



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

% **Reserved on: 25.07.2023**
Pronounced on: 27.09.2023

+ **OMP(COMM.) 15/2015**

IN THE MATTER OF:

R.T. & ASSOCIATES PVT. LTD. Petitioner
Through: Mr. Tarun Rana, Mr. Waseem Akram
and Mr. Anand, Advocates.

Versus

BHARAT SANCHAR NIGAM LTD. Respondent
Through: Mr. K.P. Sunder Rao and Mr. Videsh
Puri, Advocates.

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

1. The Award dated 27.06.2015 (hereafter, '*the impugned award*') passed by the Arbitral Tribunal comprising of Sole Arbitrator (hereafter, '*the AT*') is assailed in the present petition filed under Section 34 of the Arbitration & Conciliation Act, 1996 (hereafter, '*the A&C Act*').

2. For ease of reference, the petitioner, who was claimant before the AT, shall be referred to as the '*Consultant*'.

FACTUAL MATRIX

3. Respondent (hereafter, '*BSNL*') issued NIT on 17.07.2008 for the '*Architectural Consultancy Service for Construction Corporate Complex at CTS Compound, Netaji Nagar, New Delhi*'. The Consultant participated in



the said tender process and was awarded the work vide letter of award/appointment dated 24.07.2009. An Agreement dated 12.08.2009 was executed between the parties. The timelines for pre-commencement, construction and post-completion were stipulated as 6 months, 21 months and 3 months respectively. The scope of work included *“preparation of architectural design, structural design, interior design and engineering designing of services and obtaining approval from local/statutory authorities incharge, land use change, if required and mutation in the name of BSNL from DoT”*.

4. The Consultant claimed that to carry out mutation and change of land use, it required title documents of the project land in the name of BSNL. On being asked, BSNL instead of providing the same rather asked the Consultant to obtain them. The Consultant approached the office of L&DO but even in their records, no such document was available. Apparently, on Consultant's persuasion, the office of L&DO, requested the Ministry of Communication and I.T. to verify and establish the title of project land in BSNL's name. Even this effort was unsuccessful.

5. In the meantime, on the Consultant raising its first bill for Rs.50,93,817/- towards preparation of architectural concept design, BSNL released a sum of Rs.37.73 lacs after deducting service tax.

6. BSNL issued a Show Cause Notice on 15.11.2010 alleging breach of Agreement. It was alleged that on account of delay/suspension of work/slow progress attributable to the Consultant, the work was unlikely to be completed within the stipulated period provided under the Agreement. Disputes arose as to who was obligated to provide/obtain the ownership documents of the project land. Consequently, the Consultant invoked



arbitration vide legal notice dated 29.11.2010, whereafter BSNL appointed Chief Engineer, S. K. Babbar as the Sole Arbitrator.

7. In the arbitral proceedings, the Consultant filed its Statement of Claims on 18.05.2011. BSNL vide its letter dated 29.11.2011 invoked the Performance Bank Guarantee of Rs.17,10,000/- furnished by the Consultant. An amended Statement of Claims (hereafter, 'SOC') was filed which included a claim towards amount under the bank guarantee. BSNL filed its Statement of Defence (hereafter, 'SOD') as well as Counter claim. AT delivered the impugned Award. By order dated 03.07.2015, the impugned award was corrected under Section 33(3) of the A&C Act.

DISPUTES BEFORE THE ARBITRAL TRIBUNAL

8. In SOC, the Consultant sought the following prayers:-

“a. Direct the Respondent to cooperate with the claimant and to provide all necessary documents with regard to the property in question to enable the claimant to obtain the necessary permissions, CLU, NOCs etc. so as to give effect to the various clauses of the agreement for the successful execution of the agreement dated 12.08.2009;

b. Direct the Respondent to cooperate with the claimant and to provide all necessary assistance/documents required for fulfilment of the object of the agreement entered into between the parties, before the statutory authorities as required from time to time;

c. Direct the Respondent to fulfil all its obligations under the agreement and to also to pay to the claimant the balance amount of Rs. 15,21,757/- (Rupees Fifteen lakhs Twenty One Thousand Seven Hundred and Fifty Seven only) towards fees and expenses etc. which have been claimed from the Respondent as detailed in Bill No. 74/2009-10;

d. Direct the Respondent to pay to the Claimant an advance



of Rs. 68,40,000/- (Rupees Sixty Eight Lakhs Forty Thousand only) which the Respondent was liable to pay as per clause 5.4(b) of the agreement dated 12.08.2009;

e. That the termination letter no. 02/EE (C)/BSNL /CTS /ND/146 dated 29.11.2011 of the agreement dated 12.8.2009 is illegal, null and void; and

f. Direct the Respondent to refund to the claimant a sum of Rs. 17,10,000/- with interest @ 12% from the date of receipt of this amount from the Oriental Bank of Commerce.”

9. BSNL disputed the claims in its SOD and made the following counter claims:-

“a) Direct the claimant to refund Rs.34.20 lacs plus service tax with an interest @18% per annum from 13.01.2010 to date of payment of award amount by the claimant.

b) Direct the claimant to pay to the respondent a sum of Rs.35,000/-per month for use and occupation of space of the Respondent since 19.08.2019 till claimant vacate the site plus interest @18% per annum till date of payment by claimant.

c) Direct the claimant to pay to the salary of respondent employees and office expenditure amounting to Rs.2 crore as per detail given in para 3 of the counter claim plus interests 18% per annum till date of payment by the claimant.

d) Direct the claimant for making payment of Rs.1000/- per month since 19.08.2009 for charges of electricity bill plus interests @18% per annum till date of payment by the claimant.

e) Direct the claimant to pay cost escalation amounting to Rs.63.08 crore plus further enhancement due to cost escalation at the time of award plus interest @18% per



annum till actual date of payment by the claimant.

f) Direct the claimant to pay dismantling and disposing site office charges amounting to Rs.1,00,000/- plus Interest @18% per annum with Effect from date of dismantling till the payment made by the claimant.

g) Award a sum of Rs.10,00,000/- against the claimant and in favour of respondent as a compensation for damages suffered by the respondent due to non performance of claimant as per agreement.

h) Award cost of arbitration in favour of the answering respondent.

i) Pass any such orders as this Hon'ble Arbitrator may deem fit and proper in the interest of justice.”

THE IMPUGNED AWARD

10. Claim (a): AT rejected the claim and observed that while entering into the Agreement, the Consultant was explained about the status of the title documents of the project land in pre-bid conference held on 24.02.2009. The Consultant's obligations were also stipulated in Clause 5.2.3(g) of the Agreement. AT also observed that despite being aware of the timelines, the Consultant abandoned the project on 18.03.2011 and withdrew all of its staff from the site office. In light of Clauses 5.2.3(g), 5.15, 5.15(iv) and 5.15(v) of the Agreement, the rescission of the Agreement by BSNL was held to be legal.

11. Claim (b): Having found termination legal, AT rejected the claim in light of Clause 5.7(i) and (ii) of the Agreement which provided for the forfeiture of security deposit and performance guarantee to satisfy the



liability of BSNL. AT further noted that the balance amount was not to be refunded and stood forfeited in terms of Clause 5.15(iv)(b) of the Agreement.

12. Claim (c): AT partially allowed the claim and referred to Clause 3.3.3 of the Agreement which reads as under:-

“Nothing extra over the consultancy fee shall be payable except additional consultancy fee on account of proportionate increase in schedule of accommodation as per provisions contained in clause 5.3.”

AT observed that the original schedule of accommodation of proposal did not include area of parking, engine room, sub-station and other service such as fire-fighting, lift and machine room etc. It further observed that the land area of the proposal was changed by an additional 2147 sq. meters which justified the proportionate increase in Consultant's fee in following manner:-

Agreement Quoted Total Fee = Rs.3,42,00,000/-

For Total Schedule of Accommodation = 37241Sqm
(22300x1.67 = 37241 Sqm)

Additional area 2147 Sqm plot to be planned

Definite additional area in schedule of accommodation
(Approved by BSNL Board and conveyed vide
no.02/EE(C)/CTS/CC/RT/2009-10/96 dated 21.12.2009)
(2147 sqm and FSI 2.0 2147x2=4294sqm)

Additional proportionate fee calculated as per clause 3.3.3 for item
no.1 of payment schedule of agreement under clause 5.4.

$3420000 \times 4294 / 37241 = \text{Rs.}3,94,336/-$

13. Though in the impugned award, a sum of Rs.3,96,336/- was awarded



under Claim (c) subsequently, the clerical error was corrected on 03.07.2015 under Section 33(3) of the A&C Act. The award was corrected and sum of Rs.3,94,336/- was awarded.

14. Claim (d): AT rejected the claim by holding that the issue of advance payment was redundant as the Agreement was already rescinded on 29.11.2011.

15. Consultant in its original SOC demanded a sum of Rs.1,97,32,303.10/- as expenses and charges incurred by it for doing the work under the Agreement as described in Appendix A to the SOC. AT rejected the claim while observing that the project was a fast-track project of 30 months which was rescinded after 11 months. The Consultant was aware that time was of essence before it signed the Agreement. AT took note of various claims made in Appendix A of SOC and observed that the payments were duly made by BSNL towards the completed activity. AT found addition of 30% on expenses as co-ordination overhead charges, as being inflated and rather speculative.

16. Consultant in its original SOC also demanded a sum of Rs.10 lacs as compensation for damages suffered by it, details of which were provided in Appendix A to the SOC. AT rejected the claim by observing that the Consultant did not specify any clause or terms of the Agreement which stipulated for granting compensation to the Consultant. It referred to Clause 3.3.2 of the Agreement while rejecting the claim. It was also noted Appendix A referred to claim of Rs.1,97,32,303/- which was already rejected.

17. Consultant in its original SOC demanded interest @12% for the pendente lite and post award period till payment. AT awarded simple



interest @10% p.a. on the award amount from 45 days after the date of award to the actual date of payment.

18. Consultant in its original SOC demanded cost of litigation. AT rejected the claim by observing that both the parties would bear their own cost.

19. Counter claim No.1: BSNL demanded refund of Rs.34.20 lacs + service tax and interest @18% p.a. from 13.01.2010 till date of payment. Noting that there was no provision in the Agreement for refund of amount paid against RA Bill, AT rejected the counter claim.

20. Counter claim No.2: BSNL demanded a sum of Rs.35,000/- per month from the Consultant towards use and occupation of the space from 19.08.2009 till the Consultant vacated the site. Noting that there was no provision for payment of rent towards space occupied by the site staff temporarily, the counter claim was rejected.

21. Counter claim No.3: BSNL demanded a sum of Rs.2 crores alongwith interest @18% till date of payment towards salary of BSNL's employees and office expenditure. Noting that there was no such provision in the Agreement, the counter claim was rejected.

22. Counter claim No.4: BSNL demanded a sum of Rs.1000/- per month along with interest @18% p.a. from 19.08.2009 till date of payment towards electricity bill. AT noted Clause 5.2.6(d)(ii) of the Agreement and directed that a sum of Rs.1000/- per month be paid from 19.08.2009 to 29.12.2011 with simple interest @10% p.a. from the date the amount was due till payment. While awarding so, AT directed deduction of Rs.5,000/- as the aforesaid amount had been deducted by BSNL at the time of releasing payment towards first RA Bill.



23. Counter claim No.5: BSNL demanded Rs.63.08 crores + further amount towards cost escalation alongwith interest @18% p.a. till date of payment. Finding no such provision in the Agreement, the counter claim was rejected.

24. Counter claim No.6: BSNL demanded Rs.1,00,000/- alongwith interest @18% p.a. from date of dismantling till payment as charges towards dismantling and disposing site office. AT noted that at the time of final submission on 31.12.2014, BSNL gave its no objection if the Consultant agreed to remove the site office. AT directed the Consultant to remove the site office within 30 days of the Award failing which the Consultant was directed to pay removal cost Rs.1,00,000/- alongwith simple interest @10% p.a. from the date of Award till restoration of clear site to the BSNL.

25. Counter claim No.7: BSNL originally demanded Rs.10,00,000/- towards compensation for damages suffered by it due to non-performance by the Consultant. As per the amended counter claim, BSNL demanded a sum of Rs.34.20 lacs alongwith interest @18% p.a. from the date of termination as compensation in terms of Clause 5.9(vii) of the Agreement. While taking note of the fact that BSNL had already encashed the bank guarantee as well as forfeiture of security deposit amount of Rs.18,81,000/-, AT awarded a sum of Rs.10 lacs as originally demanded and further directed the same to be adjusted from the forfeited amount of performance guarantee. The amended counter claim was held to be an afterthought and unjustified.

26. Counter claim No.8: BSNL demanded arbitration cost. The counter claim was rejected by observing that the both the parties shall bear their own cost.

27. Counter claim No.9: BSNL asked AT to pass any other order which



request was rejected.

SUBMISSIONS BEFORE THIS COURT

28. Consultant restricted its challenge in the present petition to the misinterpretation of Clauses 5.2.1 and 5.2.3(g) of the Agreement by the AT, which, according to the Consultant, has rendered the finding patently illegal. Consultant has argued that the obligation under Clauses 5.2.1 and 5.2.3(g) only obliged it to apply to the authorities on behalf of BSNL for change of land use based on title documents of BSNL. It could not have been the intent behind Clauses 5.2.1 and 5.2.3 that the Consultant was obliged to facilitate execution of title documents in favour of BSNL by the concerned authorities. It is contended that, to this extent, the AT's reading of the aforesaid clauses is unreasonable and hence patently illegal.

A contention was raised, although half-heartedly, suspecting the competence of the Arbitrator to act as an arbitrator in the dispute. It was alleged that he was an ex-employee of BSNL and was involved in the preparation of tender documents pertaining to this very contract. However, the challenge was given up by the Consultant conceding that it did not have any evidence to substantiate the allegation.

29. BSNL contended that AT's finding regarding Consultant's obligation under Clause 5.2.3(g), is consistent with the letter and spirit of aforesaid clauses. What was expected of the Consultant under Clause 5.2.1 and 5.2.3(g) was fully emphasised in the pre-bid meeting dated 24.02.2009, where BSNL clarified that the Consultant had to obtain the land ownership documents as well as mutation and change of land use. It is contended that there was no scope for any ambiguity regarding the scope of Clause 5.2.3(g).



Consultant's contention therefore is contrary to the facts and intention of the parties. It was further argued by BSNL, that termination of the contract was also on account of the Consultant abandoning the site with its personnel thereby abandoning the contract itself.

DISCUSSION AND CONCLUSION

30. The ground of patent illegality came to be interpreted by Supreme Court in Delhi Airport Metro Express (P) Ltd. v. Delhi Metro Rail Corporation Ltd.¹ in the following words:-

“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

¹ (2022) 1 SCC 131



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”.

31. The contention raised herein requires interpretation of Clause 5.2.3(g) of the Agreement which is extracted hereunder:-

*“g. The **Architectural Consultant shall be responsible** for pursuing and obtaining of all approvals from all Local/ Statutory authorities according to prevailing bye- laws, Laws, and Regulations etc **including obtaining land ownership documents**, mutation and change in land use if required. The BSNL shall pay all statutory fees required for obtaining the approvals from various local bodies/statutory bodies.*

(emphasis added)

32. The aforesaid clause was interpreted by the AT to observe that the clause was incorporated after a number of pre-bid conferences. A plain reading of the clause (g) would show that the Consultant was obligated to obtain ownership documents as well as mutation and change of land use. Minutes of pre-bid meeting have been relied upon by the AT to conclude that the Consultant was obliged to obtain title documents from the authorities. The scope of Clause 5.2.3(g) has been interpreted by the AT and the interpretation seems to be reasonable. Consultant’s contention that the interpretation adopted by AT would lead to absurd consequence since the Consultant was expected to “create” title documents in favour of BSNL, is not borne out to be correct from the award. AT has only held that the Consultant was obliged to obtain title documents from the authorities and apply for land use etc., if required.

33. It is seen that the AT has neither travelled beyond the contract



between the parties, nor are its findings unreasonable much less suffering from any patent illegality known to law. The award is based on evidence produced by the parties, with opportunity of hearing given to the parties, and thus, the AT adopted a judicial approach in deciding the claims.

34. With no other ground raised, the petition merits dismissal.

(MANOJ KUMAR OHRI)
JUDGE

SEPTEMBER 27, 2023/ga