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IN THE HIGH COURT OF DELHI AT NEW DELHI

FAO 147/2022

Reserved on: 02.06.2022

Date of Decision: 07.07.2022

IN THE MATTER OF:

M/S DHARAMVIR AND COMPANY Appellant
Through: Mr.G.L.Verma, Advocate

versus

DELHI DEVELOPMENT AUTHORITY Respondent
Through: Mr.Arun Birbal and Mr.Sanjay Singh,
Advocates.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

MANOJ KUMAR OHRI, J.

CM.APPL No.24765/2022 (Exemption)

1. Allowed, subject to all just exceptions.
2. Application stands disposed of.

FAO No.147/2022 & CM. APPL. No.24766/2022 (Interim Stay)

1. The present appeal has been filed under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter, referred to as the '*Arbitration Act*') on behalf of the appellant assailing the Award dated 02.11.2015 passed by the learned Arbitrator in Arbitration Case No.132/2013 as well as the order



dated 23.03.2022 passed by the learned ADJ-02, West, Delhi in Arbitration No. 60863/16. The appellant also seeks direction to the respondent for fresh adjudication of claims by another Arbitrator.

2. Brief facts of the case, as noted by the learned ADJ, are as follows:-

“2. Petitioner is approved contractor of the respondents as he is listed as such in appropriate class. The work pertaining to development of main land i.e. construction of C/o 60 mtr. & 45 m.MP.P Roads at Dwarka Phase-II, Sector 23(b 24, 25 & 26), Construction of Boundary Wall along Trunk Drain No. 2 was awarded to him. The tender is said to be an "Item rate tender" having an estimated cost of Rs. 35,12,293/- but the petitioner had taken it at 8% discount and hence, the tender costs was Rs.32,29,035/-. The work was to start on 23.07.2011 and was to be completed in three months i.e, on 22.10.2011. But the site was provided to the petitioner and hence, the actual date of completion was 16.01.2012. The respondents prepared a final bill of only Rs. 34,15,741/- but he was claiming more amount and hence an arbitrator was appointed who ruled against him vide award dated 02.12.2015.”

3. Vide the impugned order, the learned ADJ has dismissed the objections filed by the appellant against the impugned Award under Section 34 of the Arbitration Act.

4. Learned counsel for the appellant submitted that the appellant was awarded a contract by the respondent, however, the work assigned could not be completed in time due to delay attributable to the respondent itself. He further submitted that the appellant had accepted the First Bill as full and final settlement of dues, but the acceptance was under coercion since the respondent declined to make any payment at all if the said Bill was not accepted as such. It was also submitted that no copy of the aforesaid Bill was provided to the appellant, as a result whereof, the appellant had no



opportunity of seeing the quantities recorded and the rates applied. Lastly, learned counsel argued that the impugned order is cryptic and came to be passed in a mechanical manner.

5. Learned counsel for the respondent, on the other hand, opposed the submissions made on behalf of the appellant and supported the impugned order and Award. It was submitted that no force or coercion was exercised on the appellant for acceptance of the First and Final Bill as settlement of all dues. It was further submitted that despite acceptance of the aforesaid Bill and encashing the relevant cheque, the appellant is now claiming three times the amount agreed upon in the original contract. Learned counsel also submitted that the time period for completion of the work was extended at request of the appellant; in view of the undertaking given by the appellant on the concerned application, that no claim would be made on the basis of delay, as well as the terms of the contract, the appellant is not entitled to any additional/enhanced amount.

6. I have heard learned counsels for the parties and perused the material placed on record.

7. In the present case, the appellant was contracted by the respondent for construction of 'Boundary wall along with Trunk Drain No. 2 Dwarka' at a tendered amount of Rs.32,29,035/-. Though the work was awarded on 13.07.2011 to be completed within a period of 3 months, it came to be completed only on 16.01.2012. On account of delay in completion of work and revised payments claimed by the appellant, disputes arose between the parties and led to the appointment of an Arbitrator on 24.07.2013. The concerned Arbitrator rejected the claim of the appellant vide Award dated



02.11.2015, primarily on the ground that the Bill raised by the respondent was voluntarily accepted by the appellant in full. Aggrieved by the Award, the appellant had filed objections under Section 34 of the Arbitration Act, but the same were dismissed vide the impugned order.

8. The appellant's case is that the work was awarded on 13.07.2011, when rainy season was at peak and the Drain was overflowing with flood waters. Further, clear site and passage to the Drain embankments *inter-alia* were not made available by the respondent. As such, the scope of work was enlarged and it could be completed only on 16.01.2012 as opposed to the stipulated date of 22.10.2011. Over time, market rates had increased but against the actual work done for Rs.83,93,205.74/-, the respondent released only Rs.34,15,741/- leaving the balance Rs.49,77,464.77/- payable. The appellant raised claim for remaining amount through Final Bill vide letter dated 09.08.2012, however, the same was not paid.

9. Per contra, the respondent's case is that the First Bill was accepted by the appellant in full without any coercion, and it cannot be allowed to claim increase in market rates and/or payable amount after having settled all dues, especially as that the contract was arrived at on the basis of rates prevailing in the year 2007. Further, it is stated that the time period for completion of the work was extended by the respondent without levying any compensation and the appellant had undertaken at the time that it would not raise any claim on the basis of delay.

10. A perusal of the impugned Award would show that the concerned Arbitrator had gone into the contentions raised by the parties in detail and recorded reasons for taking particular view of the matter. It was opined



that – (i) the change in the stance of the appellant, i.e. from first accepting the Final Bill of Rs.34,15,741/- at 01:00 p.m. on 26.03.2012 ‘under protest’ to later accepting it as full and final payment at 05:50 p.m. on the same day, was voluntary, (ii) apart from making a bald statement, the appellant had not come out with any tangible reason for accepting the payment under protest, (iii) it was admitted by the appellant that the issue essentially related to applicability of rates prevailing in the year 2012 and not less measurement, (iv) in the application made to the respondent for extension of time to complete the work, the appellant had undertaken that no claim would be raised on the basis of delay, and (v) the fact that the work was executed in the year 2012 could not be a ground for the appellant claiming payment on the basis of market rates prevalent in 2012, since the agreement between the parties was arrived at on the basis of rates prevailing in 2007 and it did not contain any provision for enhanced rates in the event of extension of time for completion.

After going through the material placed on record, the Arbitrator concluded that no force or coercion was exercised by the respondent and the appellant could not claim any additional/enhanced amount for the work performed. It was also held that the appellant was not entitled to the claimed amount of interest as the relevant Bill was accepted and payment made by the respondent without any delay.

11. In the proceedings before the learned ADJ, the appellant raised the same grounds as have been raised in the present appeal. The learned Judge, after hearing the parties and going through the material on record, concurred with the view taken by the Arbitrator. Insofar as the appellant’s claim of



escalation of price in 2012 was concerned, learned ADJ observed that the rates as per DSR-2012 were not applicable as no document in this regard was produced before the Arbitrator.

12. There is no gainsaying that the jurisdiction of this Court under Section 37 of the Arbitration is limited in scope. In this regard, it is deemed expedient to advert to the decision in State of Jharkhand and Others v. HSS Integrated SDN and Another reported as **(2019) 9 SCC 798**, where the Supreme Court observed as follows:-

“7. As held by this Court in a catena of decisions, the award passed by the Arbitral Tribunal can be interfered with in the proceedings under Sections 34 and 37 of the Arbitration Act only in a case where the finding is perverse and/or contrary to the evidence and/or the same is against the public policy. (See Associate Builders v. DDA, etc.)

7.1. In the present case, the categorical findings arrived at by the Arbitral Tribunal are to the effect that the termination of the contract was illegal and without following due procedure of the provisions of the contract. The findings are on appreciation of evidence considering the relevant provisions and material on record as well as on interpretation of the relevant provisions of the contract, which are neither perverse nor contrary to the evidence in record. Therefore, as such, the first appellate court and the High Court have rightly not interfered with such findings of fact recorded by the learned Arbitral Tribunal.”

13. The scope of Section 37 of the Arbitration Act was further analysed in MMTC Limited v. Vedanta Limited reported as **(2019) 4 SCC 163**, where it was held:-

“14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions



laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings.”

14. Recently, in Haryana Tourism Limited v. Kandhari Beverages Limited reported as (2022) 3 SCC 237, the Supreme Court was in seisin of a fact-situation akin to the case at hand. The appellant therein had accepted the tender filed by the respondent however, disputes arose between the parties during pendency of the contract and led to appointment of an Arbitrator. Aggrieved by the Arbitrator’s Award, the respondent filed objections under Section 34 of the Arbitration Act before the concerned ADJ, which was dismissed. Against the order of the learned ADJ as well as the Award of the Arbitrator, the respondent preferred an appeal before the Punjab and Haryana High Court under Section 37 of the Arbitration Act, which was allowed.

Assailing the order of the High Court, the appellant approached the Supreme Court. While setting aside the order of the High Court and restoring the Award of the Arbitrator and order of the learned ADJ, the Supreme Court delineated the scope of Section 37 of the Arbitration Act and observed thus:-

“8. So far as the impugned judgment and order passed by the High Court quashing and setting aside the award and the order passed by the Additional District Judge under Section 34 of the Arbitration Act are concerned, it is required to be noted that in an appeal under Section 37 of the Arbitration Act, the High Court has entered into the



merits of the claim, which is not permissible in exercise of powers under Section 37 of the Arbitration Act.

9. As per settled position of law laid down by this Court in a catena of decisions, an award can be set aside only if the award is against the public policy of India. The award can be set aside under Sections 34/37 of the Arbitration Act, if the award is found to be contrary to, (a) fundamental policy of Indian Law; or (b) the interest of India; or (c) justice or morality; or (d) if it is patently illegal. None of the aforesaid exceptions shall be applicable to the facts of the case on hand. The High Court has entered into the merits of the claim and has decided the appeal under Section 37 of the Arbitration Act as if the High Court was deciding the appeal against the judgment and decree passed by the learned trial court. Thus, the High Court has exercised the jurisdiction not vested in it under Section 37 of the Arbitration Act. The impugned judgment and order passed by the High Court is hence not sustainable.”

15. In matters relating to Section 37 of the Arbitration Act, this Court as well has time and again outlined the scope of interference to be limited. To elucidate, in Mahanagar Telephone Nigam Limited v. Fujitshu India Private Limited reported as **2015 SCC OnLine Del 7437**, it was held as follows:-

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

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



16. Subsequently, in NHAI v. M/s. BSC-RBM-Pati Joint Venture reported as **2018 SCC OnLine Del 6780**, the scope of interference with an Arbitrator's Award under Section 37 of the Arbitration Act was enunciated thus:-

“66. We have already highlighted, hereinabove, the limited arena of the jurisdiction of this Court, in the matter of interference with arbitral awards, under Sections 34 and 37 of the Act. The position that emerges from the law, as it stands crystallized today, is, clearly, that findings, of fact as well as of law, of the arbitrator/Arbitral Tribunal are ordinarily not amenable to interference either under Sections 34 or Section 37 of the Act. It is only where the finding is either contrary to the terms of the contract between the parties, or, ex facie, perverse, that interference, by this Court, is necessary. The arbitrator/Arbitral Tribunal is the final arbiter on facts as well as in law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Sections 34 or 37 of the Act. Insofar as the ultimate view of the learned arbitrator/Arbitral Tribunal, on any issue is concerned, so long as the view is plausible, and not merely possible, this Court would be loath to interfere therewith. We may usefully make reference, in this regard, to the following postscript, entered by this Court in its judgment in P.C.L. Suncon (JV) v. N.H.A.I.:

“As a postscript, this Court believes that it is imperative to sound a word of caution. Notwithstanding the considerable jurisprudence advising the Courts to remain circumspect in denying the enforcement of arbitral awards, interference with the awards challenged in the petition before them has become a matter of routine, imperceptibly but surely erasing the distinction between arbitral tribunals and courts. Section 34 jurisdiction calls for judicial restraint and an awareness that the process is removed from appellate review. Arbitration as a form of alternate dispute resolution, running parallel to the judicial system, attempts to avoid the prolix and lengthy process of the courts and presupposes parties consciously agreeing to submit a potential dispute to arbitration with the object of actively avoiding a confrontation in the precincts of the judicial system. If



a court is allowed to review the decision of the arbitral tribunal on the law or on the merits, the speed and, above all, the efficacy of the arbitral process is lost”.

17. In Union of India v. Sikka Engineering Company reported as **2019 SCC OnLine Del 8788**, while recapitulating the position of law on Section 37 of the Arbitration Act and dismissing an appeal filed thereunder, this Court observed:-

“18. Furthermore, this court time and again in its earlier judgments titled as L.G. Electronics India Pvt. Ltd. v. Dinesh Kalra reported at 2018 SCC OnLine Del 8367, FAO (OS)(COMM) 55/2018 titled as M.L. Lakhanpal v. Darshan Lal and ADTV Communication Pvt. Ltd. v. Vibha Goel, reported at 2018 SCC OnLine Del 8843 reiterated the limited scope of intervention in an appeal under Section 37 of the Arbitration and Conciliation Act and held as under:—

“It has been repeatedly held that while entertaining appeals under Section 37 of the Act, the Court is not actually sitting as a Court of appeal over the award of the Arbitral Tribunal and therefore, the Court would not re-appreciate or re-assess the evidence. In the case of State Trading Corporation of India Ltd. v. Toepfer International Asia Pte. Ltd., reported at 2014 (144) DRJ 220 (DB), in para 16 it has been held as under:

“16. The senior counsel for the respondent has in this regard rightly argued that the scope of appeal under Section 37 is even more restricted. It has been so held by the Division Benches of this Court in Thyssen Krupp Werkstoffe v. Steel Authority of India 2011 SCC OnLine Del 1747 and Shree Vinayaka Cement Clearing Agency v. Cement Corporation of India 147 (2007) DLT 385. It is also the contention of the senior counsel for the respondent that the argument made by the appellant before the learned Single Judge and being made before this Court, that the particular clause in the contract is a contract of indemnification, was not even raised before the Arbitral Tribunal and did not form the ground in the OMP filed under



Section 34 of the Act and was raised for the first time in the arguments.”

In the case of Steel Authority of India v. Gupta Brothers Steel Tubes Limited, (2009) 10 SCC 63, the Supreme Court has laid down that an error relatable to interpretations of the contract by an Arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award. The Supreme Court has further laid down that the Arbitrator having been made the final arbiter of resolution of disputes between the parties, the award is not open to challenge on the ground that the Arbitrator has reached a wrong conclusion. The courts do not interfere with the conclusion of the Arbitrator even with regard to the construction of contract, if it is a plausible view of the matter.

The Apex Court in J.G. Engineers (P) Ltd. v. Union of India, reported at (2011) 5 SCC 758, demarcated the boundary while explaining the ambit of section 34(2) of the Act. The Court in the aforesaid judgement relied upon the pronouncement of ONGC Ltd. v. Saw Pipes, in paragraph 19, held as under:—

“27. Interpreting the said provisions, this Court in ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705] held that a court can set aside an award Under Section 34(2)(b)(ii) of the Act, as being in conflict with the public policy of India, if it is (a) contrary to the fundamental policy of Indian law; or (b) contrary to the interests of India; or (c) contrary to justice or morality; or (d) patently illegal. This Court explained that to hold an award to be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. It is also observed that an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court, as then it would be opposed to public policy.””

18. From a perusal of the judicial dicta cited hereinabove, it is discernible that the scope of interference under Section 37 of the Arbitration Act is



narrow. Before interfering with an Award passed by the Arbitral Tribunal, which in fact has been concurred with by the First Appellate Court, this Court shall be circumspect and refrain from reassessment or re-examination of the merits of the case, as though it were a Court of Appeal against the Award.

19. Suffice it to note, the Arbitrator in the present case has dismissed the appellant's claims by a well-reasoned order. Not only are the findings of the Arbitrator reasonable and justified in the facts of the case, but the reasons cited have been concurred with by the First Appellate Court also.

20. Keeping in view the facts and circumstances of the case, and for the reasons recorded by the Arbitrator and the learned ADJ, I find no ground to interfere with the impugned order and/or the Award dated 02.11.2015 under Section 37 of the Arbitration Act. The appeal is accordingly dismissed.

(MANOJ KUMAR OHRI)
JUDGE

JULY 7, 2022/v