

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

% **Date of order : 7th February, 2023**

+ **O.M.P.(COMM.) 449/2019**

MAS DEVELOPERS PVT. LTD. Petitioner

Through: **Mr. Bhushan Kapur and Mr.
Y.K. Kapur, Advocates**

versus

MAGUS CONSORTIUM ORCHID AVENUE (P) LTD.

.....Respondent

Through: **Counsel for the Respondent**

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

1. The instant petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter "**the Act**") has been filed on behalf of the petitioner seeking to set aside the impugned Award dated 10th July 2019 passed and published by the learned Sole Arbitrator.

FACTUAL MATRIX

2. The petitioner entered into an agreement of construction with the respondent *vide* Agreement dated 19th July 2013 (hereinafter "**the Agreement**"). The contract was awarded to the petitioner for construction of a multi-storeyed building in a residential society named as "Vedanta Minaret" situated in Indirapuram, Ghaziabad, Uttar Pradesh, which included a basement and stilt along with 28 floors. The period of

completion of the project was stipulated to be 21 months from the date of commencement of work which had to begin after 5 days from the date of signing of the Agreement.

3. The project was not completed in the stipulated time and the parties again entered into an extension Agreement dated 1st September 2016 in which the completion date was fixed to be 30th November 2017. Thereafter, on 6th March 2018, when the construction work was going on, the respondent sent an email to the petitioner informing that the respondent would be carrying on the work independently and disengaged the petitioner from the aforementioned project.

4. Being aggrieved, the petitioner invoked the arbitration proceedings on 12th April 2018. After completion of the arbitral proceeding, the learned Sole Arbitrator published the impugned Award on 10th July 2019 which has been challenged by the petitioner herein.

SUBMISSIONS

(On behalf of the petitioner)

5. Learned counsel on behalf of the petitioner submitted that the very first challenge to the impugned Award passed by the learned Arbitrator is on the ground that the learned Arbitrator has arbitrarily calculated and reduced the area of the work done by the petitioner as calculated by the Local Commissioner to which respondent has also not objected. It is submitted that since the work was illegally withdrawn by the respondent without settling the measurements and the payments thereof, the petitioner had earlier filed a petition bearing no. **OMP (I) Comm. No. 146/2018** under Section 9 of the Act by way of which the Local Commissioner was appointed by this Court to measure the area of the

work done by the petitioner. As per the measurement of Local Commissioner, the petitioner had constructed area of 74602.2 square ft. as for 1st to 12th floor, 38401 square ft. for 13th to 22nd floor, 14065 square ft. for the basement, 5147.78 square ft. for the stilt, and the measurement stood accepted by respondent as well as the arbitral tribunal.

6. Learned counsel on behalf of the petitioner further submitted that during the course of proceedings in above-mentioned petition under Section 9 of the Act, the respondent appointed the Sole Arbitrator contrary to the terms of the contract between them. The petitioner in the instant petition has objected to the appointment of the learned Arbitrator on the ground that the Arbitrator was a full time member of the Mahanadi Water Disputes Tribunal, constituted under the Inland Water Disputes Tribunal Act. Being a full time member, she was ineligible to act as an Arbitrator and the very fact of her being a member of the above-said tribunal came into the knowledge of the petitioner only after the impugned Award was published.

7. It is submitted that throughout the arbitration proceedings, the respondent neither raised any counter-claim nor claimed any set-off or adjustment. It is further contended that the learned Arbitrator did neither dispute the area measured by the Local Commissioner nor the bills raised by the petitioner. However, the learned Arbitrator, on its own without any pleading, evidence on record or written submission filed by the Respondent claiming that the shafts are more than 5 square meters, gave deduction under Clause 12 (1)(d) of the Agreement which did not had any applicability. After illegally and wrongfully deducting the area of shaft, the learned Arbitrator arrived at the figure of Rs. 11,01,69,747/- from

which it deducted a sum of Rs. 8,51,25,00/- which was paid to the petitioner for the work done and arrived at a figure of Rs. 2,50,44,747/- and further deducted a sum of Rs. 2,24,15,463/- arrived at a figure of Rs. 26,29,294/- to be paid to the petitioner against the work done giving effect to clause 10 of the Appendix A of the Agreement which was never the case of respondent either in the pleadings or in evidence or in written argument and therefore, the impugned Award beyond the pleadings is liable to be set aside. It is further submitted that no justified cause or calculations have been given by the learned Arbitrator as to how such deductions are calculated, thereby, signifying the non-application of mind by the learned Arbitrator at the time of passing the impugned Award.

8. It is submitted that the petitioner is entitled to Rs. 35,00,000/- retained as retention money on the ground that the work was withdrawn on 6th March 2018 and no defects were pointed out till 6th March 2019 i.e. for 12 months, therefore, making the Security amount refundable. The learned Arbitrator held that the forfeiture of security deposit was valid when it was not the case of the respondent.

9. Learned counsel on behalf of the petitioner further submitted that while deciding the issue of termination of the Agreement, the learned Arbitrator decided that the contract was terminated by the email dated 6th March 2018 and it was a valid termination on the ground that time was the essence of this Contract and the petitioner failed to adhere to the timeline. To this effect, it is submitted on behalf of the petitioner that *first*, time was never the essence of the contract as clause 4 of the Agreement specifically provides for imposition of damages in the event of delay in execution of the project. Unless and until time is made the

essence in terms of section 55 of the Indian Contract Act, 1872, the termination of a contract cannot be held to be valid and the respondent has specifically admitted the fact that no communication pertaining to time fixation was ever made. It is submitted that the delay caused is attributable to the respondent company itself, being not fully mobilized and financially capable to get the work executed on time. **Secondly**, no resolution was passed by the board of directors of the company in which the decision to withdraw the contract was taken. It is submitted that the email dated 6th March 2018 did not mention the termination of the contract but only indicated that the respondent would be carrying on the remaining work independently. Therefore, it is submitted that the learned Arbitrator has also erred while deciding that the contract has been terminated on the grounds of delay.

10. Learned counsel for the petitioner submitted that the petitioner is entitled to receive the amount pertaining to loss of its profit on the ground of reduction of work from 30 floors to 22 floors as no resolution was passed to reduce the number of floors in the awarded contract. It is submitted that the petitioner is also entitled to the final bill as the contract was illegally terminated. The final bill was prepared on the undisputed calculations and measurements of Local Commissioner and no objections thereto were laid down by the respondent. It was only before the Arbitrator that respondent objected to the final claim contending that he came to know the claims only during the arbitration proceedings.

11. Accordingly, it is submitted that the impugned Award passed by the learned Arbitrator, being patently illegal and contrary to fundamental policy of Indian Law, is liable to be set aside.

(On behalf of the respondent)

12. *Per contra*, learned counsel on behalf of respondent vehemently opposed the averments made by the petitioner in the instant petition on the ground that the impugned Award passed by the learned Arbitrator is based on the finding of facts after appreciation of documents and evidence and the same cannot be substituted by this Court in the ambit of Section 34 of the Act.

13. Learned counsel on behalf of the respondent submitted that the major covered area of the project was restricted to 1,50,000 square ft. only and the same was mentioned clearly in the first contract/agreement itself. It is also submitted that after the dispute arose and the Sole Arbitrator was appointed, the petitioner did not object to the appointment and conceded to the proceedings before her.

14. Learned counsel for the respondent has categorically denied the averment that the impugned Award passed by the learned Arbitrator is beyond pleadings. The learned Arbitrator opined to first give finding *qua* termination of the Agreement and forfeiture of the security amount by respondent. And thereafter, the learned Arbitrator dealt with the same and held the termination to be valid. The same is a finding of the fact that delay was caused by the petitioner in completion of the project even beyond the extended period.

15. It is submitted on behalf of the respondent that the learned Arbitrator has rightly given a finding that the measurement as recorded by the Local commissioner has to be as per the terms of the Agreement executed between the parties. Further, the figures so arrived at and awarded under the impugned Award have been worked out in the

presence of the parties and their respective Counsels. The same has been recorded in the impugned Award itself.

16. Learned counsel on behalf of respondent has contended that with respect to the claims raised towards idle man and machinery, the petitioner admittedly removed all their man and machinery from the site during the pendency of arbitration proceedings and since there is no proof of idle labour, it was a finding by the Local Commissioner that the material laying on site was useless and old. It is submitted that the petitioner has raised the claims pertaining to man and machinery for the period during which the work was admittedly in progress and therefore, its claims have failed.

17. It is submitted by the respondent that the petitioner did not contend that arbitral impugned Award is in conflict with the public policy of India and thus the attempt of the petitioner to bring the so called objections under Section 34 of the Act is untenable. And accordingly, it is prayed that the instant petition is liable to be dismissed.

18. Heard learned counsel for both parties and perused the record.

ANALYSIS

19. The petitioner has sought the indulgence of this Court under Section 34 of the Act which is reproduced hereunder:

“34. Application for setting aside arbitral impugned Award.—

(1) Recourse to a Court against an arbitral impugned Award may be made only by an application for setting aside such impugned Award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral impugned Award may be set aside by the Court only if—

(a) the party making the application [establishes on the basis of the record of the arbitral tribunal that]—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral impugned Award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral impugned Award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral impugned Award is in conflict with the public policy of India.

[Explanation 1.—For the avoidance of any doubt, it is clarified that an impugned Award is in conflict with the public policy of India, only if,—

- (i) the making of the impugned Award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or*
- (ii) it is in contravention with the fundamental policy of Indian law; or*
- (iii) it is in conflict with the most basic notions of morality or justice.*

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]”

20. Upon perusal of the pleadings and hearing the parties at length, this Court opines that the controversy between the parties *qua* the impugned Award may be narrowed down to adjudicate the following issues:

- I. Whether the impugned Award was a well-reasoned Award passed after duly considering the provisions of the Agreement dated 19th July 2013 and pleadings by the parties?
- II. Whether the Arbitrator has rightly held that the contract was terminated vide email dated 6th March 2018 on the ground of delay while rejecting the claims of the petitioner?

Issue No. I

21. It has been pointed out on behalf of the petitioner that the learned Arbitrator has arbitrarily made the deduction in the area to be calculated for awarding the amount without assigning any reason or calculation. For the same purpose, the Arbitrator has only relied on clause 12 of the

Agreement but no reasonable description or calculation has been provided for such deduction.

22. It is observed that none of the parties to the arbitration had intention to defeat the finding and calculations arrived at by the Local Commissioner whereas the Arbitrator in the proceedings re-calculated the findings of the local commissioner holding as below-

“The area bill from the 1st to 12th floor is not an area of 74,602.2 sq. ft. as measured by the Local Commissioner; it is a figure 68,815.20 sq. ft. The calculation sheet filed by the Local Commissioner had not taken into account the provisions of clause 12 (l)(d) of Appendix A of CW1/1 which permits only 50% payment for a shaft if the area of the shaft is more than 5 sq. meters. Thus a reading of clause 12(1)(d) of Exhibit CW1/1 this measurement of 68,815.20 sq. ft. calculated @ Rs.860 per sq. ft. The figure works out to Rs. 5,14,87,532.00.

Similarly reading clause 12(1)(d) & (e) of Exhibit CW1/1, the total – area for the 13th to 22nd floors is calculated at 36,236.5 sq. ft when multiplied @ Rs.900 per sq ft. totals Rs.2,83,73,179.50

For the basement the area calculated at the afore method works out to 13,801.0009 sq ft which calculated @ Rs.860 totals a figure of Rs.1,03,25,908.20 This is keeping in mind the rates as mentioned in clause 12(1)(d)(e) & (b) Exhibit CW1/1 which is admittedly binding upon the parties.

For the stilt area again a measurement of 4295 sq ft calculated @Rs.800 per sq ft a figure works out to a sum of Rs.3,21,13,519.00 is worked out.”

23. The effective clause 12 of the Agreement for the aforementioned contention is reproduced hereunder:

“12. Measurements:

The works shall be measured as per actual covered area basis and inclusive of the followings:

- a) The actual covered area of the tower as per approved drawings for execution at site will be measured 100% of the covered area rate for the payment*
- b) Area of the balconies shall be measured 60% of the covered area rate for the payment.*
- c) 100% plan area of the stair case of the covered area rate as per approved drawings for execution at site will be measured for payment.*
- d) All shafts up to 5.00 sq meters will not be deducted from covered area but for area more than 5.00 sq meters, 50% deduction will be made in the covered area.*
- e) Basement area shall be measured 100% of the covered area and stilt floor area shall be measured as 75% of the covered area.”*

24. Besides intervening with the findings of the Local Commissioner which, admittedly, has not been disputed by either party, the learned Arbitrator failed to assign any reasons or calculations for the measurements, so made. The first question arising out of the instant situation is whether the learned Arbitrator was right in going beyond the pleadings to re-measure the area, which was already measured by the Local Commissioner, without giving any reason or calculation.

25. To address this issue, this Court is inclined to refer to Section 31(3) of the Act, which is as below:

“31. Form and contents of arbitral impugned Award.-

(3) The arbitral impugned Award shall state the reasons upon which it is based, unless—

(a) the parties have agreed that no reasons are to be given, or

(b) the impugned Award is an arbitral impugned Award on agreed terms under Section 30.”

It is, thus, apparent from the aforesaid Section of the Act that one of the essential requirements that are to be satisfied while making an Award include that the Award ought to be supported by well-defined reasons.

26. In ***Som Datt Builders Ltd. vs. State of Kerala, (2009) 10 SCC 259***, an elaborate finding regarding reasoned Arbitral Awards was made by the Hon’ble Supreme Court, which is reproduced hereunder:-

“20. Section 31(3) mandates that the arbitral impugned Award shall state the reasons upon which it is based, unless—(a) the parties have agreed that no reasons are to be given, or (b) the impugned Award is an arbitral impugned Award under Section 30. By legislative mandate, it is now essential for the Arbitral Tribunal to give reasons in support of the impugned Award. It is pertinent to notice here that the 1996 Act is based on Uncitral Model Law which has a provision of stating the reasons upon which the impugned Award is based.

21. In Union of India v. Mohan Lal Capoor [(1973) 2 SCC 836: 1974 SCC (L&S) 5] this Court said: (SCC p. 854, para 28)

“28. ... Reasons are the links between the materials on which certain conclusions are based and the actual conclusions.”

22. In *Woolcombers of India Ltd. v. Workers' Union* [(1974) 3 SCC 318 : 1973 SCC (L&S) 551 : AIR 1973 SC 2758] this Court stated: (SCC pp. 320-21, para 5)

“5. ... The giving of reasons in support of their conclusions by judicial and quasijudicial authorities when exercising initial jurisdiction is essential for various reasons. First, it is calculated to prevent unconscious unfairness or arbitrariness in reaching the conclusions. The very search for reasons will put the authority on the alert and minimise the chances of unconscious infiltration of personal bias or unfairness in the conclusion. The authority will adduce reasons which will be regarded as fair and legitimate by a reasonable man and will discard irrelevant or extraneous considerations.””

27. The Hon'ble Supreme Court in *Dyna Technologies (P) Ltd. vs. Crompton Greaves Ltd.*, (2019) 20 SCC 1, while determining a similar question held as under:-

“26. Having established the basic jurisprudence behind Section 34 of the Arbitration Act, we must focus on the analysis of the case. The primary contention of the learned counsel appearing on behalf of the appellant is that the impugned Award by the learned Tribunal was perverse for want of reasons. The necessity of providing reasons has been provided under Section 31 of the Arbitration Act, which reads as under:

*“31. Form and contents of arbitral impugned Award.—(1)-(2) * * **

(3) The arbitral impugned Award shall state the reasons upon which it is based, unless—

(a) the parties have agreed that no reasons are to be given, or

(b) the impugned Award is an arbitral impugned Award on agreed terms under Section 30.”

27. Under the Uncitral Model Law the aforesaid provision is provided as under:

“31. (2) The impugned Award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the impugned Award is an impugned Award on agreed terms under Article 30.”

28. Similar to the position under the Model Law, India also adopts a default rule to provide for reasons unless the parties agree otherwise. As with most countries like England, America and Model Law, Indian law recognises enforcement of the reasonless impugned Award if it has been so agreed between the parties.

35. When we consider the requirement of a reasoned order, three characteristics of a reasoned order can be fathomed. They are: proper, intelligible and adequate. If the reasonings in the order are improper, they reveal a flaw in the decision-making process. If the challenge to an impugned Award is based on impropriety or perversity in the reasoning, then it can be challenged strictly on the grounds provided under Section 34 of the Arbitration Act. If the challenge to an impugned Award is based on the ground that the same is unintelligible, the same would be equivalent of providing no reasons at all. Coming to the last aspect concerning the challenge on adequacy of reasons, the Court while exercising jurisdiction under Section 34

has to adjudicate the validity of such an impugned Award based on the degree of particularity of reasoning required having regard to the nature of issues falling for consideration. The degree of particularity cannot be stated in a precise manner as the same would depend on the complexity of the issue. Even if the Court comes to a conclusion that there were gaps in the reasoning for the conclusions reached by the Tribunal, the Court needs to have regard to the documents submitted by the parties and the contentions raised before the Tribunal so that impugned Awards with inadequate reasons are not set aside in casual and cavalier manner. On the other hand, ordinarily unintelligible impugned Awards are to be set aside, subject to party autonomy to do away with the reasoned impugned Award. Therefore, the courts are required to be careful while distinguishing between inadequacy of reasons in an impugned Award and unintelligible impugned Awards.

37. In case of absence of reasoning the utility has been provided under Section 34(4) of the Arbitration Act to cure such defects. When there is complete perversity in the reasoning then only it can be challenged under the provisions of Section 34 of the Arbitration Act. The power vested under Section 34(4) of the Arbitration Act to cure defects can be utilised in cases where the arbitral impugned Award does not provide any reasoning or if the impugned Award has some gap in the reasoning or otherwise and that can be cured so as to avoid a challenge based on the aforesaid curable defects under Section 34 of the Arbitration Act. However, in this case such remand to the Tribunal would not be beneficial as this case has taken more than 25 years for its adjudication. It is in this state of affairs that we lament that the purpose of arbitration

as an effective and expeditious forum itself stands effaced.

42. From the facts, we can only state that from a perusal of the impugned Award, in the facts and circumstances of the case, it has been rendered without reasons. However, the muddled and confused form of the impugned Award has invited the High Court to state that the arbitrator has merely restated the contentions of both parties. From a perusal of the impugned Award, the inadequate reasoning and basing the impugned Award on the approval of the respondent herein cannot be stated to be appropriate considering the complexity of the issue involved herein, and accordingly the impugned Award is unintelligible and cannot be sustained.”

28. In the light of facts and circumstances of this case, it is pertinent to refer to ***Grid Corpn. of Orissa Ltd. v. Balasore Technical School, (2000) 9 SCC 552*** wherein it was held by the Hon’ble Supreme Court as below:

“3. In this case, the High Court is of the view that a civil court does not sit in appeal against the impugned Award and the power of the court when an impugned Award is challenged is rather limited. The impugned Award of the arbitrator is ordinarily final and conclusive as long as the arbitrator has acted within his authority and according to the principle of fair play. An arbitrator's adjudication is generally considered binding between the parties for he is a tribunal selected by the parties and the power of the court to set aside the impugned Award is restricted to cases set out in Section 30 of the Arbitration Act. It is not open to the court to speculate where no reasons are given by the arbitrator, as to what impelled him to

arrive at his conclusion. If the dispute is within the scope of the arbitration clause it is no part of the province of the court to enter into the merits of the dispute. If the impugned Award goes beyond the reference or there is an error apparent on the face of the impugned Award it would certainly be open to the court to interfere with such an impugned Award. In New India Civil Erectors (P) Ltd. v. ONGC [(1997) 11 SCC 75] this Court considered a case of a non-speaking impugned Award. In that case the arbitrator had acted contrary to the specific stipulation/condition contained in the agreement between the parties. It was held that the arbitrator being a creature of the contract must operate within the four corners of the contract and cannot travel beyond it and he cannot impugned Award any amount which is ruled out or prohibited by the terms of the agreement. In that contract it was provided that for construction of a housing unit, in measuring the built-up area, balcony areas should be excluded. However, the arbitrator included the same which was held to be without jurisdiction. In the same manner it was also held that the price would be firm and not subject to any escalation under whatsoever ground till the completion of the work and impugned Awarding any sum as a result of escalation was not permissible. To the same effect is the decision in Associated Engg. Co. v. Govt. of A.P. [(1991) 4 SCC 93] It was stated that if the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error and an umpire or arbitrator cannot widen his jurisdiction by deciding a question not referred to him by the parties or by deciding a question otherwise than in accordance with the contract. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the impugned Award. The

principle of law stated in N. Chellappan case [N. Chellappan v. Kerala SEB, (1975) 1 SCC 289] on which strong reliance has been placed by the learned counsel for the respondent would make it clear that except in cases of jurisdictional errors it is not open to the court to interfere with an impugned Award. That proposition is unexceptionable. However, from a reading of the decisions of this Court referred to earlier it is clear that when an impugned Award is made plainly contrary to the terms of the contract not by misinterpretation but which is plainly contrary to the terms of the contract it would certainly lead to an inference that there is an error apparent on the face of the impugned Award which results in jurisdictional error in the impugned Award. In such a case the courts can certainly interfere with the impugned Award made by the arbitrator.”

29. As interpreted above, by placing reliance on the law settled by the Hon’ble Supreme Court in various precedents, it is a mandate that the impugned Award should not merely be reasoned but should also be supported by such reasons which are proper, intelligible and adequate. It has been time and again reiterated that **“reason is the soul of justice”**. A well-reasoned Order ensures that justice must not only be delivered but it must also appear to be delivered. The mandate of recording the reasons while passing an Order therefore, operates as a valid restraint on any possible arbitrary exercise of a judicial/quasi-judicial forum.

30. In the case at hand, the learned Arbitrator has wronged the calculations of the Local Commissioner when it was not disputed by either party. The learned Arbitrator only placed reliance on abovementioned clause 12 of the Agreement but did not elaborate or explain the applicability of the clause to deduct the area so calculated by

the Local Commissioner. On perusal of the Award, it is evident that the impugned Award does not reveal the grounds taken to re-calculate the findings of Local Commissioner and diminish the area. A well-reasoned Award is an indispensable mandate that is required to be met by the Arbitrator under Section 31 (3) of the Act. The provision is not merely a formality but a due procedure which has to be complied with to make way for a fair, reasonable and just opportunity for the aggrieved to know the reason of the failure of his/her claims. The learned Arbitrator while passing the impugned Award has made significant deductions in the basement as well as stilt area beyond permissible limits as stipulated in the running clause 12 of the Agreement. The said clause 12 explicitly provided that no deductions would be made in basement area, whereas the Arbitrator on his own volition, without any detailed calculations and measurements have made deductions in the area of basement and stilt as calculated by the learned Local Commissioner. There is no description or evidence to support such deductions made by the learned Arbitrator and therefore, the impugned Award suffers from infirmity and perversity, being decided contrary to the terms of the Agreement.

Issue No. II

31. Another point of controversy arose out between the parties *qua* the disengagement of the petitioner from the work *vide* email dated 6th March 2018. It is the case of petitioner that the learned Arbitrator has held that the contract stood terminated by the aforesaid email on the ground of delay whereas there was no communication as to time fixation by the respondent.

32. For the abovementioned, it is pertinent to observe the following clauses of the Agreement:

“3. Period of completion of work:

The Contractor shall start the work within 5 days of the date of issue of the letter and shall complete the work within 21 (Twenty one) months (Basement+ Stilt + 28 stories) including common area and common facilities from the date of commencement.

4. Compensation for delay:

The Contractor shall pay to the Developer compensation/damage@ 0.5% of contract value for every one week of delay in completion of work subject to maximum of 5% of contract cost.

5. Bonus for Early completion:

This is the essence of this contract, in case you are able to complete the work before the stipulated period, you shall be paid bonus by Developer an amount equal to 0.1 % the value of contract per every week of early completion subject to a maximum of 3% of the total value of the contract.

17. In the event of any failure on contractor part to fulfill any/or all the terms of this contract, the Developer will have the right to, among other things rescind this contract or to get the work done himself through other party at contractor's sole cost and liability.”

33. To adjudicate the instant issue, it is to be determined first that whether time was an essence of the Contract or not.

34. In the foregoing clauses of the Agreement reiterated above, it is stipulated in the Agreement that the project ought to be completed in 21 months *vis-a-vis* the awarding of compensation or bonus in case of late or early completion, as the case may be. To adjudicate the issue at hand, reference is made to ***McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181*** wherein the Hon'ble Supreme Court has held as hereunder:

“Whether time was of the essence of the contract

85. *The question which further arises for consideration is as to whether the respondents having proceeded on the basis that time was of the essence of the contract, it was bound to issue a notice of repudiating the contract subject to reservation as regards its claim of damages. MII, however, states that it had never raised a contention that the time was of the essence of the contract, but the claim arises in view of the delay caused in completion of the contract for a period of 34 months and consequent escalation of costs. The price payable in terms of the sub-contract did not adequately cover increased costs expended by MII. On a plain reading of the provisions of Section 55 of the Indian Contract Act, it is evident that as the parties did not intend that time was to be of the essence of the contract on the expiry whereof the contract became voidable at the instance of one of the parties, but by reason thereof the parties shall never be deprived of damages.*

86. *We may notice that BSCL had never pleaded before the arbitrator that the time was of the essence of the contract. In construction contracts generally time is not of the essence of the contract unless special features exist therefore. No such special features, in the instant case, have been brought to our notice.”*

35. The law deciding whether time is the essence of a contract or not has been discussed by the Hon'ble Supreme Court in the case of ***Hind Construction Contractors v. State of Maharashtra, (1979) 2 SCC 70***, wherein it was held as below:

“7. The first question that arises for our consideration, therefore, is whether time was of the essence of the contract that was executed between the parties on July 12, 1955 (Ex. 34). It cannot be disputed that question whether or not time was of the essence of the contract would essentially be a question of the intention of the parties to be gathered from the terms of the contract. The contract in the instant case is for the construction of an aqueduct across the Alandi River at Mile 2 of the Nasik Left Bank Canal and unquestionably 12 months' period commencing from the date of the commencement of the work had been specified within which the construction had to be completed by the appellant-plaintiff. Indisputably, in the work order dated July 2, 1955 the Executive Engineer had directed the appellant-plaintiff to commence the work by July 5, 1955 intimating in clear terms that the stipulated date for starting the work would be reckoned from July 5, 1955. Both the trial court as well as the High Court have found that mentioning of July 5, 1955 as the date for starting the work was not nominal but was real date intended to be acted upon by the parties. It is, therefore, clear that 12 months' period mentioned for the completion of the work was to expire on July 4, 1956. The question is whether this period of 12 months so specified in the contract was of the essence of the contract or not? On the one hand, counsel for the appellant-plaintiff contended that the contract being analogous to a building contract the period of 12 months would not ordinarily be of the essence of the contract as the subject-matter thereof was not such as

to make completion to time essential, that an agreement to complete it within reasonable time would be implied and that reasonable time for completion would be allowed. On the other hand, counsel for the respondent-defendant contended that time had been expressly made of the essence of the contract and in that behalf reliance was placed upon clause (2) of the "Conditions of Contract" where not only time was stated to be of the essence of the contract on the part of the contractor but even for completion of proportionate works specified periods had been specified and, therefore, the appellant-plaintiff's failure to complete the work within the stipulated period entitled the respondent-defendant to rescind it. In the latest 4th Edn. of Halsbury's Laws of England in regard to building and engineering contracts the statement of law is to be found in Vol. 4, para 1179, which runs thus:

"1179. Where time is of the essence of the contract.—The expression time is of the essence means that a breach of the condition as to the time for performance will entitle the innocent party to consider the breach as a repudiation of the contract. Exceptionally, the completion of the work by a specified date may be a condition precedent to the contractor's right to claim payment. The parties may expressly provide that time is of the essence of the contract and where there is power to determine the contract on a failure to complete by the specified date, the stipulation as to time will be fundamental. Other provisions of the contract may, on the construction of the contract, exclude an inference that the completion of the works by a particular date is fundamental: time is not of the essence where a sum is payable for each week that the work remains incomplete after the date fixed, nor

where the parties contemplate a postponement of completion.

Where time has not been made of the essence of the contract or, by reason of waiver, the time fixed has ceased to be applicable, the employer may by notice fix a reasonable time for the completion of the work and dismiss the contractor on a failure to complete by the date so fixed.”

(emphasis supplied)

8. *It will be clear from the aforesaid statement of law that even where the parties have expressly provided that time is of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental; for instance, if the contract were to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of contract. The emphasised portion of the aforesaid statement of law is based on Lamprell v. Billericay Union [(1849) 3 Exch 283, 308], Webb v. Hughes [(1870) LR 10 Eq 281] and Charles Rickards Ltd. v. Oppenheim [(1950) 1 KB 616 : (1950) 1 All ER 420 (CA)] . It is in light of the aforesaid position in law that we will have to consider the several clauses of the contract Ext. 34 in the case. The material clauses in this behalf are clauses 2 and 6 of the “Conditions of Contract” which run as follows:*

“2. The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor and shall be reckoned from the date on which the order to commence work is given to the contractor. The work shall throughout the stipulated period of the contract be proceeded with, with all due diligence (time being deemed to be of the essence of the contract on the part of the contractor) and the contractor shall pay as compensation an amount equal to one per cent or such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide, of the amount of the estimated cost of the whole work as shown by the tender for every day that the work remains uncommenced, or unfinished, after the proper dates. And further to ensure good progress during the execution of the work, the contractor shall be bound in all cases in which the time allowed for any work exceeds one month, to complete.

1/4 of the work in 1/4 of the time

1/2 — do — 1/2 — do—

3/4— do — 3/4— do—

6. If the contractor shall desire an extension of the time for completion of the work on the ground of his having been unavoidably hindered in its execution or on any other ground, he shall apply in writing to the Executive Engineer before the expiry of the period stipulated in the tender or before expiry of 30 days from the date on which he was hindered as aforesaid or on which the cause for asking for extension occurred, whichever is earlier, and the Executive Engineer, may if in his opinion there are reasonable grounds for granting an extension,

grant such extension as he thinks necessary or proper. The decision of the Executive Engineer in this matter shall be final.”

Two aspects emerge very clearly from the aforesaid two clauses. In the first place under clause 6 power was conferred upon the Executive Engineer to grant extension of time for completion of the work on reasonable grounds on an application being made by the contractor (appellant-plaintiff) in that behalf; in other words, in certain contingencies parties had contemplated that extension of time would be available to the contractor. Such a provision would clearly be inconsistent with parties intending to treat the stipulated period of 12 months in clause 2 as fundamental. Similarly, in clause 2 itself provision was made for levying and recovering penalty/compensation from the appellant-plaintiff at specified rates during the period the work shall remain unfinished after the expiry of the fixed date. Such provision also excludes the inference that time (12 months period) was intended to be of the essence of the contract. Further with regard to the provision that is to be found in clause 2 whereunder a time schedule for proportionate work had been set out (namely 1/4 of the work in 1/4 of the time, 1/4 of the work in 1/4 of the time and 3/4 of the work in 3/4 of the time), the evidence of the Superintending Engineer, Pandit (DW 1) is very eloquent. In para 13 of his deposition this is what he has stated:

“In the agreement (Ex. 34) the rate' of work is based on the valuation. One fourth time mentioned means one fourth in 12 months. The suit contract is for Rs 1,07,000. One fourth work means the work of about Rs 27,000 It is not possible to do the work of Rs 27,000 in one fourth time as the days were rainy. This was not reasonable.”

The witness in para 12 of his deposition has also given the following admission:

“It is not specifically mentioned in the agreement (Ex. 34), that the suit work was urgent and that it was to be completed within 12 months. In this agreement (Ex. 34) there are the clauses of imposing a penalty and extension of time.”

9. Having regard to the aforesaid material on record, particularly the clauses in the agreement pertaining to imposition of penalty and extension of time it seems to us clear that time (12 months period) was never intended by the parties to be of the essence of the contract. Further from the correspondence on the record, particularly, the letter (Ex. 78) by which the contract was rescinded it does appear that the stipulation of 12 months' period was waived, the contractor having been allowed to do some more work after the expiry of the period, albeit at his risk, by making the rescission effective from August 16, 1956.”

36. This Court is inclined to place its reliance on the precedent laid down by the Hon'ble Supreme Court in the case of ***Hind Constructions (supra)*** while adjudicating whether the time was the essence of the contract rendering delay to be a valid ground of termination as awarded by the learned Arbitrator. It is a settled law that if there is a clause with respect to stipulation of completion time, it has to be read along with other clauses of the Contract to construe its meaning. If there is a clause pertaining to fixation of completion time and another clause pertaining to imposition of penalty for every day or every week the work remained incomplete after the expiry of stipulated time period, it can be construed

as rendering ineffective the clause pertaining to stipulation of completion time.

37. In the instant case, it is patent that since clauses 4 and 5 of the Agreement pertain to imposition of penalty and awarding of bonus respectively, there is a contemplation of contingency of events that might result in delay or early completion of the project. Therefore, by a conjoint reading of aforementioned clauses, it cannot be concluded that the contract was time-bound. The email dated 6th March 2018 sent by the respondent to the petitioner therefore, cannot be treated as a valid termination but rather a withdrawal from the agreement in terms of clause 17 reproduced hereinabove. The email explicitly mentioned “*our board of directors has decided to immediately start the work independently, keeping in mind the delay already caused because of you*”. The clause 17 of the Agreement provides that the respondent has the authority to proceed with the work independently and at its own expenditure. A bare reading of clause 17 with the email dated 6th March, 2018 elucidates that the email was more in consonance with the withdrawal of the agreement rather than termination. Even if it is assumed that it was the termination, the ground so mentioned, i.e., of the delay, does not justify the competence of respondent for doing the same in light of the aforementioned clauses.

CONCLUSION

38. Therefore, in light of abovementioned facts and circumstances of the case, the pleadings made and arguments advanced by the parties, and the applicable laws and judgments, this Court is inclined to hold forth that there appears a patent illegality in the impugned Award passed by the

learned Arbitrator on the ground that the impugned Award was not well-reasoned as required by the Act under Section 31(3). Further, the Learned Arbitrator has passed the impugned Award without considering the aforementioned clauses of the Agreement while recalculating the area as well as while upholding the termination. Therefore, the impugned Award, being contrary to provisions of the Agreement, suffers from infirmity and patent illegality.

39. In light of the foregoing discussion, this Court finds merit in the instant petition and is inclined to allow the same. The learned Arbitrator has miserably failed to justify her interpretation as to the Agreement as well as to furnish the reasons for upholding the termination of the Agreement and reducing the area measured by the Local Commissioner.

40. Accordingly, the instant petition is allowed and the impugned Award dated 10th July 2019 passed by the Learned Sole Arbitrator is set aside.

41. Pending applications, if any, stand disposed of in aforesaid terms.

42. The order be uploaded on the website forthwith.

CHANDRA DHARI SINGH, J

FEBRUARY 07, 2023
DY/AS

Click here to check corrigendum, if any