

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

% **Date of order : 28th March, 2023**

+ **O.M.P. (COMM) 2/2022, I.A. 81/2022 & I.A. 83/2022**

AIIMS Petitioner

Through: Mr. Kautilya Birat, Proxy counsel
for Mr. Satya Ranjan Swain, Panel
Counsel

versus

MS S S TOTAL CONSTRUCTION INDIA PVT LTD

..... Respondent

Through: Mr. Sanjay Dewan and Mr. Anish
Dewan, Advocates

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 referred to as "Arbitration Act") has been filed on behalf of the petitioner seeking the following reliefs:-

"a) Allow the instant objections and set aside the Award dated 30.06.2021 passed in matter of "M/s S.S. Total Construction India Pvt. Ltd. v/s A.I.I.M.S" passed by Sh. Pradeep Kumar Gupta, Sole Arbitrator, Former Special Director General, CPWD, T - 17, Green Park Extension, New Delhi- 110016.

b) Award the cost in favour of the Petitioner and against the Respondent."

O.M.P. (COMM) 2/2022

Page 1 of 14

2. Despite the matter being passed over on the first call at the request of proxy counsel appearing on behalf of petitioner, the same request has been made by proxy counsel again on the second call.
3. This Court has perused the order sheets dated 24th February, 2022, 12th October, 2022, where on the said dates respectively, pass over was sought and an adjournment slip was moved on behalf of the petitioner.
4. The matter is pending since 2022 without issuance of notice to the other party. The counsel who has been engaged by the petitioner has not perused the matter or assisted the Court for even the purpose of issuance of notice to the respondent.
5. Learned counsel for the respondent has appeared on advance notice since the very first date. The written submissions have already been filed on behalf of the parties, which are on record.
6. Since no one is able to assist the Court on behalf of the petitioner and the matter is pending for over a year, that too, without issuance of notice, this Court is left with no option, but to hear the matter on merit with the assistance of learned counsel appearing on behalf of respondent and the material on record.
7. The background of the case reveals that the petitioner invited tender for construction of OPD Block for AIIMS, Ballabgarh, Hayana. The respondent submitted its proposed rates which were subsequently accepted by the petitioner vide Letter of Acceptance dated 12th February 2014/14th February 2014. The date of completion of the work was stipulated to be 26th April 2017 and accordingly, the respondent was handed over the site on 26th February 2014/28th February 2014.

O.M.P. (COMM) 2/2022

Page 2 of 14

8. The petitioner was aggrieved by the failure to deploy resources on the part of the respondent as well as the delay in execution and completion of the work within the stipulated period. Hence, the arbitration clause was invoked by the parties and a sole arbitrator was appointed to adjudicate the disputes between the parties.

9. Upon completion of the arbitration proceedings, the learned sole arbitrator passed the Award dated 30th June 2021. The petitioner being aggrieved of the findings of the sole arbitrator in relation Claims No. 1, 3, 4, 7, 9 and 10 has filed the instant petition.

10. The grounds raised in the pleadings on behalf of the petitioner are as follows:-

a. The impugned Award is contrary to the settled law and the learned arbitrator has exceeded its jurisdiction by going beyond what was agreed between the parties in Clause 10C of the Contract and thereby awarding an amount of Rs. 3,52,16,016/- in favour of the respondent. Reliance has been placed upon the judgment passed in *Associated Engineering Co. vs. Government of Andhra Pradesh*, (1991) 4 SCC 93.

b. The learned arbitrator committed an error by ignoring the factual position surrounding the computation of 25 months as the delay period for the purposes of compensation, however, the respondent never raised any notice with respect to the compensation of delay, specifically when time was essence of the Contract.

c. It is a settled principle of law that time being the 'essence of

the Contract' no more remains 'an essence' when the extension of the same is allowed for performance of contractual obligation against a cost or penalty. Therefore, without invoking the extension clause of a Contract it is not only unjustified and unreasonable for the learned arbitrator to calculate an amount in favour of the respondent herein. To support the averment, reliance has been placed upon *Hind Construction Contractors vs. the State of Maharashtra*, (1979) 2 SCC 70.

d. The learned arbitrator wrongly held that time in this case cannot be considered as the essence of the contract. Moreover, the fact is that the work was prolonged for a period of 2 years, one month and 26 days i.e., more than two times the stipulated period of completion of 12 months. The promisee is entitled to compensation from the promisor for any loss occasioned to it by such failure, hence, time was the essence of the contract.

e. The learned arbitrator wrongly reached the conclusion and levied compensation under Clause 2 of the agreement and held that "Claimants were not solely responsible for the delay and compensation of Rs. 27,36,331/- levied and recovered by the Respondents from Final Bill needs to be refunded to the Claimants."

f. The delay in the work is attributable to the respondent is evident from the various correspondences between the parties. The respondent failed to perform its obligation as per the agreement provisions and executed the work with defects. However, these

facts and circumstances were appreciated by learned arbitrator.

g. The learned arbitrator vide the impugned Award failed to appreciate that the respondent miserably failed to refute the claims raised by the petitioner herein, especially in terms of the settled principles of law.

h. The Award is contrary to Public Policy as it is contrary to settled principles of law and in case allowed to be sustained shall give rise to an anomalous situation, which would create confusion in the society and shall defeat the very purpose of conducting of the arbitration proceedings.

11. *Per Contra*, the learned counsel appearing on behalf of the respondent vehemently opposed the instant petition and submitted that the Award passed by the learned arbitrator is a detailed and well-reasoned Award, passed after consideration of all documents and written submissions on behalf of the parties produced before him as well as the provisions of the Contract.

12. It is also submitted on behalf of the respondent that the petitioner filed its counter claims on which the learned arbitrator also gave his findings. While deciding the counter claims, the learned arbitrator awarded a sum of Rs. 2,35,061/- in favour of the petitioner and rejected the other counter claims, however, the petitioner has not challenged any findings of the learned arbitrator *qua* the counter claims.

13. It is submitted that there is no ground for challenge against the impugned Award and hence, the instant petition is liable to be dismissed for being devoid of merit.

O.M.P. (COMM) 2/2022

Page 5 of 14

14. Heard the learned counsel for the respondent and perused the record.

15. The petitioner has raised challenge only *qua* certain claims, i.e., Claims No. 1, 3, 4, 7, 9 and 10, as decided by the learned arbitrator and has not assailed the validity of the entire Award.

16. The petitioner has invoked Section 34 of the Arbitration Act, which is reproduced hereunder:-

“34. Application for setting aside arbitral award.—

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

(2) An arbitral 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 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 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 award is in conflict with the public policy of India.

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

(i) the making of the 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.]

[(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award: Provided that an award shall not be set aside merely on the

ground of an erroneous application of the law or by reappreciation of evidence.] ...”

17. The contents of the provision clearly show that the intention of legislature while enacting the Arbitration Act, as well as while carrying out amendments to the same, was that there should be limited intervention of the Courts in arbitral proceedings, especially after the proceedings have been concluded and an Award thereto has been made by the concerned Arbitral Tribunal. Any claim brought forth a Court of law under Section 34 of the Arbitration Act has to be in accordance with the principle of the provisions laid down under the Arbitration Act as well as interpreted by the Hon’ble Supreme Court.

18. On a bare reading of the invoked provision, it becomes evident that the words used therein are that “*An arbitral award may be set aside by the Court only if*”, which signifies the intent of limiting the scope of interference by Courts in an Arbitral Award, passed after thorough procedure, involvement of parties, and appreciation of facts, evidence and law, “only” in the event of the circumstances delineated in the provision being met. The limited grounds which may invite the intervention and action thereupon by the Courts are explicitly laid down under the provision. What is to be seen by a Court exercising jurisdiction under Section 34 of the Arbitration Act is that an Award passed by an Arbitral Tribunal may only be set aside if it is patently illegal, against the public policy of India, based on no evidence and delineates no reason for passing the Award.

19. While elaborating upon the grounds available under the provision, and that have been invoked by the petitioner vis-à-vis the impugned

Award being in conflict with the Public Policy, the Hon'ble Supreme Court in *Ssangyong Engineering & Construction Co. Ltd. vs. NHAI*, (2019) 15 SCC 131, held as under:-

“23. What is clear, therefore, is that the expression “public policy of India”, whether contained in Section 34 or in Section 48, would now mean the “fundamental policy of Indian law” as explained in paragraphs 18 and 27 of Associate Builders (supra), i.e., the fundamental policy of Indian law would be relegated to the “Renusagar” understanding of this expression. This would necessarily mean that the Western Geco (supra) expansion has been done away with. In short, Western Geco (supra), as explained in paragraphs 28 and 29 of Associate Builders (supra), would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court’s intervention would be on the merits of the award, which cannot be permitted post amendment...

25. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of Associate Builders (supra), or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of Associate Builders (supra). Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco (supra), as understood in Associate Builders (supra), and paragraphs 28 and 29 in particular, is now done away with.

26. Insofar as domestic awards made in India are concerned, an additional ground is now available under subsection (2A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within

“the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

27. Secondly, it is also made clear that re-appreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

28. To elucidate, paragraph 42.1 of Associate Builders (supra), namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Paragraph 42.2 of Associate Builders (supra), however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

30. What is important to note is that a decision which is perverse, as understood in paragraphs 31 and 32 of Associate Builders (supra), while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.”

20. A bare perusal of the above-referred pronouncement makes it evident that the phrases are not to be construed in their plain meaning and have to be given due caution and consideration while being invoked to assail any Arbitral Award. To successfully raise a challenge against an Arbitral Award, the petitioner ought to satisfy this Court that the grounds

as provided in the Section 34 of the Arbitration Act are met. It is, therefore, clear that the decisive test is that *first*, the Arbitrator had to adopt a judicial approach; *second*, the principles of natural justice have to be upheld; and *third*, the decision must not have been egregious, or rather, perverse.

21. In the instant petition, the petitioner has raised the grounds of contravention of Public Policy and fundamental policy, however, has not been able to show or establish that the findings of the learned arbitrator are so patently illegal so as to shock the conscience of this Court. The petitioner has also raised the grounds of non-appreciation of material on record and submissions of on behalf of the petitioner, however, a perusal of the impugned Award shows that while deciding Claims No. 1, 3, 4, 7, 9 and 10, the learned arbitrator has given extensive findings and elaborate reasoning for such findings after considering the entire material before him.

22. The petitioner has also raised challenges that are substantially on the merits of the case. However, it is settled position of law that a Court while exercising jurisdiction and powers under Section 34 of the Arbitration Act shall not sit in appeal by examining and re-examining the case on its merits.

23. The decision of the learned arbitrator, passed after thorough consideration of the material on record and the submissions of the parties, is final and this Court is not required to carry out an exercise of re-adjudicating the disputes. An Arbitral Award may be set aside on the limited grounds and only under the conditions as explained by the

Hon'ble Supreme Court in *Delhi Airport Metro Express Pvt Ltd vs. Delhi Metro Rail Corporation*, (2022) 1 SCC 131, in the terms as reproduced hereunder:-

“28. The limited grounds available to Courts for annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well established principles for interference to the facts of each case that come up before the courts. There is a disturbing tendency of Courts of setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award.

29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression “patent illegality”. Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression “patent illegality”. What is prohibited is for Courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence

are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression “patent illegality”.”

24. Therefore, this Court shall also not indulge into the arguments on merits that have been raised by the petitioner, keeping in view the spirit, purpose and essence of the Arbitration Act. To enter into merits of arbitral proceedings and an arbitral award and re-appreciate all arguments while also re-adjudicating the disputes between the parties would mean to defeat the purpose of the legislation itself.

CONCLUSION

25. Upon perusal of the pleadings and upon hearing the counsel for the respondent, it is found that the grounds that have been invoked and the contentions that have been raised on behalf of the petitioner are essentially and substantially on merits of the case and the dispute between the parties. As discussed in the foregoing paragraphs, this Court shall not sit in appeal and re-adjudicate the disputes between the parties while exercising its jurisdiction under Section 34 of the Arbitration Act. Hence, the petition does not stand on this ground.

26. *Secondly*, the petitioner has raised the grounds of contradiction to the public policy, non-consideration and non-appreciation of claims raised by the petitioner, however, has miserably failed to establish the same since a perusal of the Award shows that the material before the learned arbitrator has been duly considered by him.

27. Therefore, keeping in view the contentions raised in the pleadings, the arguments advanced, the discussion on law in the foregoing

paragraphs, this Court is of the considered view that there is no merit in the instant petition since no grounds as provided for under Section 34 of the Arbitration Act have been made out to successfully challenge the Arbitral Award dated 30th June 2021.

28. Accordingly, the instant petition stands dismissed.

29. The order be uploaded on the website forthwith.

CHANDRA DHARI SINGH, J

MARCH 28, 2023

dy/ms

Click here to check corrigendum, if any