



\$~19 & 28

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

%

Date of decision: July 08, 2022

+ **FAO(COMM) 97/2022 & CM APPLs. 29720/2022 & 29721/2022**
+ **FAO(COMM) 99/2022 & CM APPLs. 29929/2022 & 29930/2022**

M/S SHINE AD.(THROUGH ITS PROPRIETOR SHRI DIGVIJAY SINGH) Appellant

Through: Mr. Avadh Kaushik, Advocate

Versus

NORTH DELHI MUNICIPAL CORPORATION Respondent

Through: Nemo.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

HON'BLE MR. JUSTICE SAURABH BANERJEE

J U D G M E N T (oral)

1. The above captioned first appeal [FAO(COMM) 97/2022] under Section 37 of the Arbitration and Conciliation Act, 1996 (henceforth referred to as the "Act") has been filed by the appellant against the order dated 23.05.2022 [in OMP (COMM) No. 03/2021] passed by the learned District Judge, whereby the objections filed by appellant under Section 34 of the Act, against the arbitral award dated 19.02.2020 (henceforth referred to as the 'arbitral award'), have been rejected.

2. The above captioned second appeal [FAO (OS) 99/2022] filed under Section 37 of the Arbitration and Conciliation Act, 1996 by the appellant



against the order dated 05.05.2022 [in OMP (COMM) No. 124/2020] passed by the learned District Judge, whereby the objections filed by appellant under Section 34 of the Act, against the arbitral award dated 19.02.2020, have been rejected.

3. We note that the first round of litigation *inter-se* the parties commenced when the respondent, as claimant filed two separate Statement of Claims before the learned arbitrator and came to an end whence the learned arbitrator allowed the claims of the respondent against the appellant vide two separate arbitral awards dated 19.02.2020.

4. We further note that the aforesaid led to the second round of litigation *inter-se* the parties, when the appellant raised its objections, being OMP (COMM) No. 3/ 2021 qua the first site and OMP (COMM) No. 124/2020 qua the second site, under Section 34 of the Act against the aforesaid arbitral awards before the learned trial court. The said second round of litigation culminated whence the learned trial court dismissed the said objections of the appellant vide two separate impugned orders dated 23.05.2022 and 05.05.2022. The aforesaid led to the filing of the third round of litigation *inter-se* the parties in the form of instant appeals under Section 37 of the Act filed by the appellant against the impugned orders of dismissal.

5. Pertinently, the arbitral award dated 19.02.2020 in the first appeal pertains to dispute with regard to “**Unipole site Muni Maya Ram Hospital Chowk, Pitampura FTC Muni Maya Ram Hospital (Rohini Zone)**” (henceforth referred to as “first site”) and the second appeal pertains to arbitral award of even date with regard to dispute arising out of “**Unipole**



site in front of DDA offices, Opp. Metro Pillar No.373 Near Madhjuban Chowk, FTC Rithala to Netaji Subhash Palace (RZ)” (henceforth referred to as the “second site”).

6. Since the parties to these appeals as well as both the impugned orders contain similar reasoning and findings and as the grounds for challenge to both the impugned orders dated 23.05.2022 and 05.05.2022 are similar, therefore, these appeals are heard together. Also, the appellant has prayed for stay of both the impugned orders and the preliminary objection qua maintainability of both these appeals under Section 37 of the Act, is involved, therefore, prior to issuing notice, we deem it appropriate to take up and decide the issue of maintainability of both these appeals.

7. According to appellant, a tender was floated by the respondent for allotment of the first site and also for allotment of the second site for display of advertisement and the highest bid offered by the appellant was accepted. The respondent vide offer letter dated 23.12.2014 offered the appellant to display its advertisements at a monthly licensing fee of Rs.71,850/- in respect of first site and Rs.88,850/- in respect of second site, for a period two years from the date of allotment. Appellant claims to have made payments of requisite amount to the respondent on 05.01.2015 in terms of offer/demand letter, however, despite request of appellant vide letter dated 26.12.2014 and respondent's letter dated 09.01.2015, exact locations/sites of Unipole was not handed over to the appellant.

8. Appellant further claims to have made various representations dated 26.12.2014; 30.12.2014; 08.04.2015; 22.05.2015; 22.06.2015; 21.07.2015 and 09.08.2015 in respect of first site and dated 30.12.2014; 14.01.2015;



04.02.2015; 18.03.2015; 08.05.2015; 27.05.2015; 30.07.2015 and 24.09.2015 in respect of second site; to notify the exact locations and handover the peaceful possession but the respondent miserably failed to provide till 15.10.2015. Appellant has alleged that the sites handed over to it in May, 2015 were running the display of some other person/vendor/company or firm, whereas the appellant was the original allottee, however, without resolving this issues, respondent issued a Show Cause Notice dated 07.09.2015 demanding Rs.2,64,718/- in respect of first site and Show Cause Notice dated 16.09.2015 demanding Rs.3,22,259/- in respect of second site, up to August, 2015. The appellant claims that in respect of second site, the respondent had issued notice of authenticity of display to one M/S Quicker Cars India Pvt. Ltd. whose advertisement was displayed on the second site, which supports the objection of the appellant. So, the appellant disputed the issuance of afore-noted Show Cause Notices and it was only thereafter the exact locations were notified to the appellant on 15.10.2015. Then as per the appellant, it became liable to pay the monthly license fee in respect of subject sites only from the erection of the Unipole on 23.10.2015.

9. According to appellant, from 09.01.2015 till 15.10.2015, it could not commence its business due to failure on the part of respondent to allot and handover the sites and despite having made various payments to the respondent in excess of what was actually due. However, the respondent again issued Show Cause Notice(s) dated 01.07.2016 to the appellant demanding a payment of Rs.6,81,281/- in respect of first site and Rs.7,55,296/- in respect of second site, which was disputed by the appellant



vide letter dated 05.07.2016. The appellant informed the respondent of having made excess payment of Rs.1,06,795/- in respect of second site.

10. Having no hope of resolution of the issue, the appellant vide letter dated 12.07.2016 served notice upon the respondent for surrender of Unipole sites; requesting to adjust the security amounts toward three months' notice period. The respondent vide letter dated 10.11.2016 accepted appellant's request to surrender and cancelled the contracts, however, raised a demand of Rs.4,96,099/- in respect of first site and of Rs.10,07,362/- in respect of second site despite having adjusted the security deposit of Rs.2,15,550/- and Rs.2,66,550/- in respect of first site and second site respectively. Appellant claims to have responded to the aforesaid demands vide letters dated 10.11.2016 and 17.11.2016, but the respondent without consent of appellant, appointed learned arbitrator out of its panel of arbitrators for adjudication of disputes. The learned arbitrator entered into the reference and after filing of statement of claims; statement of defence; rejoinder; admission and denial of documents by the parties; heard them and pronounced two separate arbitral awards dated 19.02.2020. Both the arbitral awards were pronounced against the appellant and in favour of the respondent; directing the appellant to pay the demanded amount of Rs.4,96,099/- within 90 days from the date of the Award for first site and Rs.10,07,362/- within 90 days from the date of the Award for the second site; alongwith simple interest @9% p.a. from the date of termination of the contract till the date of the award; simple interest @9% p.a. on the above amounts on the expiry of the aforesaid 90 days to the respondent.

11. The arbitral awards were challenged by the appellant by filing



objections under the provisions of Section 34 of the Act [OMP (COMM) 03/2021 and OMP (COMM) 124/2022] which stood dismissed vide order dated 23.05.2022 and 05.05.2022 respectively. It is thence that the appellant has chosen to file the instant appeals before this Court.

12. The learned counsel for the appellant has commenced his arguments contending that the impugned arbitral awards as well as the impugned orders are liable to be set aside as no notice of appointment of arbitrator was given to the appellant by the respondent before appointing the learned arbitrator for adjudication of disputes, which is mandatory post amendment of the Act and also mandatory requirements under Section 12(1) and (5) read with Seventh Schedule of the Act, were not complied with.

13. Learned counsel for appellant contends that the learned trial court has failed to appreciate that the learned arbitrator acted in biasness by accepting documents of the respondent and ignoring the documents of the appellant and also that no evidence was recorded in the case and the disputes were decided only on the basis of pleadings and documents filed by the parties. Learned counsel for the appellant also contends that the appellant was harassed by the officials of the respondent by adopting illegal means and misuse of powers just to extort money and also false and incorrect reports regarding the inspection of sites were submitted, whereas the photographs presented by the appellant from 'day one' of the sites were not considered by the learned arbitrator.

14. Learned counsel further submits that the learned trial court has not taken into consideration the facts that the subject sites were handed over to the appellants only on 15.10.2015 and, therefore, the demands for payment



of license fee for the period 09.01.2015 till 15.10.2015, is bad in law and also that the wrong calculations submitted by the respondent have been taken into consideration while passing the impugned arbitral awards.

15. We have heard the learned counsel for the appellant and also perused all the documents before us.

16. Before adverting and giving our finding upon the facts of this case, we wish to summarize the established position of law with respect to Section 37 of the Act. It is trite law that the scope of an appeal under Section 37 of the Act is extremely limited. It is an established position that while entertaining appeals under Section 37 of the Act, the Court is not to sit as a court of appeal and is not to reappreciate or reassess the evidence or interfere with the findings of the arbitrator and thus such interference by the Court is uncalled for. In fact, the Court is to intervene in few circumstances only like in case of fraud and bias by the arbitrator, violation of principles of natural justice, etc, and cannot correct errors in the arbitral award. Further, as per the Act, the Court has to play only a supervisory role for review to ensure fairness.

17. Moreover, an arbitral award can be interfered only whence the finding therein is based on 'no evidence' or the arbitrator has wrongly taken into account something irrelevant to the decision arrived at or when any vital evidence has been ignored while arriving at the decision. An Award can be said to be against justice only when it shocks the conscience of the Court or it is in contravention of any of the substantive provisions of law of India or it is in contravention of any of the provisions of the Act or it is in contravention of any of the terms of the Contract in dispute before the



arbitrator or it is patently illegal or prejudicial to the rights of the parties.

18. The Hon'ble Supreme Court in the case of ***Oil and Natural Gas Corporation Limited vs Discovery Enterprises Private Limited and Anr.***: **2022 SCC Online SC 522** has held as under:

“52. In the exercise of the appellate jurisdiction, the court must have due deference to the grounds which have weighed with the tribunal in holding that it lacks jurisdiction having regard to the object and spirit underlying the statute which entrusts the arbitral tribunal with the power to rule on its own jurisdiction. The decision of the tribunal that it lacks jurisdiction is not conclusive because it is subject to an appellate remedy under Section 37(2) (a). However, in the exercise of this appellate power, the court must be mindful of the fact that the statute has entrusted the arbitral tribunal with the power to rule on its own jurisdiction with the purpose of facilitating the efficacy of arbitration as an institutional mechanism for the resolution of disputes.”

Thus, in a nutshell, the scope of scrutiny of interference by a court in the second round of litigation under Section 37 of the Act, especially after conclusion of the first round of litigation under Section 34 of the Act, is extremely limited and is only amenable to interference by the court if it is absolutely necessary.

19. The Hon'ble Supreme Court in the case of ***Anglo American Metallurgical Coal Pty. Ltd. vs MMTC Ltd.***: **(2021) 3 SCC 308** has also held as under:

“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.

20. The Hon'ble Supreme Court in the case of **MMTC Ltd. vs M/s Vedanta Ltd.:** (2019) 4 SCC 163 has also held as under:

“12. 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. ”

21. We find that in both these appeals also the learned counsel for the appellant posits the identically similar contentions as those agitated by him before the learned trial Court. Interestingly, on a bare perusal of both the



arbitral awards and the impugned orders before us, we note that the appellant is guilty of pleading and raising fresh/new arguments before the learned trial court and before this Court for the first time, and that they were neither a part of the pleadings pleaded nor were part of arguments raised before the learned arbitrator. We also note that all the objections raised by the learned counsel for the appellant before the learned trial court have already been heard, deliberated and finally decided by the learned trial court vide the two well-reasoned and detailed impugned orders before us. We concur with the well-reasoned findings of the learned trial court in the impugned orders.

22. In view of the aforesaid discussion and settled law of the land, we find no infirmities, illegality in the impugned orders passed by the learned trial court which require interference in the present appeal. We, thus hold that the appellant has failed to make out a case for this Court to interfere under the provisions of Section 37 of the Act and also reiterate that the learned counsel for the appellant has merely agitated the same objections, already heard and rejected by the learned trial court vide its impugned orders, once again before this Court. Thus, the learned counsel for the appellant has failed to make out a case for the maintainability of the appeals under Section 37 of the Act.

23. With regard to the first plea that no notice of appointment of learned arbitrator was given to the appellant, the trial court has observed that the appellant had fully participated in both the arbitral proceedings and contested the claim of respondents on merits. On the plea that the learned trial court has failed to appreciate that the learned arbitrator acted in biasness



by accepting documents of the respondent and ignoring its documents, we find that that the trial court in both the impugned orders has noted that at no stage of proceedings before the learned arbitrator any request for recusal on the ground of biasness, prejudice or undue favour was raised and rather, the appellant was given opportunity to make a defence. The learned trial court has also rejected the allegation of appellant that the officials of respondent adopted illegal means and misused their powers to extort money as being baseless, without any details and particulars. With regard to objection of the appellant that the learned arbitrator did not record evidence of the parties, the learned trial court has observed that non-examination of witnesses of parties is not fatal to the arbitral proceedings and also that no request for recording of evidence or cross-examination was made by the appellant before the learned arbitrator.

24. At this stage, we note that in terms of Section 19 of the Act, an arbitrator is not bound by the provisions of the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872 and the parties were free to agree on the procedure to be followed by the arbitrator. Section 19 of the Act is reproduced as under:

19. Determination of rules of procedure.

- (1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).*
- (2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.*



(3) *Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.*

(4) *The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.*

25. In view of the provisions of Section 19 of the Act, the aforesaid contentions of the learned counsel for the appellant are bereft of any credence as the appellant had never raised any iota of doubt over the manner and/or the procedure adopted by the learned arbitrator at any point of time during the arbitration proceedings and in fact, willingly participated therein for more than two years until passing of the impugned arbitral awards. The appellant cannot *approve and reprobate* and try to unwind the clock by raising new found issues after facing defeat before the learned arbitrator by agitating fresh grounds in the petition under Section 34 of the Act or in the appeal under Section 37 of the Act.

26. Accordingly, both the appeals are dismissed as not being maintainable under the provisions of Section 37 of the Act along with pending applications.

27. No order as to costs.

(SURESH KUMAR KAIT)
JUDGE

(SAURABH BANERJEE)
JUDGE

JULY 08, 2022/So/r