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

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Judgment delivered on: 18.02.2020

+ FAO 86/2020 & CM APPLS. 6614-6617/2020

UNION OF INDIA

..... Appellant

versus

M/S PROMINENT BUILDERS

..... Respondent_

Advocates who appeared in this case:

For the Petitioner:

Mr.Jaswant Rai Aggarwal, Advocate

For the Respondents/Caveators:

Mr.R.Rajappan, Advocate.

CORAM:-

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J. (ORAL)

CM APPL. 6615-6617/2020 (Exemption)

Allowed, subject to all just exceptions.

CAV. 159/2020

Since learned counsel for the respondent/caveator has entered appearance, the caveat is discharged.

FAO 86/2020

1. Appellant, by this appeal under section 37 of the of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act), impugns order dated 25.09.2019 whereby the objections of the appellant, under Section 34 of the Act, impugning arbitral award dated 30.06.2014 have

been dismissed.

2. Learned counsel for the appellant seeks to impugn the order on two counts. It is contended that the Trial Court while considering the objections under Section 34 of the Act have erred in not noticing that on the one hand the Arbitral Tribunal has held that delay beyond the stipulated period was attributable to the respondent and on the other hand has awarded damages and losses for the loss of profitability due to prolongation of the contract.

3. Second ground of challenge is that the Trial Court has erred in not noticing that the Tribunal had erred in not awarding the counter claim of the appellant whereby appellant had claimed amounts for damage of reputation due to the respondent failing to fulfil the commitment in time and due to poor workmanship of the respondent/contractor.

4. I am unable to accept the contentions of learned counsel for the appellant for the reasons that challenge under Section 37 of the Act is much narrower than a challenge under Section 34 of the Act.

5. The Supreme Court in *McDermott International Inc. v. Burn Standard Co. Ltd. and Ors.* (2006) 11 SCC 181 held as under:

“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.”

6. 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 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 of the Act 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 of the Act 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.

7. If the Arbitrator has taken a view which the court finds reasonable and plausible, the court would certainly not interfere.

8. The extent of judicial scrutiny under Section 34 of the Act is limited and scope of interference is narrow. Under Section 37 of the Act, the extent of judicial scrutiny and scope of interference is further narrower. An appeal under Section 37 of the Act 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.

9. In this case, no doubt that the Arbitral Tribunal has held that the delay is attributable to the respondent, however, while considering the claim No.5 of the respondent i.e. claim on account of damages and losses for the loss of profitability due to prolongation of the contract, the Arbitral Tribunal has only awarded the overhead expenditure @ 2% during the original time of completion of 15 months. The Arbitral award has not awarded any amount beyond the stipulated date of completion of the contract as is evident from paragraph 5.5 of the award which reads as under:-

“5.5. During original time of completion of 15 months overhead expenditure @ 2% per month on tendered value of ₹44005724/- works out to ₹58674/- or say ₹60000/- per month. Total amount for 4.7 months works out to ₹282000/-.

I award ₹282000 to claimant against claim No.5.”

10. The claim of the respondent had been of ₹74,57,000/-. The Arbitral Tribunal in paragraph 5.1 has given detailed calculations as to how the

Tribunal has come to the figure of 4.7 months. The Arbitral Tribunal has held that the contractor is not entitled for loss of overhead expenditure for 4.5 months but is entitled for full loss of overhead expenditure of 1.5 months and entitled for half of the overhead losses for the loss of the time upto 31.03.2005. 31.03.2005 being the date of completion of the contract after giving benefit to the respondent for the period of delay attributable to the appellant themselves.

11. With regard to the rejection of the counter claim of the appellant on account of damage of reputation and poor workmanship the Tribunal has held as under:-

“Under provisions of Clause 2, liquidated damages up to 10% on tendered value of ₹440005724/- could only be imposed up on contractor. It is noticed that against liquidated damages of ₹4400057/- that could have been imposed up on contractor in case entire delay attributable to contractor, a sum of ₹660086/- was only imposed up on contractor. This indicates that contractor was not fully responsible for delayed completion. If so much damage were really suffered by respondents then they would have imposed liquidated damages @ 10% of tendered value. Liability of contractor for delayed completion has already been fixed under Clause 2 which is limited to 10% of tendered value and respondents have not even exercised their rights to that extent. If contractor has executed bad work or poor quality work then respondents are responsible for their inaction in accepting poor quality work despite all powers conferred on Executive Engineer to get such bad work dismantled and got it re-done at the cost of contractor. If there is any loss to the reputation of department then respondents are responsible themselves. I find no merit in the claims.

I award ‘Nil’ amount to the respondents against their claim No.1 & 2.”

12. The Arbitral Tribunal has clearly held that appellants, under the

condition of contract, could have imposed liquidated damages upto 10% of the tendered value. The liquidated damages that could have been imposed were ₹44,00,057/- but the damages that were imposed were only ₹6,60,086/- which clearly indicated that even as per the appellants the loss occasioned on account of this claim was not beyond the amount of damages imposed. Further the Tribunal has held that if the workmanship was not upto the mark then the appellant should not have accepted the work done by the respondent and issued the completion certificate.

13. I find no infirmity in the view taken by the Trial Court in holding that no ground has been made out under Section 34 of the Arbitration and Conciliation Act to set aside the award.

14. I find no merit in the appeal.

15. The appeal is accordingly dismissed.

SANJEEV SACHDEVA, J

FEBRUARY 18, 2020

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