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

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Date of Decision: 29 November 2021

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O.M.P. (COMM) 348/2021 & I.A. 15537/2021 & I.A. 15539/2021, I.A. 15538/2021 (for exemption)

UNION OF INDIA

..... Petitioner

Through

Mr. Sushil Kumar Pandey & Ms.
Richa Pandey, Advs.

Versus

M/S AADHAR STUMBH TOWNSHIP PVT
LTD.

..... Respondent

Through

None.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

VIBHU BAKHRU, J. (ORAL)

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the A&C Act') challenging an arbitral award dated 14.07.2020 (hereafter 'the impugned award') passed by the Arbitral Tribunal comprising of a Sole Arbitrator (hereafter 'the Arbitral Tribunal').

2. The petitioner states that after the impugned award was delivered, the parties filed an application under Section 33 of the A&C Act seeking certain corrections. The said application was disposed of by the Arbitral Tribunal on 27.08.2020 and therefore, the period of limitation under Section 34(3) of the A&C Act is required to be reckoned from that date.

3. The petitioner states that on 10.12.2020, the petitioner filed its petition under Section 34 of the A&C Act before the District Court, being OMP (COMM) 103/2020 captioned *Union of India v. M/s Aadhar Stumbh Township Pvt. Ltd.*. However, the said petition was disposed of as withdrawn as the learned District Judge found that the court did not have pecuniary jurisdiction to entertain the said petition. Consequently, the petitioner has filed this petition.

Factual Background

4. The petitioner [CPWD, Ministry of Urban Development, Government of India] had issued a Notice Inviting Tenders (NIT) for the construction of office building and staff quarters at Mandawali, Fazalpur, Delhi [SH. C/o T-III-16 Nos. and T-II-32 Nos. (8 Story)] and basement including an internal electrical installation. The respondent submitted its bid, which was opened on 09.10.2012. The respondent was declared successful and the petitioner issued a Letter of Intent (hereinafter 'LoI') dated 30.01.2013 for awarding the Contract in favour of the respondent. The aforesaid Contract awarded to the respondent at a negotiated value of ₹10,70,67,114/-, which was about 10.35% below the estimated cost of ₹ 11,94,26,929/-.

5. The date of commencement of the work was stipulated as fifteen days after issuance of the LoI. Thus, the works were to commence on 14.02.2013. The Contract was to be completed within a period of 450 days and the expected date of completion was agreed as 09.05.2014.

6. The works were completed on 19.06.2015. There is some

controversy regarding the date of completion of the works. The petitioner claims that the parties had agreed that the works were completed on 19.06.2015, however, the physical works were completed on 21.06.2021. This controversy is not material.

7. The Final Bill was submitted on 17.09.2015 and the respondent claimed that the balance amount of ₹4,14,19,475/- was due. Thereafter, on 15.10.2015, the respondent applied for extension of time, which was granted without levy of any compensation.

8. The Final Bill was paid on 29.08.2016. The respondent had made an endorsement, which reads as '*15th bill accepted with measurement on account of full and final*'. Thereafter, on 28.09.2016, the respondent sent a letter demanding the balance payment payable under the Final Bill. It claimed that it had only received part payment of the amounts due to it.

9. The demand raised by the respondent was not accepted. Consequently, on 15.10.2016, the respondent sent a letter to the Superintendent Engineer raising certain claims and further, stated that the endorsement made by it for receiving part payment of the Final Bill was under coercion and economic duress. The said Superintendent Engineer did not accept the claims as raised.

10. Thereafter, the respondent sent a letter dated 23.01.2017 referring its claims to the concerned Chief Engineer with a request that a Dispute Resolution Committee (DRC) be constituted in terms of Clause 25(1) of the General Conditions of Contract (GCC).

11. Pursuant to the request made by the respondent, a DRC was constituted. It considered the claims made by the respondent and rendered its decision on 19.04.2018 directing the petitioner to make a payment of ₹92,69,297/- to the respondent. The respondent accepted the said amount while reserving its right to pursue the remaining claims in arbitration. However, the payments as directed were not made.

12. On 21.05.2018, the respondent invoked the arbitration agreement and sought reference of its claims (13 in number) to arbitration.

13. The Arbitral Tribunal partly allowed the claims and awarded a sum of ₹92,69,297/- along with interest at the rate of 9% per annum on the amount of ₹88,93,173/- with effect from 17.03.2016 till the date of the award. The Arbitral Tribunal also awarded future interest at the rate of 10% per annum on the awarded amount if the said amount was not paid within a period of three months from the date of receipt of the award. The operative part of the impugned award is set out below:

“21. NOW, THEREFORE, In view of the above, I hereby make this AWARD that the Respondent is required:

- (i) To pay ₹92,69,297 (Rupees Ninety Two Lakh Sixty Nine Thousand Two Hundred and Ninety Seven only) to the claimant;
- (ii) To pay to the clamant simple interest at the rate of 9% per annum on an amount of ₹88,93,173 with effect from 17-03-2016 till the date of this award;
- (iii) To pay to the claimant simple interest at the rate of 10% per annum on an amount of ₹92,69,297 plus the interest calculated under (ii) above with effect from the date of this award till the date of payment,

if the payment as awarded in (i) and (ii) above is not made within three months of the date of receipt of the award by the respondent; and

To reimburse the actual amount of GST that is paid by the claimant as and when levied on the arbitral amount”

14. It is not necessary for this Court to examine the dispute regarding various heads of claims as the learned counsel for the petitioner has assailed the impugned award on limited grounds.

Submissions

15. Mr. Sushil Kumar Pandey, learned counsel appearing for the petitioner has assailed the impugned award, essentially, on five fronts.

16. First, he contended that the Arbitral Tribunal had erred in rejecting the petitioner’s contention that the respondent had accepted the payment of the Final Bill in full and final settlement of its dues as reflected by the endorsement made on behalf of the respondent. He submitted that in view of the above, the Contract in question was discharged by accord and satisfaction. In the circumstances, none of the claims made by the respondent were maintainable and the impugned award was vitiated on the ground of patent illegality as the Arbitral Tribunal had erred in entertaining the claims. He also referred to the decision of the Supreme Court in ***Union of India & Ors. v. M/s Master Construction Co.: 2011 (12) SCC 349***, in support of his contention.

17. Second, he submitted that the Arbitral Tribunal had erred in awarding a sum of ₹4,73,774/- (Claim No. 4) in favour of the

respondent for short payments for quantities executed beyond the deviation limit. He submitted that the respondent had not supported its claim with any credible evidence regarding costs of executing such additional quantities and therefore, the impugned award to that extent was not based on any evidence. He contended that the invoices produced by the respondent were not tax paid invoices and therefore, could not be relied upon.

18. Third, he submitted that the Arbitral Tribunal had erred in appreciating that the respondent had given an undertaking that it would not claim anything extra for liquidated damages on account of extension of time for completion of the Contract, which was granted without levy of compensation. He submitted that the petitioner had accepted the said undertaking and granted Extension of Time (EOT) without levy of any compensation. However, the claims raised by the respondent also included claims on account of overheads at site and other items as a result of prolongation of work.

19. Fourth, he submitted that the Arbitral Tribunal had erred in partly allowing the respondent's claims for short payments for executing extra items. He pointed out that the respondent had claimed a sum of ₹38,48,673/- and the Arbitral Tribunal had allowed claims to the extent of ₹21,49,870/- (Claim No. 5) without any evidence on record. He submitted that the respondent had produced bills, which were not tax paid invoices and the Arbitral Tribunal had erred in relying on the such evidence.

20. Lastly, he submitted that the award of interest on Performance Guarantee was erroneous as there was no provision in the Contract for entertaining such a claim.

Reasons and Conclusion

21. The first and foremost question to be examined is whether the impugned award is required to be interfered with on the ground that the Contract in question was discharged by accord and satisfaction. According to the respondent, the works were completed on 28.02.2015 and by a letter dated 03.03.2015, the respondent had applied for a Completion Certificate. The petitioner had issued the Completion Certificate on 19.06.2015, that is, three months after the respondent had applied for the same.

22. Thereafter, the respondent immediately submitted its Final Bill on 17.09.2015. However, the same remained pending. Indisputably, a significant amount was due to the respondent under the Final Bill. It is important to note that according to the respondent, a sum of ₹4,14,19,475/- was due and payable at the material time. However, even the admitted amounts due to the respondent were not released within a reasonable time. The part payments were made on 29.08.2016 after the respondent had recorded the endorsement “15th Bill accepted with measurement on account of full and final”. However, thereafter, the respondent had made a representation listing out its claims. According to the respondent, the said endorsement did not preclude it from raising its claims as it had no intention to give up its claims. The said

endorsement was made to receive the payments, which according to the petitioner were admittedly payable to the respondent.

23. The Arbitral Tribunal had considered the aforesaid dispute and had decided in favour of the respondent. The relevant extract of the impugned award is set out below:

“It is seen that CV 110 no. 177 dated 29-08-2016 through which the final payment was made, is a standard proforma (CPWA 17) and it has no provision for recording of any type of certificate by the contractor on its body. It requires only dated signature of the contractor. Moreover, recording “acceptance with measurement on a/c full & final” does not mean that the signatory loses the right to prefer any claim over and above what has been included in the bill, especially when clause 25 of the GCC gives the right to the contractor to seek arbitration if he is dissatisfied with the decision of the authorities. The very fact that this, as estoppels, was not raised by various authorities to whom the claimant represented for redressal and on the contrary, the department referred the claims for arbitration, clearly shows that this acceptance recorded by the claimant cannot act as estoppels to making any claim over and above what has been included in the final bill. This view gets further support from the fact that DRC also considered the claims and did not reject them on the ground which has been taken by the respondent before me, namely that the claimant has forfeited the right to prefer any claim. On the other hand, the DRC considered all the claims and allowed some of them.”

24. The Tribunal also referred to the decision of this Court in *Pandit*

Construction Company v Delhi Development Authority & Anr.: 2007(3) Arb LR 205.

25. It is apparent from the above that the Arbitral Tribunal has rendered its decision after evaluating the circumstances and the material placed by the parties. As noted above, there was no dispute that substantial amounts were due and payable to the respondent. The respondent had submitted the Final Bill and there was no plausible reason for the respondent to have voluntarily given up its claims.

26. The respondent had contended that it had no intention of giving up its claims and the endorsement was made under economic duress and coercion. The said contentions are not insubstantial. The Arbitral Tribunal had also noted that the DRC had examined the claims raised by the respondent and found the same to be merited. The Arbitral Tribunal also found that the endorsement was ambiguous and did not, in clear terms, record an agreement for full and final discharge of the Contract.

27. Clearly, the view expressed by the Arbitral Tribunal cannot be held to be one that no reasonable person could possibly accept. It is clearly a plausible view. The contentions advanced by the respondent are not insubstantial and there was ample material on record to support the respondent's contention.

28. It is well settled that this Court is not required to reappreciate the material and evidence on record considering a first appeal as the first appellate court. The Court is merely to examine whether the award falls

foul of the fundamental policy of Indian law or the impugned award is vitiated by patent illegality. As authoritatively explained by the Supreme Court in ***Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd.***: 2021 SCC OnLine SC 695, the impugned award is not vitiated on the ground of patent illegality even after it is found to be erroneous. Illegality must necessarily go to the root of the matter and an examination by this Court under Section 34(2A) of the A&C Act does not entail reappreciation and re-evaluation of evidence for determining whether an award is patently illegal.

29. The decisions of the Supreme Court in ***Union of India v Master Construction Co (supra)*** and ***National Insurance Company Ltd. v. M/s Boghara Polyfab Pvt. Ltd.***: (2009) 1 SCC 267 are of little assistance to the petitioner. In that case, the Supreme Court had decided an appeal arising from the decision of the Chief Justice of the Bombay High Court allowing the respondent's petition under Section 11 of the A&C Act. The appellant (National Insurance Company Ltd.) had contended that the contract of insurance between the parties stood discharged by accord and satisfaction in view of the discharge voucher issued by the respondent accepting the payments in full and final settlement of all claims. According to the appellant, the same also extinguished the arbitration agreement. However, according to the respondent, it was coerced to issue the discharge voucher as the appellant had declined to pay even the admitted amounts due. The Supreme Court had examined its earlier decisions and observed that the cases fall under two categories. In the first category of cases, which was relied upon by the

appellant, the Court had after considering the facts found that there was full and final settlement resulting in accord and satisfaction and there was no substance in the allegations of coercion or undue influence. In such circumstances, the Courts had declined to refer the disputes to arbitration. However, there were another category of cases relied upon by the respondent, where the Court found that there was some substance in the appellant's contention that 'no dues/claim certificates' or 'full and final settlement discharge vouchers' were taken as a condition for release of admitted dues. In such category of cases, the Court had held that the disputes were arbitral.

30. The Supreme Court had further concluded that *“none of the three cases relied on by the appellant lay down a proposition that mere execution of a full and final settlement receipt or a discharge voucher is a bar to arbitration, even when the validity thereof is challenged by the claimant on the ground of fraud, coercion or undue influence. Nor do they lay down a proposition that even if the discharge of contract is not genuine or legal, the claims cannot be referred to arbitration.”*.

31. The question whether a discharge voucher is obtained by coercion is a question of fact and the same is required to be decided either by a court or by an arbitral tribunal. In the present case, the Arbitral Tribunal has examined the circumstances and has found in favour of the respondent (Claimant) and this Court does not find any infirmity that warrants interference by this Court under Section 34 of the A&C Act.

32. The decision in the case of *Union of India & Ors. v. M/s Master Construction Co (supra)* is also of little assistance. In that case, the contractor had executed a certificate certifying that “it had no further claims”. It had further certified that the payment received was “in full and final settlement of all money due” and that it did not have “further claims” in respect of the contract in question. In addition, the contractor also appended a certificate. The Supreme Court found that the said certificate did not leave any doubt that upon receipt of the payments, the contractor’s claim stood fully satisfied. The decision in the case of *Union of India & Ors. v. M/s Master Construction Company (supra)* is not an authority for the proposition that in all cases where a party executes a discharge voucher or a no dues certificate, it is precluded from challenging the same or establishing that the said voucher/certificate was issued under coercion or duress and, is illegal. The Supreme Court had expressly clarified the same in the following words:

“In our opinion, there is no rule of the absolute kind. In a case where the claimant contends that a discharge voucher or no-claim certificate has been obtained by fraud, coercion, duress or undue influence and the other side contests the correctness thereof, the Chief Justice/his designate must look into this aspect to find out at least, prima facie, whether or not the dispute is bona fide and genuine....If the Chief Justice/his designate finds some merit in the allegation of fraud, coercion, duress or undue influence, he may decide the same or leave it to be decided by the Arbitral Tribunal. ”

33. As is apparent from the extract of the aforesaid decision, the

contention that the petitioner could not claim any amount on account of prolongation of Contract as it had submitted an undertaking and the impugned award is vitiated as the Arbitral Tribunal has rejected the said contention, is also persuasive.

34. Admittedly, the parties had agreed that the works were completed on 19.06.2015. The respondent had also submitted its Final Bill and had applied for extension of time, however, that was not processed. In the aforesaid circumstances, the respondent had contended as under:

“Since we could not have afforded to keep on waiting indefinitely for finalization of the contracted payment of even undisputed items/payments, as we have huge market liabilities and suffering huge losses on account of overheads at site, so were coerced into giving such undertaking under financial duress and pressure exercised by the department and as such the same is of no consequences and validity. As intimated by us during the course of execution of the work since we have suffered losses due to prolongation beyond stipulated period for the reasons not in any way attributable to us and mainly for the reasons attributable to the department and its agencies, as such we are entitled to all such claims and be please included and paid in the final bill.”

35. Immediately after granting extension of time, the respondent had made a representation stating that the undertaking was given under financial duress.

36. The Arbitral Tribunal examined the aforesaid contentions in the context of the circumstances and the contemporaneous correspondence and, had found in favour of the respondent. The relevant extract of the

impugned award is set out below:

“1.8 Immediately on getting the letter of extension, the contractor through his letter dated 11-02-2016 asserted that there was no delay on his part and that the undertaking regarding “not claiming anything” due to prolongation of the contract period was given under financial duress and pressure exercised by the department and as such “the same is of no consequence and validity”.

1.9 From the above discussion, it emerges as an admitted fact that the delay in completion of the work is in no way attributable to the contractor. In fact, while considering the issue of grant of extension of time, the Executive Engineer listed out various hindrances, a perusal of which clearly indicates that these hindrances were caused because of lapses or delays on the part of the department. The respondent has, therefore, rightly granted extension of time without levying any compensation on the contractor. As a corollary, the claimant should be entitled to get damages and reimbursement of extra expenses incurred by the contractor up to the accepted date of completion. The objection of the respondent rests on the “no claim” undertaking given by the contractor while applying for extension of time. The contention of the claimant that this undertaking was given because of “financial duress and pressure exercised by the department” gets support from the fact that, although the contractor submitted EOT application and the final bill on 17—9-2015, no action appears to have been taken by the respondent for over three months. It was only in December 2015 that the proposal for extension of time was moved. It is quite likely that the formal proposal for grant of extension of time was initiated only after the contractor agreed to sign the “no claim” undertaking. The unexplained delay of three months in

moving formal proposal for extension of time does strengthens the argument that the “no claim” undertaking was not given voluntarily as a quid pro quo for non-levying of compensation. The argument of the claimant that this undertaking is of “no consequence and validity” gets support from the Supreme Court judgment in Civil Appeal No 4906 of 2000 between KN Sathyapalan (dead) by LRs Vs State of Kerala and Anr.”

37. It is apparent from the above that the Arbitral Tribunal had made its decision after considering the available material. This Court is unable to accept that the said view is not a plausible view and no rational person could have taken such a view. For the reasons as discussed above, this Court is unable to accept that the impugned award warrants any interference by this Court in these proceedings.

38. The next aspect to be considered is whether the award of ₹4,73,774/- in favour of the respondent on account of loss due to short payments for quantities executed beyond the deviation limit (Claim No. 4), is patently illegal. The respondent had claimed a sum of ₹5,91,479/- in respect of seven items, which were executed beyond the agreed quantities. The respondent claimed that the payments made in respect of the aforesaid items beyond the deviation limit were made at a rate less than the market rate. In support of its claim, the respondent had submitted rate analysis along with the purchase documents. The Arbitral Tribunal had found that three items (Steel Reinforcement for RCC Work, fixing of T-iron Frames, and fixing of Polyethelene – Aluminum - Polyethelene pipe) were supported by actual purchase documents and a rate analysis based on the Delhi Schedule of Rates.

Accordingly, the Arbitral Tribunal had accepted the said claim in respect of the aforesaid items. The Arbitral Tribunal found that the claims for the remaining items were not supported by any credible documents and had rejected the same. The petitioner's contention that the claim awarded in favour of the respondent is patently illegal as it is not supported by any documents is without any merit. The learned counsel appearing for the petitioner had conceded that the respondent had produced purchase documents as noted by the Arbitral Tribunal. He, however, stated that the said documents were of no evidentiary value as they were not tax paid invoices. The contention advanced on behalf of the petitioner is beyond the standards of examination under Section 34 of the A&C Act. As noticed above, this Court is not required to dissect and reevaluate the evidence and material examined by the Arbitral Tribunal. It is apparent that the decision of the Arbitral Tribunal is based on evidence or material on record; the decision is based on analysis of Rates coupled with the purchase documents produced by the respondent. The relevant extract of the impugned award reads as under:

“5.2 As per the claimant, the contractor had submitted rate analysis along with actual purchase document in each case. It is claimed that in the rate analysis the market rate for the material is based on actual purchase and the cost of execution is based on DSR. I find that in respect of the following agreement items, the claim is supported by proper rate analysis and actual purchase documents:

- | | | |
|----|-------------------------|-------------|
| 1. | Agreement Item No. | Rs.3,74,096 |
| | 3.3.1.2 regarding steel | |
| | reinforcement | for |

RCC work

2.	Agreement Item No. 7.3.1 regarding providing and fixing T-iron frames with 15x3 mm lugs	Rs.8,920
3.	Agreement Item No. 14.2.2 regarding providing and fixing 1620 (20 mm OD) Polyethelene – Aluminium – Polythelenene pipe	Rs. 82,689
XXXX	XXXX	XXXX

5.4 The claimant has not submitted any credible document in respect of the remaining 3 agreement items and the claim in respect thereof.”

39. In addition to the above, the Arbitral Tribunal has also awarded a sum of ₹8,069/- in respect of ‘autoclaved flyash lime bricks’. In respect of the aforesaid claim, the Arbitral Tribunal found that none of the parties had produced any credible supporting documents. Nonetheless, the Arbitral Tribunal had awarded a sum of ₹8,069/- in favour of the respondent. The learned Sole Arbitrator was technically qualified and had substantial experience. He had determined the market rate on the basis of his assumption and, after having found that the rates as mentioned by the petitioner were extremely low. The amount of ₹8,069/- awarded by the Arbitral Tribunal is not significant to warrant any further examination. Thus, without examining the question whether

this was warranted, this Court considers it apposite to not entertain any challenge in this respect in this proceeding.

40. The contention that the Arbitral Tribunal has erred in awarding a sum of ₹21,49,870/- for loss due to short payments of quantities executed as extra items (Claim No. 5) is premised on the basis that the Arbitral Tribunal had no material or evidence to award the said claim. The respondent had made a claim of ₹38,49,673/- in respect of fifteen extra items. The Arbitral Tribunal found that the respondent's claim in respect of ten items was based on the actual purchase and the cost of execution was also supported by the analysis of rates under the Delhi Schedule of Rates. The respondent had also produced the actual purchase documents. The claim in respect of the ten items was allowed. However, the Arbitral Tribunal found that there were no credible purchase documents in respect of the remaining five items and accordingly, claims relating to those five items were rejected.

41. The petitioner claims that the purchase documents produced by the respondent could not be relied upon as they were not tax invoices. As discussed above, the said contention is beyond the scope of examination as permissible under Section 34 of the A&C Act. Notwithstanding that the invoices produced may not be tax invoices; they were, nonetheless, material that the Arbitral Tribunal could have evaluated to render its decision. It is not possible to accept that the award for payment relating to extra items is without any material.

42. This Court also does not find any merit in the contention that the

impugned award is vitiated by patent illegality as the Arbitral Tribunal has awarded interest and bank guarantee charges. The Arbitral Tribunal has not awarded any interest on the Performance Bank Guarantee furnished by the petitioner. However, the Arbitral Tribunal has awarded bank guarantee charges for a period of three months as the Arbitral Tribunal found that the bank guarantee had to be extended because its release was delayed. The Arbitral Tribunal has awarded a sum of ₹13,383/- on this count. Similarly, the Arbitral Tribunal has also awarded bank guarantee charges on the Bank Guarantee furnished by the respondent as security for a period of seven months as the release of the said bank guarantee was also delayed. The Arbitral Tribunal has awarded interest on the security amount of ₹51,74,363/- as it found that the same was required to be released on 18.06.2016 after the defect liability period was over but the same was released on 24.01.2017. The Arbitral Tribunal has compensated the respondent for the delay of seven months in releasing the security deposit. This Court finds no ground to interfere with the said award.

43. For the reasons stated above, the petition is, unmerited, and is, accordingly, dismissed.

44. All pending applications are also disposed of.

VIBHU BAKHRU, J

NOVEMBER 29, 2021

pkv/gsr