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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Reserved on: 21st November, 2019
Pronounced on: 14th May, 2020

+ **O.M.P.(COMM) 156/2017**

UNION OF INDIA Petitioner
Through: Mr.Ripu Daman Bhardwaj,
CGSC with Mr.T.P.Singh,
Advocate with Mr.Ashok
Kumar Suneja & Mr.Charanjeet
Lal, Officials.

versus

M/S SATISH BUILDERS Respondent
Through: Mr.Sunil K.Mittal, Mr.Anshul
Mittal & Mr.Harshit Vashisht,
Advocates.

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CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

J U D G M E N T

1. This petition under Section 34 of the Arbitration & Conciliation Act, 1996 [hereinafter, "the Act"], has been filed by the Central Public Works Department, Union of India [hereinafter, "CPWD"] against an award dated 22.02.2011 rendered by a sole arbitrator.

Facts

2. The arbitral proceedings arose out of an agreement between the parties dated 24.05.2003, pursuant to a tender floated by CPWD in

February, 2003. The contract was for civil and electrification work for 62 family quarters for CRPF Academy at Kadirpur, District Gurgaon. It was awarded to the respondent by a letter dated 24.05.2003 and was to be completed within fifteen months from the starting date of 03.06.2003, i.e. by 02.09.2004. The negotiated amount payable to the respondent under the tender was ₹2,04,14,910/-. The contract was not completed within the stipulated time, for which each of the parties placed responsibility upon the other. This led to the rescission of the contract by CPWD on 24.09.2005 and to the invocation of arbitration by the respondent under clause 25 of the agreement. Mr. Chandra Pal, a former Additional Director General of CPWD was appointed as the arbitrator.

3. In the statement of claims filed before the arbitrator, the respondent detailed the allegations against the CPWD and raised eighteen claims against it. The heads of the claims are summarised below:

Claim No.	Particulars	Amount
1.	Work executed but not paid. a) Civil b) Electric Total:	 ₹8,77,140.84 ₹1,79,280.00 ₹10,56,420.84
2.	Amount withheld due to non-achievement of milestones.	₹6,18,000/-
3.	Damages on account of deployment of personnel during extended period [September, 2004-February, 2005]	₹2,40,000/-

4.	Damages for idling/under utilization of tools and machinery.	₹13,84,902/-
5.	Release of performance bank guarantee.	₹10,20,250/-
6.	Refund of security deposit.	₹15,33,092/-
7.	Loss of profits.	₹16,44,550/-
8.	Escalation in the value of work during the extended period of the contract.	₹3,80,219/-
9.	Excess interest on mobilization advance.	₹64,607/-
10.	Interest on performance guarantee.	₹10,20,750/-
11.	Interest on delayed payment of bills.	₹37,145/-
12.	Interest on payment for extra work done.	₹7,188.18
13.	Due under clause 10 CC during the stipulated period of completion.	₹10,67,102/-
14.	Refund of interest paid on mobilization advance.	₹10,00,000/-
15.	Refund of bank charges towards bank guarantee.	₹91,881/-
16.	Refund of bank charges for release of bank guarantees.	₹24,158/-
17.	Interest on all due amounts.	18% interest on all the due amounts
18.	Costs.	₹2,00,000/-

4. In the counter statement of facts filed before the arbitrator, the CPWD denied each of the claims on merits contending that the delay

was in fact attributable to the respondent. In addition, CPWD made five counter claims, as summarized below:

Counter Claim No.	Particulars	Amount
CC-1.	Completion of balance work at risk and cost of respondent.	₹31,55,439/-
CC-2.	Compensation under clause 2 of the agreement.	₹20,41,491/-
CC-3.	Claim under bank guarantee.	₹10,20,750/-
CC-4.	Interest.	@ 18% per annum
CC-5.	Costs.	₹50,000/-

5. Upon a consideration of the claims and counter claims, the arbitrator has rendered a finding that the delay was attributable to both the parties and the repudiation of the contract was not the most appropriate alternative available to the CPWD. The arbitrator has regarded it as just and reasonable to treat the contract as closed and settle the accounts in a fair and equitable manner. Applying this yardstick, he has awarded a sum of ₹22,22,990/- [plus interest] in favour of the respondent as follows:

Claim No.1 (civil) (electrical)	₹85,032/- ₹22,750/-
Claim No.2.	₹6,00,000/- + interest @ 9% per annum
Claim No.3.	₹1,02,000/-
Claim No.4.	₹3,40,000/-

Claim No.5.	Not adjudicated as the matter was <i>sub judice</i>
Claim No.6.	₹9,95,208/- + interest @ 9% per annum
Claim No.7.	Nil
Claim No.8.	₹78,000/-
Claim No.9.	Nil
Claim No.10.	Nil
Claim No.11.	Nil
Claim No.12.	Nil
Claim No.13.	Nil
Claim No.14.	Nil
Claim No.15.	Nil
Claim No.16.	Nil
Claim No.17.	Interest @ 9% per annum
Claim No.18.	Nil

Counter Claim No.1.	Nil
Counter Claim No.2.	Nil
Counter Claim No.3.	Not adjudicated as the matter was <i>sub judice.</i>
Counter Claim No.4.	Nil
Counter Claim No.5.	Nil.

6. In the present petition, the CPWD has challenged the award in respect of all the claims awarded [Claims No.1, 2, 3, 4, 6, 8 & 17] and also in respect of counter claim Nos. 1, 2, 4 & 5.

Submissions

7. The principal grievance of CPWD, advanced by Mr. Ripu Daman Bhardwaj, learned counsel, is that the arbitrator has erred in holding that (a) the parties were both responsible for the delay in completing the contract, and (b) that the rescission of the contract by the CPWD was inappropriate. He submitted in the alternative that, even on the arbitrator's reasoning that both parties were responsible for the delay, the arbitrator was unjustified in allowing the respondent's claims partially while rejecting all the counter claims altogether. On facts, Mr. Bhardwaj submitted that 75% of the site was handed over to the respondent on 03.06.2003 alongwith the final drawings for execution of the work on that portion of the site. The remainder of the site was handed over on 25.08.2003, by which time the respondent had not even commenced work on the part of the site handed over earlier. He referred to the materials on record to submit that the required advances were released to the respondent well in time and that the delay was occasioned by inadequate deployment of labour and resources by the respondent. Mr. Bhardwaj contended that the arbitrator had ignored clause 5 of the agreement which was with regard to the milestones required to be achieved and the consequences of failure to achieve those milestones. With regard to claim no. 8 awarded by the arbitrator, Mr. Bhardwaj contended that the formula in Clause 10CC of the General Conditions of Contract for CPWD is inapplicable to the agreement in question and had been erroneously applied by the arbitrator. Reliance has been placed by him on *State of*

Orissa vs. Sudhakar Das (dead) by LRs (2000) 3 SCC 27 in this regard.

8. Mr. Sunil Mittal, learned counsel for the respondent submitted that the impugned award is based on a consideration of the evidence before the arbitrator and these findings are not liable to be set aside on the grounds permitted under Section 34 of the Act. He emphasised that the arbitrator was an engineer and an expert in the field. Mr. Mittal submitted that the counter claims were different in nature from the claims raised by the respondent herein, inasmuch as the respondent's claims were for compensation for work actually done whereas the petitioner's counter claims were in fact by way of damages arising out of the termination of the contract, which the arbitrator had held invalid. He also pointed out that the petitioner had conceded before the arbitrator that counter claim no.2 was beyond the scope of arbitration. Mr. Mittal submitted that the award on claim no. 8 [with regard to escalation] was justified, relying *inter alia* upon the decision of the Supreme Court in *K.N. Sathyapalan (Dead) by LRs. vs. State of Kerala & Anr.* (2007) 13 SCC 43.

Analysis

Scope of Interference under Section 34 of the Act:

9. It must be noted at the outset that the scope of interference by the Court under Section 34 of the Act is extremely limited. The principles upon which an arbitral award must be tested have been laid down by the Supreme Court *inter alia* in *Associate Builders vs. Delhi Development Authority* (2015) 3 SCC 49 and *Ssangyong*

Engineering & Construction Co. Ltd. vs. National Highways Authority of India (2019) 15 SCC 131.

10. In *Associate Builders* (supra) the Court held *inter alia* as follows:-

“17. It will be seen that none of the grounds contained in sub-section (2)(a) of Section 34 deal with the merits of the decision rendered by an arbitral award. It is only when we come to the award being in conflict with the public policy in India that the merits of an arbitral award are to be looked into under certain specified circumstances.

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29. It is clear that the juristic principle of a “judicial approach” demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

30. The audi alteram partem principle which undoubtedly is a fundamental juristic principle in Indian law is also contained in Sections 18 and 34(2)(a)(iii) of the Arbitration and Conciliation Act.

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31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

- (i) a finding is based on no evidence, or*
- (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or*

(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

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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. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts....

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42. In the 1996 Act, this principle is substituted by the “patent illegality” principle which, in turn, contains three subheads:

42.1 (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:

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42.2 (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality – for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.

42.3 (c) *Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:*

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This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.”

11. In *Ssangyong Engineering* (supra), these principles have been reiterated in the following terms:-

“37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

38. Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

39. To elucidate, para 42.1 of Associate Builders, namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set

aside an arbitral award. Para 42.2 of Associate Builders, however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders, namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders, while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.

42. Given the fact that the amended Act will now apply, and that the “patent illegality” ground for setting aside arbitral awards in international commercial arbitrations will not apply, it is necessary to advert to the grounds contained in Sections 34(2)(a)(iii) and (iv) as applicable to the facts of the present case.”

Background Issues determined by the Arbitrator:

12. Applying these principles to the present case, I find that, before dealing with the particular claims and counter claims, the arbitrator has examined three background issues - (i) responsibility for delay in execution of the work, (ii) justification for withholding of amounts on account of not achieving milestones and, (iii) justification for rescission of the contract. On each of these issues, the finding of the arbitrator turns on an appreciation of the evidence placed before him. He has examined the drawing register and site order book to come to the conclusion that there was partial delay in the respondent furnishing the lay out plans. He has also found some delay in respect of handing over of the site for Type-III quarters and that subsequent change in the plinth level of Type-III quarters, and other changes in decisions by the CPWD, could also contribute to partial delay. The arbitrator has similarly found some delays attributable to the respondent and therefore returned the finding that both parties are responsible for delay. The aforesaid findings of the arbitrator make express reference to the materials which he has considered. As held by the Supreme Court (*inter alia* in *Ssangyong Engineering*, cited above) the re-appreciation of the evidence laid before the arbitrator is beyond the scope of proceedings for setting aside an award. The award can be set aside only if it is found to be entirely unsupported by evidence or in disregard of material evidence or otherwise perverse in the sense that no reasonable person could have returned the finding given by the arbitrator. In the present case, the finding of the arbitrator with regard

to the responsibility for the delay does not suffer from any of these defects. In addition, the arbitrator was an expert in the field and awards of experts, at least on the technical aspect of the matter, are entitled to particular deference. Reference in this connection may be made to *Delhi Development Authority vs. Madan Construction Company* (2008) 1 Arb.LR 499 (paragraph 9) and *IRCON International Limited vs. Arvind Construction Company Ltd. & Anr.* (1999) 81 DLT 268 (paragraph 10). To apportion the delay to both parties found responsible is also within the province of the arbitrator, as held by this Court, *inter alia*, in *M/s Deconar Services Pvt. Ltd. vs. National Thermal Power Corporation* [O.M.P 254/2000, decided on 16.12.2009].

13. Similarly, on the question of achievement of milestones, the arbitrator has come to the conclusion that the progress recorded by the respondent with regard to the first milestone was reasonable in view of the site conditions, and that the achievement of the second and the third milestones were impeded by hindrances for which the CPWD was at least partially responsible. These conclusions follow from the arbitrator's findings on delay and do not call for any interference.

14. It is for the same reason that the rescission of the contract has been found unjustified. Having come to the conclusion that both parties were responsible for the delay, the arbitrator has reasoned that the contract could not have been unilaterally rescinded. The approach of the arbitrator, treating the contract as closed and working out the rights and liabilities of parties on that basis was not an unreasonable

or fanciful approach and is therefore not vulnerable to scrutiny under 34 of the Act.

15. The arbitrator's award on each of the specific claims and counter claims is a corollary to the background findings dealt with above. The arbitrator has proceeded to consider the claims and counter claims on the basis that the respondent is required to be compensated for the work actually carried out by it, and neither party is entitled to damages against the other. As far as the additional claims of the respondent are concerned [on account of escalation etc.], those have been awarded to the extent of 50%, i.e. each of the parties bears 50% of the additional burden caused by the delay.

16. I am not impressed by Mr. Bhardwaj's submission that the claims and counter claims have been treated unequally. The award of 50% of the claims to the respondent is on the basis that the respondent was compelled to incur extra expenditure during the extended period of the contract, for which the parties ought to share the burden. The counter claims, particularly with regard to the balance work having been completed at the risk and cost of the respondent, on the other hand, are predicated upon the lawful termination of the contract. The arbitrator clearly found the rescission to be unjustified and the counter claims of CPWD, which had arisen only as a consequence of the rescission, were therefore rightly disallowed.

Award on Impugned Claims:

17. Returning now to the specific claims and counter claims, I find that the respondent's claim of approximately ₹10.56 lakhs towards

civil and electrical work executed but not paid [claim no. 1] for has been allowed by the arbitrator to the extent of ₹1.07 lakhs. The arbitrator has considered the claim with regard to the civil work in Part A of the award and with regard to electrical award in Part B of the award. In both cases, the arbitrator has examined the correspondence and the bills submitted by the respondent. For the civil work, he has relied upon the measurement taken by the CPWD itself which showed that the value of work done since the previous bill was ₹1,21,765/- out of which recoveries of ₹36,733 have been found permissible. As far as electric work is concerned also, the arbitrator has accepted the gross amount worked out in the final bill prepared by the CPWD. He has permitted statutory recovery and recovery for material received from CPWD. The arbitrator's discussion on both aspects of this claim is entirely factual and his findings turn on an appreciation of the evidence. No interference under Section 34 is called for.

18. With regard to claim no.2 [refund of the amounts withheld for failure to achieve the milestones], a sum of ₹6,00,000/- was withheld from the respondent's invoices in three installments of ₹2,00,000/- each for failure to achieve three milestones. In the written submissions filed by Mr. Bhardwaj, it is contended that the award on this account is beyond the terms of the contract. These withholdings were based on the contractual provision appearing in clause 5, flyleaf no. 5 of the agreement which contains the following table:-

“(i) Fly Leaf no.5 for clause 5 on page 43 of Agreement, amount to be withheld if stage is not achieved is as follows:

<i>Milestone</i>	<i>Stage</i>	<i>Amount to be withheld if stage is not achieved</i>
<i>Milestone 1</i>	<i>1/8th of work in 1/4th time</i>	<i>Rs.2.00.000/-</i>
<i>Milestone 2</i>	<i>3/8th of work in 1/2 time</i>	<i>Rs.2.00.00/-</i>
<i>Milestone 3</i>	<i>3/4th work in 3/4th time</i>	<i>Rs.2.00.000/-</i>

”

19. While awarding refund of these amounts with interest, the arbitrator has noticed that the site conditions and hindrances justified the imposition of a lower milestone [with respect to the first milestone] and could not support withholding of amounts on this account for any of the milestones. The logic of the award is that the contractor cannot be penalized for failure to achieve milestones which are either unreasonably set or unachievable due to hindrances for which the CPWD itself was wholly or partially responsible. This reasoning cannot be said to be absurd or perverse justifying interference under Section 34 of the Act. The arbitrator's finding is based on an interpretation of the contract and appreciation of the evidence. Both these considerations were well within his jurisdiction.

20. Claim nos. 3 and 4 were respectively for ₹2,40,000/- and ₹13,84,902/- on account of deployment of personnel during the extended period of the contract and for idling/under utilisation of tools and machinery. The arbitrator has examined the justification offered by the respondent for the said claims and, to the extent the claims were found justified, half of the amount has been attributed to the

respondent itself and the award has been made for the balance. Such apportionment has been held by this Court in *M/s Deconar Services (supra)* [paragraph 8] to be permissible. There is no reason to interfere with the award on this count.

21. Claim no. 6 [refund of security deposit] has been partially allowed on the reasoning that the contract is required to be treated as closed and the accounts had been settled between the parties. Having upheld the above finding, I do not find any ground to interfere with the award on this claim.

22. Claim No.8 is predicated upon the respondent's contention that it is liable to be compensated for the escalation after the stipulated date of completion. The contention of the CPWD is that under the contract in question Clause 10CC of the General Conditions of Contract for CPWD was inapplicable and the respondent was not entitled to escalation. The Division Bench judgment of this Court in *Anurodh Constructions vs. Delhi Development Authority & Anr.* (2005) 84 DRJ 314 [paragraphs 9 to 11] makes it clear that Clause 10CC of the General Conditions of Contract for CPWD can be applied for computation of the amount payable even when the clause is itself not applicable and the damages have been awarded under Section 73 of the Indian Contract Act, 1872. As the arbitrator has rendered a specific finding in the present case that both the parties are responsible for the delay thus, the judgment in *Sudhakar Das (dead)* (*supra*) cited by Mr. Bhardwaj is not applicable.

23. Mr. Mittal, learned counsel for the respondent, relied in this connection upon the decision of the Supreme Court in

K.N.Sathyapalan (supra). In the said judgment [paragraphs 31 and 32], the Supreme Court has upheld the grant of escalation for the period beyond the stipulated date of completion of the contract when the blame for the delay was not attributable to the contractor alone. The objection of the CPWD in the present case is therefore rejected.

24. Claim no. 17 for interest was awarded at the rate of interest of 9% p.a. on the allowed claim, no specific challenge has been pressed in this regard.

Award on Impugned Counter Claims:

25. Counter claim no. 1 [both in respect of civil work and electrical work] is based on the contract given by the CPWD to a third party for executing the balance work after the rescission of the contract with the respondent. As stated hereinabove, the rescission having been held to be invalid, the rejection of the counter claim on this account was justified.

26. As far as counter claim No.2 is concerned, although the prayers in the petition include a challenge to the rejection of the said counter claim, the same was neither urged in oral arguments nor pressed in the written submissions. It is also recorded in the impugned award that, at the hearing on 17.04.2010, both parties had agreed that levy of compensation under clause 2 of the agreement is non-arbitrable. The grounds in the petition, insofar as they relate to counter claim No.2, do not challenge this recording in the impugned award. The impugned award on this ground, therefore, does not call for interference.

27. Counter claims no. 4 and 5 are for interest and costs respectively. As the CPWD has not succeeded in any of its substantive counter claims, the challenge to the award on these counter claims does not survive.

Conclusion

28. In view of the aforesaid, the petitioner has failed to make out any ground for any ground for interference with the award under Section 34 of the Act. The petition is therefore dismissed.

PRATEEK JALAN, J.

MAY 14, 2020

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