

\$~16

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

%

Date of Judgment: 10th September, 2021

O.M.P. (COMM) 496/2018 & I.A. 17981/2019 & 10369/2020

HAMILTON HEIGHTS PVT. LTD. Petitioner

Through: Mr Saurabh Kirpal, Senior
Advocate with Mr Brijesh
Chaudhary and Ms Prins Kumar,
Advocates.

versus

**M/ S KRISHNA BUILD ESTATES
PVT. LTD.** Respondent

Through: Mr Vaibhav Gaggar, Advocate
with Ms Sumeda Dang, Ms
Mrityunjay Mahendra,
Advocates.

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') impugning an arbitral award dated 30.06.2018 (hereafter the 'impugned award') rendered by an Arbitral Tribunal comprising of a Sole Arbitrator.

2. The disputes between the parties relate to the amount claimed by the respondent as due and payable for the work executed pursuant to

their agreement dated 11.11.2013. It is the case of the petitioner that the respondent had overbilled and was overpaid up to the 12th RA Bill. The petitioner contends that impugned award, which accepts the amount payable to the respondent against the 14th RA Bill, is patently illegal as the 14th RA Bill raised by the respondent included consideration for construction work at the 14th Floor of the building, Tower 'C' at Hamilton Heights, Sector 27, Faridabad, Haryana, which was admittedly not constructed.

Factual Context

3. The petitioner is a public limited company incorporated under the Companies Act, 1956 and is engaged in the business of developing residential group housing projects.

4. In 2013, the parties entered into negotiations for carrying out construction of the civil structure and finishing work of Tower D and finishing work of Tower C at Hamilton Heights, 37, Tilpat Palla Road, Faridabad 121003, Haryana (hereafter the 'project'). The negotiations culminated in the petitioner issuing a Letter of Intent (LOI) dated 26.06.2013 in favour of the respondent.

5. Thereafter, on 11.11.2013, the parties entered into an agreement (hereafter 'the Agreement') in respect of the aforesaid project, whereby the respondent agreed to execute the subject works at a total value of ₹19,41,12,925/-. The Agreement incorporated the LOI by reference.

6. It is not disputed that the petitioners made payments for the RA Bills up to the 12th RA Bill. However, disputes arose between the parties in respect of amounts charged under the 14th RA Bill dated 15.10.2015 for the work done during the period 01.08.2015 to 30.09.2015.

7. The petitioner sought to terminate the Agreement on 15.01.2016. On 18.01.2016, the petitioner sent a revised 14th RA Bill for the work done from 01.08.2015 to 15.01.2016.

8. On 02.03.2016, the respondent preferred a petition under Section 9 of the A&C Act, (being *O.M.P.(I) (COMM.) 69/2016*) restraining the petitioner from terminating or foreclosing the Agreement and to direct the parties to undertake a joint measurement for finalization of the 14th RA Bill. By an order dated 01.04.2016, this Court appointed Mr Baldev Raj, Assistant Engineer (Civil), PWD, Government of NCT of Delhi, as the Local Commissioner for measuring the work carried out by the respondent, which was the subject matter of the 14th RA Bill. The Local Commissioner was also directed to supervise the removal of the material and equipment at the site by the respondent and, to further prepare an inventory of the material/equipment, the possession of which was taken by the respondent. The report was submitted by the Local Commissioner on 17.04.2016.

9. Since the disputes relating to the 14th RA Bill were not resolved, the parties referred the disputes to arbitration. The arbitral proceedings culminated in the impugned award.

10. The claims made by the respondent in its Statement of Claims filed before the Arbitral Tribunal, are summarized as under:

Claim	Particulars
Claim (a)	Declaration that termination of the Agreement between the parties is illegal and void
Claim (b)	Outstanding payment amounting to ₹ 2,28,89,904/- towards the 13 th and 14 th RA Bills
Claim (c)	Release of retention amount of a sum of ₹ 40,00,000/-
Claim (d)	Release of ₹ 28,49,096/- withheld on account of reconciliation towards cement and steel against the 7 th running bill
Claim (e)	Expenses incurred due to illegal termination towards demobilization amounting to ₹ 8,04,600/-
Claim (f)	Reimbursement in respect of material procured for construction amounting to ₹4,38,126/-
Claim (g)	Interest payment at the rate of 18% on account of delayed payment

Claim (h)	An amount of ₹10,00,000/- towards excessive overheads due to delay, resulting in time over-run for the period February 2015 to April 2016
Claim (i)	A sum of ₹13,35,050/- towards certain tools and plant equipment lying at the plant site not returned
Claim (j)	A sum of ₹18,62,799/- towards idling cost of equipment and machinery for the period December 2015 to April 2016
Claim (k)	A sum of ₹1,22,40,595/- as loss of profit
Claim (l)	Amount of ₹50,00,000/- deposited for purchase of flats, in lieu of pending payments
Claim (m)	Cost of litigation amounting to ₹20,00,000/- plus cost of arbitration
Claim (n)	Interest at the rate of 18% per annum towards pre-suit, pendant-lite and future interest on the awarded amount

11. The petitioner also raised a counter-claim for a sum of ₹92,43,000/- on account of amounts allegedly over-paid to the respondent.

12. The Arbitral Tribunal considered the rival contentions and partly allowed the claims preferred by the respondent. The Arbitral Tribunal held that the termination of the Agreement was illegal as the petitioner had not issued any prior notice, as required under Clause 64 of the General Conditions of Contract (GCC), to the respondent before terminating the Agreement. The Arbitral Tribunal accepted the respondent's contention that there was some confusion in describing the works mentioned in the 14th RA Bill, as the ceiling of the 13th floor was also the floor for the 14th floor. The 14th RA Bill was subsequently corrected. The Arbitral Tribunal accepted that the respondent had executed the work as claimed by it. This was also verified by the Local Commissioner appointed by this Court.

13. The Arbitral Tribunal rendered the impugned award in favour of the respondent awarding (i) release of the retention money amounting ₹40,00,000/-; (ii) refund of ₹11,82,840.18 towards steel reconciliation; (iii) an amount of ₹8,04,600/- as expenses incurred towards demobilisation due to illegal termination of the contract; and (iv) a sum of ₹4,38,160/- as reimbursement of material procured for construction. In respect of the claim made under the 14th RA Bill, the Arbitral Tribunal awarded interest at the rate of 12% per annum from the date of the corrected 14th RA Bill till its realisation. The Arbitral Tribunal also awarded interest at the rate of 12% per annum on the awarded amounts from the date of the arbitral award till its realisation.

Submissions

14. Mr Kirpal, learned senior counsel appearing for the petitioner has assailed the impugned award on the sole ground that the Arbitral Tribunal had grossly erred in accepting the respondent's explanation regarding the 14th RA Bill for construction on the 14th floor even though it was admitted that no construction was carried out on the 14th floor. He submitted that the respondent had raised three bills for the said period. He drew the attention of this Court to the 'RA-14th Bill' (at page 500 of the documents filed by the petitioner) and pointed out that the said bill clearly specified the construction allegedly carried out on the 14th floor including construction in relation to the toilets, rooms, marble skirting, doors etc. He stated that it was clear from the bill that the respondent was claiming payment for construction carried out on the 14th floor of Tower 'C' of the project. However, it was admitted that no construction was carried out on the 14th floor of Tower 'C'. He submitted that the respondent had attempted to explain the said invoice by contending that there was some confusion as the ceiling of the 13th floor is also the floor of the 14th floor and, this explanation was erroneously accepted by the Arbitral Tribunal.

15. He submitted that the respondent's aforesaid explanation was wholly without merit as the bill in question was not restricted to work carried out on the floor or the ceiling, but also in respect of the toilets, rooms/toilet walls, marble skirting and marble staircase, internal doors as well as main doors amongst other works allegedly executed. He contended that the impugned award was therefore, vitiated on the ground of patent illegality on the face of the award.

16. He submitted that the Arbitral Tribunal had also grossly erred in proceeding on the basis that the report submitted by the Local Commissioner was admitted by the petitioner. However, the petitioner had no occasion to object to the report and the contents of the same were, in any event, required to be proved.

17. He further submitted that the respondent was complicit with the Project Manager employed by the petitioner and he had certified the bills in respect of works that were not executed.

Reasons and Conclusion

18. The disputes between the parties essentially relate to the bills raised by the respondent for executing the works under the Agreement. According to the petitioner, the respondent had raised bills for work over and above of what was executed. The petitioner had made payments against the RA Bills till the 12th RA Bill. However, it had not made payments against the 13th and 14th RA Bills. According to the petitioner, the respondent was not entitled to payment of the said bills as it had not executed the work as claimed. The petitioner claimed that the respondent had been overpaid as the respondent had over-invoiced the 12 RA Bills, which were cleared. Accordingly, the petitioner had raised a counter claim of ₹92.43 lacs being the amount allegedly overpaid to the respondent.

19. In view of the disputes between the parties, the respondent apprehended that the petitioner would hand over the site to another agency without clearing its bills. In these circumstances, the respondent

filed a petition (being *O.M.P.(I) (COMM.) 69/2016*) before this Court under Section 9 of the A&C Act, *inter alia*, praying that the petitioner be restrained from terminating the Agreement dated 11.11.2013 and/or appointing any other agency to execute the works without clearing its dues. The respondent also prayed that directions be issued for joint measurement of the work completed by the respondent for finalising the amounts payable to it.

20. The said petition – *OMP(I)(COMM) 69/2016* captioned *Krishna Build Estate Pvt. Ltd. v. Hamilton Heights Pvt. Ltd.* – was taken up on 15.03.2016 and this Court appointed a Local Commissioner for measuring the work carried out by the respondent. The said order is set out below:

“Notice was issued on this petition limited to prayer (b), (c) and (d).

Mr. Sachin Datta, learned Senior Counsel appearing for the respondent would submit that insofar as the prayer (b) is concerned, in terms of the contractual stipulation, it is the Project Manager, who has to carry out the measurements. He states, even though measurements of 14th A.R.A. bill was carried out by the respondent, he has no objection if the measurements are taken afresh by the Project Manager under the supervision of Local Commissioner to be appointed by this Court, at the request of the learned counsel for the petitioner.

Mr. Gaggar, learned counsel for the petitioner suggests otherwise inasmuch as the Local Commissioner be appointed, who would carry out the measurements in the presence of the Project Manager.

The suggestion made by Mr. Gaggar seems to be reasonable.

Insofar as prayer at serial No. (c) is concerned, Mr. Datta, learned Senior Counsel for the respondent states, material and equipment are under lock and key of the petitioner and can be taken out by the petitioner in the presence of the Local Commissioner to be appointed by this Court.

Having considered the submissions, I accordingly appoint Mr. S.R. Pandey, Retired DG, C.P.W.D. (Mobile No.9810275731) who is in the panel of the Arbitrators of Delhi International Arbitration Centre as the Local Commissioner, for measuring the work carried out by the petitioner herein, which was the subject matter of the 14th A.R.A. bill. He shall be within his right to take the assistance of the Project Manager of the respondent as well as the representative of the petitioner. The measurements shall be carried out on or before March 20, 2016. The Local Commissioner shall also supervise the removal of the material and equipment lying at the site by the petitioner on a date convenient to both the parties but not later than 10 days from today. The Local Commissioner shall prepare the inventory of the Materials/equipment taken possession by the petitioner. He shall file a report in the Court within 10 days of completing the commission as aforesaid.

Insofar as the prayer at serial No. (e) is concerned, let reply to the prayer (e) be filed within a week. Rejoinder within a week thereafter.

List on April 19, 2016.

Dasti under the signatures of Court Master.”

21. It is clear from the above that the petitioner had consented that the works executed by the respondent be measured afresh by the Local Commissioner with the assistance of the Project Manager.

22. The Local Commissioner, so appointed, had expressed his inability to execute the commission and by an order dated 22.03.2016, Mr K.K. Varma, Retired Additional Director General, CPWD was appointed as the Local Commissioner to carry out the commission in lieu of Mr Pandey. Mr K.K. Varma, was also unable to conduct the commission and accordingly, by an order dated 01.04.2016, this Court appointed Mr Baldev Raj, Assistant Engineer, PWD as the Local Commissioner to carry out the commission in terms of the order dated 15.03.2016.

23. It is not disputed that the Local Commissioner had carried out the commission and had measured the work done in the presence of the representatives of both parties. The report of the Local Commissioner was submitted to this Court. The said petition [OMP(I)(COMM) 69/2016] was disposed of by an order dated 22.07.2016 permitting the respondent to present the application before the Arbitral Tribunal to be considered in terms of Section 17 of the A&C Act.

24. Thus, the contention that the petitioner had no opportunity to object to the report of the Local Commissioner, is unmerited. The impugned award clearly indicates that the Arbitral Tribunal had examined the material available on record and the evidence led by the parties to adjudicate the dispute regarding the balance amount payable

to the respondent. The Arbitral Tribunal had noted that the parties had filed large volume of documents giving minute details of the quantity of work done. After examining the documents, the Arbitral Tribunal concluded that there was no substantial dispute regarding the amounts billed and paid up to the 12th RA Bill. The Tribunal noted that although there were minor discrepancies, however, both parties were substantially in agreement with the value of work done till the 12th RA Bill. In the aforesaid context, the controversy largely related to whether the respondent was entitled to the difference between the value of work done till the 14th RA Bill and the work done and billed up to the 12th RA Bill.

25. The Arbitral Tribunal had accepted the measurement of work executed, as submitted by the Local Commissioner appointed by this Court, in his report.

26. The petitioner's case that the respondent had raised inflated bills by forging the signatures of its Project Manager was also rejected on the basis of evaluation of evidence and material placed on record. This is clear from the following extract from the impugned award:

“19. One of the pleas raised by the respondent against non-payment of 13th & 14th RA bills was that the claimant had been raising inflated bills vis-a-vis the unscheduled items by forging signatures of its Project Manager in order to show that the approvals of non-scheduled items had been duly granted by the Project Manager. Accordingly, it was submitted that payments due under 13th & 14th RA bills were adjusted against over payment. However, in this regard its own witness

could not stand the test of cross-examination. The following extract from the cross-examination of RWI Mr. Rajneesh Gupta would bear this out.

“It is correct that the signatures at page 3 & 4 (Ex.CW-1/14E, CW-1/14F) and pages 6 to 8 (Ex.CW-1/14H, CW-1/14I, CW-1/14J) of the additional documents are the signatures of my Project Manager. Again says these signatures are forged. I do not remember the date of knowledge of the purported forgery. I had issued communication in writing that the signatures are forged but I do not remember the date of such communication. It is incorrect to suggest that no such communication has been addressed and no such communication has been produced on record. We have carried out handwriting analysis matching the signatures of the Project Manager with the signatures of the document at Page 3 & 4 and 6 to 8. I matched the said signature with the scanned copy of the signatures of the Project Manager. Again said that the signatures were superimposed on the document. I do not remember if the Respondent requested the claimant to provide the original of the document. I do not remember the name who carried out the handwriting analysis. I do not remember the contents of the purported report. It is incorrect to suggest that there was any forgery or superimposition on pages 3, 4 and 6 to 8 of the additional documents. I have not filed any police complaint in relation to such purported forgery.”

20. It will be seen from from above that the witness was evasive. He was approbating and reprobating. Though he said that he had issued communications in writing that signatures were forged but he did not remember the date of such communications nor any such communication was produced on the record. He also said “ we have carried out handwriting analysis matching the signature of Project Manager with the signature on the documents at Pages 3&4 and 6-8 ”. He

then said he matched the said signatures. The question is who was he? Was he a handwriting expert? Certainly not. He was therefore nobody to have pronounced a judgement on the authenticity of a document. The handwriting expert is the best person in a matter like this, to whom no reference seemed to have been made, and even if made as claimed by the witness neither his report was placed on record nor was he summoned as a witness. And what also begs an answer is, if really forgery was committed, why no police complaint was made against the claimant, more so when such an act on the part of the claimant was causing huge financial loss to the respondent.

21. The aforesaid witness in his testimony dated 21st March 2018 claimed that the respondent had carried out 2-3 internal audits and one external audit. In so far as internal audit is concerned, none of the auditors, who allegedly carried out the audit were produced as witness nor any audit report has been placed on record. As regards the external audit, its auditor Shri Pradeep Kumar Garg did appear as a witness, but his testimony is totally uninspiring. To start with he did not have a letter of appointment in his favour to conduct the audit. It was his wife Ms. Preeti Garg, who was actually engaged. He admitted that he had not done any course relating to Chartered Accountancy. He further admitted that he had not maintained any document which reflected the date on which he visited the site.

22. It emerged from his cross-examination that he had not made any working computation which was signed by the claimant. He did not remember whether working computation was provided to the claimant. He did not remember whether a document was prepared which indicated that a particular item had not been executed. He did not remember the date of 14 A RA bill. He was not able to produce a contemporaneous record which reflected a revised rate for extra items, though he

claimed that the rates were revised. He was also not able to produce any document signed by the claimant which reflected that there was doubling / or grossly inflated quantity. However, he did agree with the measurements of Local Commissioner.

23. The above evidence in the form of audit reports which was sought to be authenticated through the testimony of RW-1 and more particularly through RW-2 is a failed attempt on the part of the respondent to create evidence in its favour. The audit report is a self serving document , which its author failed to prove and in any case it was prepared without in any way involving the claimant in the audit process. Hence, such a report cannot be used against the claimant to its detriment.

24. One other aspect, about which much was sought to be made out was that the claimant had billed the respondent for 14th floor, which in fact was never built. On this score, it may be noted that claimant also does not dispute that 14th floor was not constructed. However claimant explained that it was to build 13 floors including the ground floor. After 13th floor was built, the roof of that floor came to form foundation for the 14th floor and that is why the confusion arose and bills were prepared referring to the construction as 14th floor RA bill which were later corrected to 14th RA. In any case what is the fuss about, as ultimately it the measurements and not nomenclature which matter. As the Local commissioner had verified the work done and his report has been accepted by both sides, the controversy has been needlessly raised.”

27. It is apparent from the above that the petitioner’s contention that the respondent had sought payments under the 14th RA Bill for work that was never executed was rejected, as the Arbitral Tribunal had accepted that the entire work done was verified and measured by the

Local Commissioner in the presence of the representatives of both the parties.

28. In view of the above, the petitioner's contention that the impugned award is vitiated on account of patent illegality is founded on the basis that the Arbitral Tribunal has committed an error in evaluation and appreciation of evidence led by the parties and the material placed before the Arbitral Tribunal. The said contention is unmerited.

29. It is well settled that the court cannot re-examine and re-evaluate the evidence as a court of first appeal and supplant its opinion in place of that of the Arbitral Tribunal. The arbitral award can be interfered with only on the grounds as set out in Section 34(2) and 34(2A) of the A&C Act. The award would be vitiated by patent illegality if it is found that the illegality goes to the root of the matter. A mere error in appreciation of evidence does not vitiate an arbitral award.

30. In ***Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd.: Civil Appeal No. 5627/2021, decided on 09.09.2021***, the Supreme Court had once again explained the concept of patent illegality that would render an arbitral award liable to be set aside under Section 34(2A) of the A&C Act. The relevant extract of the said decision is set out below:

“24. This Court has in several other judgments interpreted Section 34 of the 1996 Act to stress on the restraint to be shown by courts while examining the validity of the arbitral awards. The limited grounds available to courts for annulment of arbitral awards are

well known to legally trained minds. However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the courts. There is a disturbing tendency of courts setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award. This approach would lead to corrosion of the object of the 1996 Act and the endeavours made to preserve this object, which is minimal judicial interference with arbitral awards. That apart, several judicial pronouncements of this Court would become a dead letter if arbitral awards are set aside by categorising them as perverse or patently illegal without appreciating the contours of the said expressions.

25. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression 'patent illegality'. Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression 'patent illegality'. What is prohibited is for courts to re-appreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral

award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression 'patent illegality'.

26. Section 34 (2) (b) refers to the other grounds on which a court can set aside an arbitral award. If a dispute which is not capable of settlement by arbitration is the subject-matter of the award or if the award is in conflict with public policy of India, the award is liable to be set aside. Explanation (1), amended by the 2015 Amendment Act, clarified the expression 'public policy of India' and its connotations for the purposes of reviewing arbitral awards. It has been made clear that an award would be in conflict with public policy of India only when it is induced or affected by fraud or corruption or is in violation of Section 75 or Section 81 of the 1996 Act, if it is in contravention with the fundamental policy of Indian law or if it is in conflict with the most basic notions of morality or justice. In *Ssangyong* (supra), this Court held that the meaning of the expression 'fundamental policy of Indian law' would be in accordance with the understanding of this Court in *Renusagar Power Co. Ltd. v. General Electric Co.* In *Renusagar* (supra), this Court observed that violation of the Foreign Exchange Regulation Act, 1973, a statute enacted for the 'national economic interest', and disregarding the superior courts in India would be antithetical to the fundamental policy of Indian law. Contravention of a statute not linked to public policy or public interest cannot be a ground to set at naught an arbitral award as being discordant with the fundamental policy of Indian law and neither can it be brought within the confines of 'patent illegality' as

discussed above. In other words, contravention of a statute only if it is linked to public policy or public interest is cause for setting aside the award as being at odds with the fundamental policy of Indian law. If an arbitral award shocks the conscience of the court, it can be set aside as being in conflict with the most basic notions of justice. The ground of morality in this context has been interpreted by this Court to encompass awards involving elements of sexual morality, such as prostitution, or awards seeking to validate agreements which are not illegal but would not be enforced given the prevailing mores of the day.

27. In light of the principles elucidated herein for interference with an arbitral award by a court in exercise of its jurisdiction under Section 34 of the 1996 Act, we proceed to consider the questions that arise in these Appeals as to whether the Division Bench of the High Court was right in setting aside the award of the Arbitral Tribunal dated 11.05.2017.”

31. In the present case, this Court is unable to accept that the impugned award is vitiated by patent illegality appearing on the face of the award. The petition is, accordingly, dismissed. All pending applications are also dismissed.

VIBHU BAKHRU, J

SEPTEMBER 10, 2021
RK