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

Date of decision: 07.08.2024

+ **O.M.P. (COMM) 23/2019**

BHAYANA BUILDERS PVT. LTD.

.....Petitioner

Through: Mr. Sameer Rohatgi, Ms. Manmeet
Kaur, Ms. Suditi Batra, Mr. Gurtejpal
Singh, Advs.

versus

HINDUSTAN INFRASTRUCTURE CONSTRUCTION & ANR.

.....Respondents

Through: Mr. SK Maniktala, Mr. Udit
Maniktala, Mr. Mohit Sharma, Mr.
Kanav Madnani, Mr. Kritik, Advs.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

: **JASMEET SINGH, J (ORAL)**

1. This is a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 seeking to set aside the Arbitral Award dated 29.09.2018 passed by the Sole Arbitrator.
2. The facts are that the petitioner and respondent No. 1 entered into a Joint venture Agreement dated 16.01.2010 for undertaking projects for civil construction work within the territory of Delhi and Haryana.
3. Subsequently, the petitioner and Respondent No. 1 established a Joint Venture Company i.e. Respondent No. 2 namely, M/S Bhayana Builders Hindustan Infrastructure for carrying out the civil construction work with a 50 - 50 shareholding between the petitioner and Respondent No. 1 which was later on altered.



4. The parties thereafter decided to terminate the Joint Venture Agreement and in order to do that the parties entered into a Memorandum of Understanding (“MOU”) dated 21.06.2011. The purpose of the MOU was to allow the petitioner to exit from the Joint Venture Company and to lay down the responsibilities and liabilities of Respondent No. 1 towards Respondent No. 2 pursuant to the termination of the Joint Venture Agreement.

5. It is stated that all the actions to be done under the MOU were to be executed by Mr. Kamal Kumar who is an authorised representative of Respondent No. 1.

6. Since certain disputes arose between the parties in terms of the Joint Venture Agreement and the MOU, the petitioner invoked Arbitration *vide* Legal notice dated 03.03.2016.

7. The Joint Venture Agreement contains an Arbitration Clause being Clause 20.3 which reads as under:

“20.3 Any Dispute which is not settled to the satisfaction of the Disputing parties under Clause 20.2 shall be finally resolved by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996, by a panel of three (3) arbitrators, one each to be appointed by the Disputing Parties and the third arbitrator to be appointed by the two (2) arbitrators so appointed.”

8. Since the Arbitrator was not appointed pursuant to the legal Notice dated 15.01.2016, the petitioner filed a petition under section 11(6) of the Arbitration and Conciliation Act, 1996 and the learned Sole Arbitrator was appointed.

9. The Arbitral Award came to be passed on 29.09.2018 whereby the following Award was passed:



“9.1 For the all foregoing reasons, the Petition of the Claimant is rejected and all the prayers sought by them are declined and dismissed.

9.2 The costs of the proceedings as prayed by the Claimant and paid by them for the arbitration proceedings is also declined.

9.3 There is no order as well as costs of the arbitration proceedings is concerned.

9.4 Before party I place on record, my appreciation of Ld. Counsels for both the sides who have very ably presented all the facts and did their best in assisting the Tribunal by bringing forth all the relevant aspects of law.”

10. Mr. Rohatgi, learned counsel for the petitioner has restricted his arguments only to the aspect that the learned sole arbitrator has given findings with regard to payment of Rs 2.5 crores being paid by Mr. Kamal Kumar to the petitioner which extinguishes the debt of respondent No. 1.

11. In this regard he draws my attention to the Arbitral Award dated 29.09.2018. The operative portion of the Award reads as under:

As stated the parties to the dispute were the Claimant BBPL, R-1 HICCL and their respective directors. The object of the MOU was the inter-se settlement of account between the parties to the dispute. The control of R-2 J V Co., its business activities along with its assets and liabilities formed one of the conditions provided in the agreement. It is for this reason that the MOU in its clause 5 contained the stipulation with respect to the treatment of the sum of Rs. 2.5 Crores loaned by the Claimant BBPL to the Director of R-1 HICCL i.e. Mr. Kamal Kumar. The Claimant BBPL has insisted that a sum of Rs. 2. 5



Crore be first paid back and only thereafter will the claimant carry out the settlement of accounts. Considering the insistence of the Claimant BBPL, R-1 HICCL paid back the amount of Rs. 2.5 Crore on 11.04.2011 itself. Therefore the repayment of Rs. 2.5 Crore formed one of the most critical, primary and major object of the MOU and was specifically captured in a separate clause of the MOU dated 21.06.2011 i.e. Clause 5 of the said MOU.

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As stated from the evidence brought on record as well as by way of oral evidence lead by Claimant BBPL and R-1 HICCL it was proved that even the balance amount of Rs. 2.5 Crore was paid back by R-1 on behalf of its director i.e. Mr. Kamal Kumar on 11.04.2011. In this regard specific questions were put by claimant BBPL to the witness of R-1 HICCL answer was given. The said fact was also proved by the statement of bank account of R-2 JV Company maintained with Indian Overseas Bank, Defence Colony filed by the witness/ Managing Director Mr. Nitin Bhayana of the claimant BBPL during his cross examination. Another issue was the sum of Rs. 3 Crore received in the account of the R-2 JV Company from M/s. G.S. promoters Pvt. Ltd. in form of mobilization advance under the construction contract for development of the group housing project at Noida.

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That the balance sum of Rs. 2.5 crore mentioned in Clause 5 of the MOU was paid by R-1 HICCL on 11.04.2011 itself. Questions related to these points were specifically put to the witness of the R-1 HICCL in cross examination and were duly proved in reply to such questions.



The relevant portions have been pointed out and marked during arguments.

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Now the main disputes pertains to the Claimant and R-1 HICCL, because as the Claimant in their written submissions in the above stated that they are not claiming any amounts, compensation or losses suffered as averred by them against Mr. Kamal Kumar (KK) and R-2 JV Company. It is also evident from the evidence of the witness of the Claimant Mr. Nitin Bhayana. It is also stated by the Claimant Ld. Counsel that as far as Mr. Kamal Kumar (KK) is concerned their might be separate action against him as may be advised including proceedings currently pending in Hon'ble Delhi High Court. This reflected in para 1.2.6 of claimants' written agreements [also at para 3.8 of the part III of this Award]. So in the present proceedings in view of this the matter is only confined to the disputes between the Claimant BBPL and R-1 HICCL.

12. He states that in view of the aforesaid findings made by the learned sole Arbitrator, the learned Arbitrator has held that the repayment of Rs 2.5 crores out of the total loan amount of Rs 5 crores was made towards the repayment of the directors of the Respondent Company.

13. He states that the said findings given by the learned sole arbitrator will have a direct bearing on the suit filed by the petitioner, being CS OS 1263/2012 titled “M/S Bhayana Builders Pvt. Ltd vs Kamal Kumar”.

14. Mr. Maniktala, learned counsel for the respondent states that there is no such finding by the learned arbitrator, and the averments that have been relied on by the petitioner in the Arbitral Award are not the findings of the



Arbitrator but just mere submissions raised during the Arbitral Proceedings.

15. Mr. Maniktala, learned counsel for the respondent states that from a bare perusal of the findings of the Arbitrator, it is clear that the arbitrator has not dealt with the alleged debt of Mr. Kamal Kumar qua the petitioner.

16. I have heard learned counsel for the parties.

17. It is a well-settled position of law that the scope of interference as mandated under Section 34 of the Arbitration and Conciliation Act, 1996 is very narrow and limited, and in order to adjudicate the matter related to the interpretation of the contract, determination of facts and appreciation and re-appreciation of evidence, the learned Arbitral Tribunal is the best authority for the said purpose. In this regard, reliance is placed on **MMTC VS Vedanta Limited, (2019) 4 SCC 163** wherein the Hon'ble Supreme Court of India *inter alia* held as under:

“11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii), i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the “fundamental policy of Indian law” would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the



principles of natural justice, and Wednesbury reasonableness. Furthermore, “patent illegality” itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.

12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b) (ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See Associate Builders v. DDA, (2015) 3 SCC 49). Also see ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705; Hindustan Zinc Ltd v. Friends Coal Carbonisation, (2006) 4 SCC 445; and McDermott International v. Burn Standard Co. Ltd., (2006) 11 SCC 181).”

18. A bare perusal of the Arbitral Award dated 29.09.2018 categorically shows that the learned Arbitrator did not give any finding regarding the personal dealing of Mr. Kamal Kumar. In this regard, the finding of the learned Sole Arbitrator reads as under:

“I am afraid I cannot comment on the personal dealings of Mr. KK with claimant or its Director except that the dealings find mention in clause 6. More so when KK is not a party in the present Arbitration but surely it has bearing on clause 5 of the MOU and statements made in evidence if they are un-rebutted and relevant in overall



situation and are taken note of.”

19. In my view, the learned Sole Arbitrator has not given any findings on the personal dealings of Mr. Kamal Kumar, and the purview of this court under a section 34 petition is very limited and therefore it does not need any interference. If this Court was to interpret or clarify the award dated 29.09.2018, the same would be re-appreciating pleadings, documents and evidence before the Arbitrator and going into the findings arrived at, by the arbitrator. This court under Section 34 of the Arbitration and Conciliation Act, 1996 cannot do so.

20. In this view of the matter, nothing survives in the petition and the same is disposed of.

JASMEET SINGH, J

AUGUST 7, 2024/DM/PP

(Corrected and released on 21.08.2024)

Click here to check corrigendum, if any