrance in the ongoing work besides the impracticability as rightly noted by the tribunal.

29. The law on interference in an order passed by the Arbitral Tribunal under Section 17 of the Act in a proceeding under Section 37 is well settled. It has been held by this Court in ***Green Infra Wind Energy Limited v. Regen Powertech Private Limited*** 2018 SCC Online Del 8273 as under:

“16. In my view, the Arbitral Tribunal has balanced the equity between the parties and has considered the submissions made by the parties before the Arbitral Tribunal. This Court in exercise of its power under Section 37 of the Act cannot interfere with the order passed by the Arbitral Tribunal under Section 17 of the Act unless the discretion exercised by the

Tribunal is found to be perverse or contrary to law. As an Appellate Court, the interference is not warranted merely because the Appellate Court in exercise of its discretion would have exercised the same otherwise.”

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“20. In view of the above, the Arbitral Tribunal having exercised its discretion and found a balance of equity between the parties, this Court in exercise of its power under Section 37(2)(b) of the Act would not interfere with the same unless it is shown that the discretion so exercised is perverse in any manner or contrary to the law. In the present case, no such exception has been made out by the appellant.”

30. The Court relied upon the various judgements as under:

“17. In Wander Ltd. v. Antox India P. Ltd., 1990 Supp SCC 727, the Supreme Court while dealing with the power of the Appellate Court under the Code of Civil Procedure, 1908 has held as under:

“13. On a consideration of the matter, we are afraid, the Appellate Bench fell into error on two important propositions. The first is a misdirection in regard to the very scope and nature of the appeals before it and the limitations on the powers of the Appellate Court to substitute its own discretion in an appeal preferred against a discretionary order. The second pertains to the infirmities in the ratiocinations as to the quality of Antox's alleged user of the trade-mark on which the passing-off action is founded. We shall deal with these two separately.

14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the Appellate Court will not interfere with the exercise of discretion of the court of first

instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the Trial Court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in Printers (Mysore) Private Ltd. v. Pothan Joseph: (SCR 721)

“... These principles are well established, but as has been observed by Viscount Simon in Charles Oseption & Co. v. Jhanaton ...the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case.”

The appellate judgment does not seem to defer to this principle.”

18. Recently in Ascot Hotels and Resorts Pvt. Ltd. v. Connaught Plaza Restaurants Pvt. Ltd., Arb.A.(Comm) 12/2017, this Court again reiterated the above mentioned principle.

19. This Court in Bakshi Speedways v. Hindustan Petroleum Corporation, 2009 SCC OnLine Del 2476, has held that the same principles will apply even in case of an appeal under Section 37(2)(b) of the Act. Paragraph 4 of the said judgment is quoted herein below:

“4. The principles applicable to an appeal under Section 37(2)(b) in my view ought to be the same as the principles in an appeal against an order under Order 39 Rules 1 and 2, CPC i.e., unless the discretion exercised by the Court against whose order the appeal is preferred is found to have been exercised perversely and contrary to law, the appellate Court ought not to interfere with the order merely because the appellate court in the exercise of its discretion would have exercised so otherwise. I had at the beginning of the hearing itself inquired from the senior counsel for the appellant as to what could be said to be perverse in the exercise of discretion by the Arbitral Tribunal in the exercise of powers under Section 17 of the Act and as to how the said interim measures granted by the Arbitral Tribunal could be said to be contrary to law; it was further pointed out that in the opinion of this court, on the perusal of the memorandum of appeal, the only ground which appeared to have some force was the ground taken in the memorandum of appeal of the arbitrator as on the date of making of the order having become functus officio.”

31. In my view no ground is made out by the appellant for interference in the impugned order. There is no perversity or patent illegality in the order

and the view is a plausible view based on documents and provisions of the contract.

32. I thus find that there is no infirmity in the impugned order passed by the Arbitral Tribunal. The appeal has no merits and is hereby dismissed.

I.A. No. 16478/2019

In view of the above, the present application is hereby dismissed.

JYOTI SINGH, J

NOVEMBER 27, 2019
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