



\$~1

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

+ **FAO (COMM) 108/2022 & CM APPL. 32231/2022**

KAMAL KUMAR

..... Appellant

Through: Mr. Rahul Sagar Sahay, Mr. Raghav
Rajmalani, Mr. Prince Kumar Singh,
Advocates

versus

MUNICIPAL CORPORATION OF DELHI

..... Respondent

Through: Mr. Dhanesh Relan, Mr. Arindam
Dey, Mr. Aditya Pandey, Advocates

%

Date of Decision: 09th October, 2023

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE MINI PUSHKARNA

J U D G M E N T

MINI PUSHKARNA, J: (ORAL)

1. The present appeal has been filed under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (hereinafter referred as the "Arbitration Act") read with Section 13 of the Commercial Courts Act, 2015 challenging the Judgment dated 10th December, 2021 passed by the learned District Judge, Tis Hazari Courts, New Delhi in petition bearing *Arb. A.(Comm) 74/2018*. By way of the impugned Judgment, petition filed on behalf of the appellant under Section 34 of the Arbitration Act seeking setting aside of the Arbitral Award dated 15th January, 2017 passed by the learned Sole Arbitrator, was dismissed.

2. Facts stated in brief as canvassed before the learned Arbitrator, are as



follows:

2.1 The respondent/Municipal Corporation of Delhi (MCD) floated a tender for allotment of a parking site for scooters and cars in the area DC at West Old Middle School. The appellant participated in the said tender by submitting his bid, which was accepted by the respondent. Pursuant thereto, a provisional offer letter dated 12th December, 2007 was issued by the respondent.

2.2 Subsequently, on 07th January, 2008, a formal agreement was executed between the parties, which stipulated monthly license fee of Rs. 20,000/- + Rs. 449/- per month as Tax Collected at Source ("TCS"). As per the said agreement, the contract between the parties was for a duration of 2 years with effect from the date of handing over the site to the licensee, but the contract shall be renewed after the expiry of 1 year with the enhancement of monthly license fee by 10%, subject to the satisfactory completion of previous year of contract.

2.3 The appellant took the possession of the parking site in question on 10th January, 2008 after inspecting the site in terms of the agreement. However, the appellant was not regular in making the payments since the beginning of the contract. The appellant had issued 6 cheques for payment of monthly license fee, which on presentation were dishonored. Thus, the respondent issued Show Cause Notice dated 05th November, 2008 to the appellant, upon receipt of which the appellant deposited an amount of Rs. 1,85,500/-.

2.4 As the appellant continued to be irregular in payment of license fee, the total outstanding amount against the appellant towards license fee with the penal interest as per the terms and conditions of the agreement escalated



to Rs. 8,32,724/-. The respondent issued several demand notices to the appellant in this regard.

2.5 Appellant filed a suit bearing no. 1020/2009 in District Court, Rohini for mandatory and permanent injunction against the respondent herein for not adjusting the deposited amount by the appellant as security amount and license fee, and direction to not pass any adverse order against him regarding the parking site. The respondent Municipal Corporation filed its written statement in the said suit on 6th January, 2010 and took the objection that there was an arbitration clause in the agreement between the parties in respect of the parking site in question.

2.6 Thus, vide order dated 1st May, 2010, the learned Civil Judge dismissed the injunction application filed on behalf of the appellant in the said suit. Subsequently, the suit filed by the appellant was dismissed vide order dated 20th August, 2010 on the basis of default for non-prosecution as well as for non-appearance.

2.7 In the meanwhile, since the appellant failed to clear the outstanding amount, the respondent vide its letter dated 2nd June, 2010 cancelled the allotment of the appellant and declared it as “free parking” to facilitate the general public. The appellant was blacklisted by respondent vide notice dated 6th September, 2010 on account of non-payment of Rs. 8,32,724/-, in pursuance of the Show Cause Notice dated 4th January, 2010 and 21st April, 2010 issued to the appellant. The security amount/earnest money deposited by the appellant was forfeited and his registration as parking contractor was cancelled.

2.8 Subsequently, the respondent initiated arbitration proceedings vide its notification dated 10th August, 2011 by which an arbitrator was appointed to



decide the claims/demand of dues of the respondent against the appellant. The parties appeared before the learned Arbitrator and duly filed their pleadings. They were given opportunity of hearing and thereafter the matter was reserved for pronouncement of Award. By the Award dated 15th January, 2017, the learned Arbitrator held that an amount of Rs. 6,15,765/- was payable by the appellant to the respondent towards monthly license fee. Since an amount of Rs. 2,86,000/- had already been paid by the appellant, therefore, balance amount of Rs. 3,29,765/- was directed to be paid by the appellant to the respondent. It was further directed that the appellant was liable to pay an interest @10% per annum on Rs. 3,29,765/- w.e.f 2nd June, 2010 till the date of signing of the Award i.e. 15th January, 2017.

2.9 Against the aforesaid Arbitral Award dated 15th January, 2017, the appellant filed a petition under Section 34 of the Arbitration Act. By the impugned Judgment dated 10th December, 2021, the petition filed on behalf of appellant was dismissed. Hence, the present appeal has been filed.

3. On behalf of the appellant, the following submissions have been made:

3.1 The last hearing before the learned Arbitrator took place on 5th March, 2012. The Award was passed by the learned Arbitrator on 15th January, 2017 after around 5 years, without any further notice to the appellant or any final hearing. It is completely contrary to law that an Arbitral Award be passed after around 5 years of hearings in the matter.

3.2 Impugned judgment failed to appreciate that it is a settled law that when there is an inordinate delay in making of an Arbitral Award with unexplained reason, such Award is in violation of Public Policy and the same has to be set aside.



3.3 The impugned Judgment as well as the Award suffer from patent illegality, which goes to the root of the matter and are against Public Policy, Public Interest and Fundamental Policy of Indian Law.

3.4 After the expiry of the first year of the contract, the contract had to be renewed for the second year after satisfactory completion of the first year. Admittedly, neither the appellant herein had written to the respondent for renewal of the contract, nor the respondent had shown interest in doing so. Appellant was not making payments as he was not physically handed over the site properly. Disputes had already arisen for which the appellant had approached the Court. There was not even any satisfactory completion of work in the previous year. At best, the contract was valid only for the first year.

3.5 The impugned Judgment and the Arbitral Award have given an interpretation to the contractual provision, which was not possible on reading the contract. The very concept of renewal provided that the contract had to be renewed by both the parties. Throughout the first year itself, the appellant had consistently showed that he was completely dissatisfied with the contract and had even initiated a suit with regard to the same. It is submitted that an Arbitral Award can be set aside on the ground that the interpretation of contractual provision by the Arbitral Tribunal was not possible on perusal of the contract.

3.6 The impugned judgment as well as the Arbitral Award completely ignored the fundamental issue in the case whether the appellant was handed over the parking site without any obstruction. The appellant had clearly mentioned that the parking site was not handed over to him properly and the said issue had to be tried upon on merits.



3.7 Unilateral appointment of an arbitrator was declared void *ab initio* and contrary to law. The learned Arbitrator was appointed by the respondent vide its letter dated 10th August, 2011. The Arbitral Award was passed on 15th January, 2017. In the instant case, the Commissioner of the respondent could not have become an arbitrator himself, so he could not even appoint an Arbitrator. The Amendment Act, 2015 to Arbitration Act became effective from 23rd October, 2015 and accordingly, was applicable to the instant arbitration.

3.8 The Arbitral Award was perverse and irrational and that no reasonable person would have arrived at the same decision. The Arbitrator's view was impossible.

3.9 In support of his submissions, learned counsel for the appellant has relied upon the following judgments:

- (i) ***Harji Engg. Works Pvt. Ltd. Vs. Bharat Heavy Electrical Ltd. and Others, MANU/DE/1419/2008***
- (ii) ***Director General Central Reserve Police Force Vs. Fibroplast Marine Private Limited, MANU/DE/1542/2022***
- (iii) ***Patel Engineering Vs. North Eastern Electric Power Corporation Limited, MANU/SC/0447/2020***
- (iv) ***South East Asia Marine Engineering and Constructions Limited Vs. Oil India Limited, MANU/SC/0441/2020***
- (V) ***K. Dhanasekar Vs. Union of India, MANU/TN/9389/2019***

4. Since no reply affidavit has been filed on behalf of respondent despite seeking opportunity for the same, this Court had made it clear vide order dated 4th September, 2023 that the matter shall be heard on the basis of the Lower Court Record.

5. Having heard learned counsel for the appellant and having perused the



record, this Court finds it difficult to accept the contention on behalf of the appellant that it was not liable for any payment to the respondent since the contract had not been renewed after the expiry of the first year and that the appellant had not been handed over the parking site by the respondent properly. Rather, the said contention raised on behalf of appellant is belied by the very conduct of the appellant in filing *Suit No. 1029/2009*, wherein the appellant herein had prayed for mandatory and permanent injunction against the respondent from not adjusting the deposited amount by the appellant as security amount and license fee, and from restraining the Municipal Corporation from passing any adverse order against the appellant with respect to the parking site. This conduct of the appellant clearly shows that the appellant herein was in possession of the parking site and that he was operating the said parking site. Otherwise, there would be no occasion for the appellant to seek mandatory and permanent injunction against the respondent-Municipal Corporation from not passing any adverse order against him qua the parking site.

6. There is a categorical observation by the District Court, Rohini in the suit filed on behalf of appellant that he had not surrendered the parking site despite the allegation of being dissatisfied in carrying out the parking operation at the site in question and the allegation that the said parking site was not physically capable of being utilized. Thus, in the order dated 1st May, 2010 passed by the District Court, Rohini in Suit No. 1020/2009, filed on behalf of appellant herein, it has been held as follows:

*“4. I have heard the submission of the counsel for the parties. For seeking a relief of temporary injunction, plaintiff is required to show prima facie case, balance of convenience and irreparable loss and injury. **In the case in hand, plaintiff, on the one hand, has been***



carrying out parking operation at the site despite being dissatisfied, yet did not surrender the same as provided in the agreement despite the fact that he has alleged that the same was not physically capable of being utilized. He had every right under the agreement to surrender the site and further to refer the matter for arbitration and further to appear before the remission committee to look into his grievances, but he chose not to do any of above and in view of the aforesaid, prima facie case is not made out in his favour. As per written statement, his representation before the remission committee was also rejected only because of his failure to put his grievance in writing and as such he cannot take the plea that the site is not physically capable of being utilized, more so when it was given to him "as is where is basis". Plaintiff prior to taking the site should have been vigilant enough to visit the same and ascertain the practical hindrances in carrying out the business of parking site and prima facie case is not made out in his favour."

(Emphasis Supplied)

7. It is also to be noted that the learned Arbitrator has categorically held that the appellant herein never wrote to the respondent regarding his intention not to continue with the parking site. Despite various notices issued by the respondent, the appellant continued to occupy the parking site without depositing the license fee as per terms of the agreement. It is clearly recorded by the learned Arbitrator that the respondent had to seek police help for vacation of the parking site. It is further recorded that the fact that the appellant was depositing money as late as 19th September, 2009, confirms the fact that the site was in possession of the appellant herein. This showed that the appellant had agreed in principle to continue beyond the first year of the contract as per terms of the agreement, thereby giving an implicit willingness for continuation of the agreement. Thus, the learned arbitrator has held as follows:

"2.3.4 Respondent has also raised the issue of termination of work on 02.06.2010 as void since the contract expired on 10.01.2009. It is a fact that the claimants had the right to extend/ not extend the contract beyond one year as the argument clearly stated that after satisfactory



completion of period of previous year contract, the same will be extended. Respondent never wrote to Claimant regarding his intentions not to continue the parking site and continued to occupy for financial benefits. Despite various notices from the Claimant, he continued to occupy the site without depositing money as per terms of agreement. For vacation of site, the department had to take police help. Letter addressed to S.H.O. Police Station, Keshav Puram was issued on 02.06.2010 for cancellation of parking site with immediate effect allotted to Sh. Kamal Kumar and directions were given to officials for the parking not to be used unauthorisedly. It was also declared to be a free parking.

Further, the fact that the Respondents were depositing money as late as 19.09.2009 confirms the fact that the site was in their possession and they had agreed in principle to continue beyond 10.01.2009 as per terms of the agreement and thereby giving an implicit willingness for the continuation of agreement and agreeing to pay the enhanced licence fees of Rs.21,000/+Rs.471/- for the period 11.01.2009 to 10.01.2010. Respondent was in possession of the site till 02.06.2010, when the site was declared free parking."

(Emphasis Supplied)

8. In view of the aforesaid, the contention of the appellant that the agreement had not been renewed after expiry of first year of the contract and that he was not liable to pay any license fee on such ground, is found to be without any basis and the same is liable to be rejected.

9. As regards the contention of the appellant regarding delay in passing of the Arbitral Award, this Court notes that the learned Arbitrator in the Award dated 15th January, 2017 has categorically stated that despite directions, the appellant herein had not paid the fee amount to the arbitrator. Due to failure of payment of arbitration fee by the appellant herein, directions were issued to the respondent to pay their balance share as well as share of the appellant towards Arbitrator's fee. The amount towards the Arbitrator's fee was paid only on 10th December, 2016, causing delay in publishing the Arbitral Award. The finding of the learned Arbitrator in this



regard is reproduced hereunder:

“5.3.2 Despite directions during hearings, the Respondent has not paid the fee amount of Rs.50,300/- of Arbitrator as per Section of Arbitration and Reconciliation Act 1996. Due to the failure of nonpayment of arbitration fees by Claimant & Respondent, directions were given to Claimant to pay their balance share of Rs.25,300/- and share of Rs.50,300/- of Respondent, The amount of Rs.76,000/- was paid only on 10.12.16 causing delay in publishing the Award.”

10. In view thereof, it is manifest that cogent explanation and reason has been given by the learned Arbitrator for delay in publishing the Award. The appellant herein cannot take advantage of his own wrong. Therefore, the contention raised on behalf of the appellant on the aspect of delay in publishing the Award is found to be without any basis and the same is hereby rejected.

11. Similarly, the contention on behalf of the appellant that the unilateral appointment of the learned Arbitrator was *void ab initio* in view of the 2015 Amendment in the Arbitration Act, is liable to be rejected. In the present case the appointment of the learned Arbitrator was made in the year 2011. After completion of pleadings and hearing the parties, the matter was reserved for pronouncement of the Award. The Arbitral Award was subsequently pronounced on 15th January, 2017. There is nothing on record to show that the appellant had raised any objections as regards the competence of the learned Arbitrator after the 2015 Amendment of the Arbitration Act came into effect. Therefore, the plea raised on behalf of appellant in this regard is without any merit and is hereby rejected.

12. Drawing an inference that the 2015 Amendment in the Arbitration Act shall not apply to arbitration proceedings that have commenced validly before coming into force of the 2015 Amendment unless the parties



otherwise agree, the Supreme Court in the case of ***Rajasthan Small Industries Corporation Limited Vs. Ganesh Containers Movers Syndicate¹***, has held as follows:

“Whether by virtue of Section 12 as amended by the Amendment Act, the Managing Director has become ineligible to act?”

23. After the amendment to the Arbitration and Conciliation Act, 1996 in 2015, Section 12(5) prohibits the employee of one of the parties from being an arbitrator. In the present case, the agreement between the parties was entered into on 28-1-2000 and the arbitration proceedings commenced way back in 2009 and thus, the respondent cannot invoke Section 12(5) of the Arbitration and Conciliation (Amendment) Act, 2015. As per Section 26 of the Amendment Act, the provisions of the Amendment Act, 2015 shall not apply to the arbitral proceedings commenced in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree.

24. In BCCI v. Kochi Cricket (P) Ltd. [BCCI v. Kochi Cricket (P) Ltd., (2018) 6 SCC 287 : (2018) 3 SCC (Civ) 534] , this Court held that the provisions of the Amendment Act, 2015 (with effect from 23-10-2015) cannot have retrospective operation in the arbitral proceedings already commenced unless the parties otherwise agree. In the present case, there is nothing to suggest that the parties have agreed that the provisions of the new Act shall apply in relation to the arbitral proceedings.

(Emphasis Supplied)

13. Likewise, in the case of ***Union of India Vs. Parmar Construction Company²***, Supreme Court has held as follows:

“25. As on 1-1-2016, the 2015 Amendment Act was gazette and according to Section 1(2) of the 2015 Amendment Act, it was deemed to have come into force on 23-10-2015. Section 21 of the 1996 Act clearly envisages that unless otherwise agreed by the parties, the arbitral proceedings in respect of a dispute shall commence from the date on which a request for that dispute to be referred to arbitration is received by the respondent and the plain reading of Section 26 of the 2015 Amendment Act is self-explicit, leaves no room for

¹ (2019) 3 SCC 282

² (2019) 15 SCC 682



interpretation. Sections 21 and 26 of the 1996 Act/the 2015 Amendment Act relevant for the purpose are extracted hereunder:

“21. Commencement of arbitral proceedings.—Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

.....
26. Act not to apply to pending arbitral proceedings.—Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.”

26. The conjoint reading of Section 21 read with Section 26 leaves no manner of doubt that the provisions of the 2015 Amendment Act shall not apply to such of the arbitral proceedings which have commenced in terms of the provisions of Section 21 of the principal Act unless the parties otherwise agree. The effect of Section 21 read with Section 26 of the 2015 Amendment Act has been examined by this Court in *Aravali Power Co. (P) Ltd. v. Era Infra Engg. Ltd.* [*Aravali Power Co. (P) Ltd. v. Era Infra Engg. Ltd.*, (2017) 15 SCC 32 : (2018) 2 SCC (Civ) 642] and taking note of Section 26 of the 2015 Amendment Act laid down the broad principles as under : (SCC p. 53, para 22)

“22. The principles which emerge from the decisions referred to above are:

22.1. In cases governed by the 1996 Act as it stood before the Amendment Act came into force:

22.1.1. The fact that the named arbitrator is an employee of one of the parties is not ipso facto a ground to raise a presumption of bias or partiality or lack of independence on his part. There can however be a justifiable apprehension about the independence or impartiality of an employee arbitrator, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate to the officer whose decision is the subject-matter of the dispute.

22.1.2. Unless the cause of action for invoking jurisdiction under clauses (a), (b) or (c) of sub-section (6) of Section 11 of the 1996 Act arises, there is no question of the Chief Justice or his designate exercising power under sub-section (6) of Section 11.



22.1.3. The Chief Justice or his designate while exercising power under sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.

22.1.4. While exercising such power under sub-section (6) of Section 11, if circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else.

22.2. In cases governed by the 1996 Act after the Amendment Act has come into force : If the arbitration clause finds foul with the amended provisions, the appointment of the arbitrator even if apparently in conformity with the arbitration clause in the agreement, would be illegal and thus the court would be within its powers to appoint such arbitrator(s) as may be permissible.”

Which has been further considered in S.P. Singla Constructions (P) Ltd. case [S.P. Singla Constructions (P) Ltd. v. State of H.P., (2019) 2 SCC 488 : (2019) 1 SCC (Civ) 748] : (SCC p. 495, para 16)

“16. Considering the facts and circumstances of the present case, we are not inclined to go into the merits of this contention of the appellant nor examine the correctness or otherwise of the above view taken by the Delhi High Court in Ratna Infrastructure Projects case [Ratna Infrastructure Projects (P) Ltd. v. Meja Urja Nigam (P) Ltd., 2017 SCC OnLine Del 7808] ; suffice it to note that as per Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015, the provisions of the amended 2015 Act shall not apply to the arbitral proceedings commenced in accordance with the provisions of Section 21 of the principal Act before the commencement of the Amendment Act unless the parties otherwise agree. In the facts and circumstances of the present case, the proviso in Clause (65) of the general conditions of the contract cannot be taken to be the agreement between the parties so as to apply the provisions of the amended Act. As per Section 26 of the Act, the provisions of the 2015 Amendment Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of the 2015 Amendment Act (w.e.f. 23-10-2015). In the present case, arbitration proceedings commenced way back in 2013, much prior to coming into force of the amended Act and therefore, provisions of the amended Act cannot be invoked.”

27. We are also of the view that the 2015 Amendment Act which came into force i.e. on 23-10-2015, shall not apply to the arbitral proceedings which have commenced in accordance with the provisions of Section 21 of the principal Act, 1996 before the coming



into force of the 2015 Amendment Act, unless the parties otherwise agree.”

(Emphasis Supplied)

14. The challenge to the impugned Judgment in the present case being in the nature of appeal under Section 37 of the Arbitration Act, the scope of interference by this Court is statutorily very limited. It is no longer *res integra* that the Court cannot undertake an independent assessment of the merits of the Award. If a Court while deciding a petition under Section 34 of the Arbitration Act has not exceeded the scope of its jurisdiction, then a Court hearing an appeal under Section 37 of the Arbitration Act, will not upset the concurrent findings as given by the learned Arbitrator and the Court under Section 34 of the Arbitration Act. Further, it is settled law that the construction of the terms of a contract is primarily for an arbitrator to decide.

15. The learned District Court while deciding the petition under Section 34 of the Arbitration Act has found the reasoning and findings of the learned Arbitrator to be justified. This Court will not reassess and re-examine the evidence before the learned Arbitrator. The view taken by the learned Arbitrator is found to be a plausible view based on the evidence before him.

16. In view of the aforesaid detailed discussion, this Court finds no infirmity in the impugned Judgment. The present appeal is accordingly dismissed along with the pending application.

MINI PUSHKARNA, J

MANMOHAN, J

OCTOBER 9, 2023/ ak/au