



\$~57

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

Date of Decision: 15th December, 2023

+ O.M.P. (COMM) 513/2023, I.A. 25192-25193/2023

TMB ELECTRONICS

..... Petitioner

Through: Mr. Jayant Mehta, Senior Advocate
with Mr. Navin Kumar, Mr.
Rashmeete Kaur, Ms. Surbhi
Aggarwal, Ms. Aarti Mehto, Ms.
Bhagya Ajith and Mr. Bhuvnesh
Mittal, Advocates.

versus

SHANTI DEVELOPERS & ANR.

..... Respondents

Through: Mr. Sunil K. Mittal, Mr. Kshitij
Mittal, Mr. Anshul Mittal and Mr.
Sameer Dawar, Advocates for R-1.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J. (Oral):

CAV 640/2023

1. Since counsel for the Respondents have appeared, the caveat stands discharged.

O.M.P. (COMM) 513/2023

2. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 [*“the Act”*], challenges arbitral award dated 29th



August, 2023 [*“impugned Award”*], whereby M/s Shanti Developers/ Respondent No. 1 (Claimant before Arbitral Tribunal) has been awarded the entire amount in terms of final bill/ tax invoice dated 7th August, 2021 [*“Final Bill”*]. M/s TMB Electronics/ Petitioner (Respondent No. 1 before Arbitral Tribunal) contends that the Sole Arbitrator has arrived at conclusions without appreciating the evidence placed on record and prays that the impugned Award be set aside.

THE FACTUAL BACKDROP AND ARBITRAL PROCEEDINGS

3. Petitioner engaged Respondent No. 1 for construction of a proposed factory building on a plot of land belonging to Petitioner, bearing No. 113, Kundli District, Sonipat. On 13th March, 2018, the parties formalized this arrangement by executing an agreement [*“the Agreement”*]. Respondent No. 2 was engaged as the architect for the project. However, they have been named as a Proforma co-respondent, with no claims directed against them.

4. Pursuant to disputes emerging between the parties, Respondent No. 1 invoked arbitration in terms of Clause 36 of the Agreement *vide* notice dated 21st August, 2021. Thereafter, by order dated 3rd March, 2022, in ARB.P. 1046/2021, this Court appointed a Sole Arbitrator to adjudicate disputes between the parties.

5. Before the Arbitrator, Respondent No. 1 (Claimant therein) contended that they had employed requisite manpower and resources, and executed the sanctioned work in a timely manner, under supervision of the Petitioner. Respondent No. 1 completed the originally stipulated work, as well as additional work, in August/ September, 2020 and handed over the site to the Petitioner. No issues/ objections were raised at this point. Periodical bills



were submitted throughout the project, which underwent verification for the work done and assessment for the corresponding value. Subsequently, on 7th August, 2021, Respondent No. 1 issued the Final Bill amounting to INR 13,37,98,982/-, encompassing charges for both the original contract and the additional work. Of this total, they assert to have received payment of INR 5,16,00,000/-, leaving an outstanding balance of INR 8,21,98,982/-. Consequently, Respondent No. 1 presented their claims for this unpaid amount to the Sole Arbitrator, in the following manner:

- “(i) Rs.8,21,98,982/- towards work done and not paid for;
- (ii) Rs.2,00,69,847/- towards loss of profits calculated at 15% of the amount of the total bill;
- (iii) Interest at the rate of 18% per annum; and
- (iv) Costs.”

6. Before the Arbitral Tribunal, the Petitioner refuted the claims by raising the following contentions:

6.1. Respondent No. 1 had been unprofessional and did not carry out the entire work. Consequently, Petitioner had to get the unfinished construction of the factory completed on their own accord.

6.2. Respondent No. 1 did not act in terms of the Agreement as (i) bill was not raised on completion of work worth Rs.25,00,000/-; (ii) rates for additional work were not submitted in terms of clause 7; (iii) material procured was never submitted for quality check as per clause 39; (iv) timeline of work was not adhered to as per clause 30; (v) prior reasons for delay were not given as per clause 31; and (vi) due compliance with labour norms was not done to in violation of Clause 11.

6.3. Respondent No. 1 failed to deposit GST against four invoices. Furthermore, even the Final Bill was not duly reported to GST authorities,



thereby casting doubt on the veracity of the Final Bill.

6.4. During the process of completion of the work, Petitioner had inspected the basement and discovered that the building's foundation was not properly laid and that there was a water leak in the basement, putting the building at risk of having to be demolished.

7. Against the aforementioned backdrop, the Arbitrator framed the following issues for determination:

"Points of Determination"

13. *Basis of the pleadings of the parties, the following points of determination were framed on 28.10.2022:*

- (1) *Whether the claimant is entitled to the reliefs claimed in the statement of claim?*
- (2) *Whether the claimant is entitled to interest, if yes, at what rate?*
- (3) *Cost?*
- (4) *Relief?*

14. *The parties thereafter filed their affidavits of admission/denial of documents. It was also agreed that it is not necessary to lead oral evidence and the matter can be decided on the basis of pleadings and documents filed."*

8. As noted hereinabove, both the parties agreed not to lead oral evidence. Further, Petitioner did not raise any counter claims in the course of the arbitration. Accordingly, the Arbitrator proceeded to adjudicate the claims of Respondent No. 1 on the basis of documentary evidence filed by both parties, which was subjected to admission/ denial by both sides.

9. On consideration of the rival contentions, the Arbitrator proceeded to give his findings on the afore-stated Issue No. 1 as follows:

"Point of Determination (1): Whether the claimant is entitled to the reliefs claimed in the statement of claim?"

25. *The claims of the claimant are twofold, i.e. first, against the amounts due from the final bill and second, towards loss of profits.*



Claim (1.1): Amounts due under the final bill

26. A perusal of the final bill would show that it has five separate components being (1) towards work under the original Agreement; (2) price escalation for steel and cement, (3) excess steel consumed, (4) extra work done, and (5) Other miscellaneous items and purchases. These are taken to be separate sub-points of determination.

Sub-Point (1.1.1): Claim for work done under the original Agreement

27. The Agreement between the parties was entered into in March, 2018. As per clause 30, the work was to be completed within 12 months of the date of signature. As per the claimant, the work was completed in August-September, 2020; while the case of the respondent no.1 is that the same was never completed and the project was abandoned by the claimant. In the statement of defence, there is no detail as to when the work was abandoned or till what stage, the claimant had completed the work. The pleadings of the respondent no.1 remain vague. During the course of argument, Mr.Aziz submitted that the work was done till the upper ground floor level only. In the written submissions of the respondent no.1 (which has already been eschewed), it is stated that the work was abandoned in November, 2019.
28. The claimant has placed on record the screenshots of chats on whatsapp groups at Annexure C-9 and C-10. Both the respondent no.1 and the architect/respondent no.2 members the first group, i.e. Annexure C- 9, titled "TMB 113 Kundli". The contents and existence of the said screenshots stand admitted by the respondent no.1 in its affidavit of admission/denial of documents. A perusal of the said screenshots shows that the claimant was regularly giving updates regarding the work being carried out; while drawings are being shared by the respondent no.2. The chats show that the work was being carried out much beyond November, 2019. At page 155 of the statement of claim, the chat pertains to January, 2020 wherein drawings are being sought. At page 160, photos showing progress of the work in July, 2020 have been shared. Pertinently, the photos show construction much beyond the upper ground floor level. The chats go until 21.09.2020 when drawings of the front elevation wall are being sought. This vindicates the stand taken by the claimant that work was being carried out until August-September, 2020.



29. *As regards the abandonment of the work by the claimant, the plea of the respondent no. 1 remains vague and unclear. Additionally, the respondent no. 1 never objected to the alleged abandonment of the work by the claimant. Admittedly, there is no communication in this regard nor any penalty was imposed.*
30. *As regards the delay in execution of the work, the claimant has attributed the same to the respondent no. 1. In any case, the claimant continued to work much beyond the stipulated period and was accepted by the respondent no.1. There is no clause in the Agreement making time the essence of the contract nor has it been the case of the respondent no.1. Coupled with the nature of the contract and clauses 31-33 providing for extension, it is clear that time was not the essence [see **Hind Construction Contractors v. State of Maharashtra, (1979) 2 SCC 70** (Paras 7-9); and **Arosan Enterprises Ltd. v. Union of India, (1999) 9 SCC 449** (Para 14)]. Even otherwise, the respondent no.1 having accepted performance after the stipulated period, the case would come under third paragraph of section 55 of the Indian Contract Act. Hence, it is not open to the respondent no.1 to raise any grievance qua the delay in completion. Till date, the respondent no. 1 has not imposed liquidated damages nor is there any counter claim before me.*
31. *The other defaults highlighted in the statement of defence have also not been established. The issue of quality was material was never raised when the work was being carried out under due intimation to the respondent no.1 and its architect (respondent no.2). Even accepting the stand of the respondent no.1 that the parties shared good relations, this may justify the absence of any formal communication, however surely a whatsapp message would have been sent. The respondent no.1 has not been able to pinpoint any non-compliance with labour norms.*

...xxx..

...xxx..

...xxx..

36. *The claimant has then placed on record an email dated 21.12.2020 at page 111 of the statement of claim sent to the architect enclosing a draft final bill (at page 126) for Rs. 12,40, 13,500/-. This is followed by a notice dated 09.07.2021 alleging total value of the work to be Rs.12, 17,45,400/-. In this background, the final bill is stated to have been raised on 07.08.2021 for Rs. 13, 17,98,982/-. The covering letter itself records as under:*

"Although, the work was completed by us in all respects August/September 2020, you kept on delaying the payments



on the pretext of verification of work and conciliation of accounts. Despite several reminders, you have failed to honour your part of obligations under the agreement of timely release of our payments. We are therefore, submitting the Final Bill amounting to a sum of Rs. 13,37,98,982/- with all the relevant details. The balance payments due and payable by you to us is Rs.8,21,98,982/-. You are required to make the payment of the balance amount to us within a period of one week from the date of receipt."

37. *Considering the admitted practice of raising invoices subsequent to payments, the claimant cannot be faulted for having waited for sometime and then raised its final bill. Coming to the amount, the item rates are given at page 33 of the Agreement. The rates in the final bill remain lower to the same. The working area has also not been disputed by the respondent no.1. On comparison with the final bill sent on 21.12.2020, it is noticed that the working area for "Roof Proj. on Second Floor" and "Mumty & Proj." has been increased in the final bill dated 07.08.2021. Adjusting for this increase, the final amount comes to Rs.9,59,46,266/-. Adding GST, it comes to Rs.11,32,16,594/-.*
- 38 *Of the said amount, the claimant claims that only Rs.5,16,00,000/- has been paid; while the case of the respondent no.1 is that Rs.5,17,19,000/has been paid. The receipt of the latter amount has not been denied in the rejoinder. The letter dated 09.07.2021 sent by the claimant itself also states that the amount of Rs.5.16 crores is an approximate figure. As such, I believe the version of the respondent no.1 and hold that a sum of Rs.5,17,19,000/- has already been paid. Deducting the said amount, the claimant is held entitled to a sum of Rs.6,14,97,594/- against the work done within the original scope of work."*

[sic.]

10. The remaining sub-points, categorised in the Impugned Award as Sub-Points 1.1.2 to 1.1.5 under Claim 1.1, were all rejected by the Arbitrator after due consideration. Further, Claim No. 2 for 'Loss of Profits' was also denied. Thus, the aforementioned finding, categorised in the Impugned Award as Sub-point 1.1.1 under Claim 1.1, is the only claim awarded against the Petitioner. The same is called into question in the present petition.



CONTENTIONS OF PETITIONER:

11. Mr. Jayant Mehta, Senior Counsel representing the Petitioner, raised several contentions which are summarised as follows:

11.1. There is 'no evidence' supporting the decision for awarding the amount under Claim No. 1. Respondent No. 1 has not met the burden of proof for this claim. Beyond the contested Final Bill — which the Petitioner disputed in their communication dated 20th August, 2021 — there is complete lack of any corroborative evidence to prove that Respondent No. 1 actually completed the work billed. In the Arbitrator's decisions to reject other claims, which are also with reference to the Final Bill's sub-heads, the Final Bill itself was not considered to be reliable proof of the claim. Consequently, the logic used to dismiss those other claims should similarly apply to Claim No. 1. Therefore, the Arbitrator's conclusions are deemed illogical and perverse.

11.2. Respondent No. 1 has failed to substantiate the monetary value of the work purportedly completed. The authenticity of the Final Bill is questionable since it wasn't filed with the GST authorities. As such, it appears to be nothing more than an unverified tabulation created by Respondent No. 1, lacking substantial proof. This concern, combined with the fact that no oral evidence was presented by any party, clearly indicates that the Arbitrator did not have sufficient evidence to conclude that Respondent No. 1 had performed the work as claimed in the Final Bill, and therefore, should not have been entitled to the awarded amount.

11.3 The WhatsApp communications between the parties do not in any manner prove performance on the part of Respondent No. 1. Thus, the



Arbitrator cannot have relied on the same to hold that the work in terms of the Agreement had been completed.

11.4 The impugned Award is against the basic notions of justice as it awards the amount under Claim 1 in favour of Respondent No. 1 for work which has not been executed. The Arbitrator failed to take note of the fact that the Final Bill dated 7th August, 2021, was forged and fabricated by Respondent No. 1, which is evident from the fact that it was not included in the turnover shown to the GST authorities. Thus, the claims based thereon were fictitious.

CONTENTIONS OF RESPONDENT NO. 1:

12. *Per contra*, Mr. Sunil K. Mittal, counsel for the Respondent No. 1, controverts the Petitioner's contentions, and defends the impugned Award. He emphasises that the parties mutually decided not to lead oral evidence before the Arbitrator, and there was sufficient documentary evidence on record for the Arbitrator to arrive at a reasoned conclusion, as has been done in the impugned Award. The communications sent by Respondent No. 1 prior to invocation of arbitration were never replied to or refuted by the Petitioner. In accordance with the terms of the Agreement, Respondent No. 1 had sent communications to the architect/ Respondent No. 2 for verification of bills and work done. Despite Respondent No. 1 raising such claims, the same were not contradicted or controverted by the Petitioner. Furthermore, the fact that the work had been done was duly proved from several photographs placed on record, which were admitted by the Petitioner. Accordingly, there is no infirmity in the impugned Award.



ANALYSIS AND FINDINGS:

13. The Court has considered the aforementioned contentions. Before dealing with the grounds of challenge delineated above, the Court must acknowledge its circumscribed role under Section 34 of the Act, which delineates the limited scope within which judicial intervention is permissible in arbitral awards. It is a well-established principle that the Court does not act as an appellate body over arbitral decisions. Therefore, it does not engage in a reappraisal or reassessment of evidence, as an appellate court would. In considering challenges under Section 34, the Court's examination is confined to specific grounds mentioned within the Act itself. Under Section 34, the grounds for setting aside an arbitral award are particularly narrow, focusing on circumstances where there has been a manifest procedural irregularity, jurisdictional error, or the award is in conflict with the public policy of India. These grounds are interpreted restrictively to respect the finality of arbitration and the autonomy of the parties' chosen dispute resolution mechanism. An award may be challenged on the basis of 'manifest irregularity' or 'perversity' only when it is evident that the Arbitral Tribunal's conclusions are not just incorrect, but grossly unreasonable or fundamentally irrational. Thus, while addressing the grounds of challenge, it is imperative to bear in mind this constrained jurisdiction. Any intervention is to be measured and strictly within the legal parameters set forth.

14. As already observed above, the bone of contention in the present petition is only with respect to Claim No. 1 for the work claimed to have been done by Respondent No. 1. The Arbitrator has given his findings after meticulous consideration of the material on record. The Arbitrator takes note



of the fact that the Petitioner had contested Respondent No. 1's claims by arguing that the work had been abandoned by Respondent No. 1, as a result of which the Petitioner had to get the remaining work completed by a third-party. On this aspect, the Arbitrator has rightly identified the plea of abandonment of work as being vague and unsubstantiated. No evidence, such as communications exchanged between the parties, was noticed by the Arbitrator or shown to this Court to indicate either that the work had been abandoned by Respondent No. 1 or completed through a third party. On the contrary, the photographs of the site taken up until August-September 2020 clearly depict ongoing work, directly contradicting the Petitioner's stance.

15. The Final Bill in question delineates two components for arriving at the claimed amount, i.e., the working area and the rate applied. The rate applied specified in the Final Bill was less than the contractually agreed rate, which is a finding of fact rendered by the Arbitrator. Thus, the same does not warrant any adverse inference by this Court. As regards the working area, the Arbitrator has observed at Paragraph No. 37 of the impugned Award that — *"The working area has also not been disputed by respondent no. 1"*. In light of the foregoing observation, it is evident that the Petitioner (referenced as 'respondent no. 1' by the Arbitrator) did not dispute the working area in the course of the arbitration. Therefore, the Arbitrator was justified in concluding that the work claimed under the Final Bill had been completed.

16. Mr. Mehta has placed significant emphasis on the fact that the Final Bill was not reported to the GST authorities. While non-compliance with tax regulations may indeed represent a violation under the relevant tax laws, it is crucial to distinguish the nature of this infraction. As the Arbitrator rightly



observed, this issue is separate from the current dispute and will follow its independent course within the appropriate tax regulatory framework. The primary concern of this Court in the present matter is to assess the arbitral process and the resulting award's adherence to legal and procedural standards, not to enforce tax regulations. Thus, while reporting of the Final Bill to the GST authorities is a relevant fact, it does not directly impinge upon the legitimacy of the claims.

17. For adjudicating the claims presented in arbitration, the crucial question the Arbitrator needed to determine was whether the work was actually completed. Contrary to Mr. Mehta's assertions, the Court observes that the Arbitrator's conclusions were not solely based on the Final Bill. Instead, the Arbitrator conducted a comprehensive review of all available evidence. This included not just the Final Bill but also other substantial materials, such as admitted WhatsApp messages and the averments made in the Statement of Defence. These pieces of documentary evidence collectively supported the conclusion that the work was indeed completed by Respondent No. 1. Furthermore, the Petitioner has failed to present any compelling material that effectively counters Respondent No. 1's assertion of having executed the work. Without such evidence to refute the claims, the Arbitrator's reliance on the breadth of the material on record appears well-founded and reasonable.

18. The totality of evidence presented on record supports the conclusion that the amount detailed in the Final Bill is indeed due and payable to Respondent No. 1. The Petitioner has not successfully established its defence, and each of the grounds raised has been methodically addressed and refuted by the Arbitrator, as detailed in the above extracted Paragraphs



No. 28, 29, 30, and 31. The Arbitrator's factual findings, grounded in a careful appreciation of the evidence, appear reasonable and well-justified. Consequently, these findings do not warrant any interference under Section 34 of the Act.

19. In view of the above, the Court does not find any merit in the contentions advanced by the Petitioner.

20. The present petition is dismissed, along with pending applications.

SANJEEV NARULA, J

DECEMBER 15, 2023

as