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

+ **O.M.P. (COMM) 145/2024 & I.A. 7361-7362/2024**

FAKHRUDDIN MEMORIAL CGHS LTD. Petitioner

**Through: Mr.Amit George, Mr.ChiragAlagh
and Mrs.Suparna Jain, Advts.**

versus

M/S MAHALAKSHMI INFRAENGINEERS PVT LTD & ANR.

..... Respondents

Through: Mr.BipinKr.Prabhat, Adv.

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Date of Decision: 03.04.2024

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

DINESH KUMAR SHARMA, J. (Oral)

1. Present petition has been filed under Section 34 of the Arbitration and Conciliation Act by the petitioner for setting aside the award dated 23.12.2023, which was clarified vide further award dated 08.02.2024. The petitioner has challenged the finding of the award predominantly on the ground that the learned arbitrator has awarded Claim (1) i.e. non-payment of alleged final bill dated 10.06.2019, Claim (2) Release of security deposit, Claim (3) Payment on account of alleged extra work, Claim (5) Payment on account of extra work executed in society office. Learned counsel has also challenged the interest awarded in the award amount and the dismissal of counter claim by the learned



arbitrator.

2. Learned counsel for the petitioner has argued vehemently and at length that Claim (1) has been allowed by the learned arbitrator without giving reasons and against the evidence on record and therefore, the same is liable to be set aside. Similarly, in respect of Claim (2) i.e. Release of security deposit, learned counsel submits that the respondent himself has admitted that he left the site leaving around unfinished work and therefore in these circumstances, learned arbitrator should not have passed an award releasing the security amount. Similarly, with respect to the award relating to payment on account of alleged extra work and payment on account of extra work executed in society office, learned counsel submits that there is no evidence in this behalf. Learned counsel has also submitted that the interest at the rate of 9% per annum with effect from 10.06.2019 on equitable ground is also impermissible.
3. I have considered the submissions. It is pertinent to reproduce the relevant portions of the impugned arbitral award and the clarification dated 08.02.2024 in order to assess whether the grounds of challenge find any footing therein:

Claim 1:

“vii) Moreover, the glaring fabrication of the same is evident from a bare comparison of the details as mentioned in the alleged Final Bill with Para 34 of the SOC as the amounts mentioned are not identical. Further, the said alleged Final Bill also includes alleged Extra Work and Escalation which are also separately claimed under Claims 3, 5 and 8, respectively, hence, the same amounts to overlapping/ double counting which is not permissible.



viii) Furthermore, the alleged Final Bill includes various taxes which has neither been paid by the Claimant nor the work qua the same has been undertaken by the Claimant. Moreover, the said Final Bill has been raised by the Claimant in complete derogation and violation of the Agreement as the Claimant neither completed the work allotted under the Agreement nor terminated the agreement and unilaterally left the project site on 10.06.2019 despite receiving the entire lawful dues payable under the agreement till 10th RA Bill dated 24.04.2019 to the tune of Rs. 3,39,97,023/- (Ex.RW 1 / 17).

ix) Hence, the alleged Final Bill dated 10.06.2019 is not only fabricated, manipulated and vexatious, but also holds no authenticity and validity in the eyes of contract and law, therefore, the Claimant is not entitled to any sum of money and the Respondent No. 1 has already paid the entire payable dues.

x) CONCLUSION: Since the Final RA bill is pending payment and the Respondent No. 1 has not given any proper and satisfactory justification for not making the said payment. However, this Tribunal found the amount mentioned in the final RA Bill is inclusive of extra work, escalation and security deposit, which have separately been claimed in Claim No.2, 3, 4, 5 & 8. Therefore, once we deduct the amount claimed in Claim No.2, 3, 4, 5 & 8, the balance amount is the payable amount towards the work done as mentioned in table at para 34 of SOC. However, the Claimant has not placed any document on record with respect to payment of Service Tax, Work Contract Tax & GST (whether payable or paid), this Tribunal accepts the Claim but rejects the amount mentioned in Claim No. 1 and awards Respondent No.1 to pay only Rs.93,34,411 to the Claimant towards the work done.”

Claim 2:

“ii) Clause 4.3 of the agreement outlines the provision and indicates that 50% of the security deposit would be released with the final bill, and the remaining 50% would be released after the defect liability period. It is worth noting that the defect liability period expired on 10.12.2019.

iii) However, to the contrary, the Respondent No. 1 failed and neglected to release the same. Admittedly, sum of Rs.22,49,164 I - had been deducted as is apparent from 10th RA bills, which the



Respondent No. 1 has admitted to this Claim to the extent of Rs. 22,49,164/- in the 10th RA bills dated 24.04.2019 (Ex. CW 1 / 27).

iv) The Claimant emphasizes that no defects were notified by Respondent No. 1, and in fact, no counterclaim has also been raised in this regard by the Respondent No. 1.

v) In view of the above, Claimant is entitled to the refund of Security deposit, which is being illegally withheld by the Respondent No.1. Claimant relies on 1st RA to 10th RA Bills in this regard [Ex.CW 1 / 2, Ex.CW 1 / 6, Ex.CW 1 / 8, Ex.CW 1 / 10, Ex.CW 1 / 18, Ex.CW 1 / 19, Ex.CW 1 / 20, Ex.CW 1 / 21, Ex.CW 1 / 23, Ex.CW 1 / 27].

vi) Whereas Respondent No. 1 contends that as per Clause 4.3, 50% of the security deposit was to be released with the final bill to be submitted after completion of the entire work and the remaining 50% was to be released after expiry of 6-month defect liability period. However, the claimant left the construction site without completing the works and without performing its part of obligations, without the consent or intimation of the Respondent No. 1 and breached the agreement unilaterally without any notice. Hence, the Claimant is not entitled for refund of security deposit as the claimant has failed, or has deliberately neglected to perform its part of obligations under the agreement and has breached the same.

vii) Moreover, the claimant has already received the due Security Deposit as is evident from last para of letter dated 18.10.2018 (Ex. CW/22) and no amount is due towards Security Deposit as is evident from the alleged Final Bill dated 10.06.2019, wherein the Claimant has claimed "0" against the Retention Money or Security Deposit, hence is now estopped from raising the said claim. Therefore, the Claimant is not entitled to any sum towards security deposit.

viii) CONCLUSION: As per the 10th RA Bill dated 24.04.2019 [Ex.CW/27], the security deposit lying with the Respondent No .1 is to the tune of Rs. 22,49,164/-. The letter referred by the Respondent No.1 dated 18.10.2018 [Ex.CW 1 / 22] nowhere mentions that the Claimant has received the security deposit. Further, it is correct that in the Final bill dated 10.06.2019 [Ex.CW 1 / 29] as argued by Respondent No. 1 does not find mention of the security deposit. However, as per letter dated 05.01.2020 [Ex.CW 1 / 33] the Claimant



has sought recovery/release of the security deposit after the defect liability period i.e., 6 months, which expired on 10.12.2019 as the security deposit became due and payable to the Claimant only on 10.12. 2019. Further, as argued by the Claimant and also evident from the Counter Claim filed by the Respondent No. 1, no claim towards the defect in the construction has been sought by Respondent No. 1 in its Counter Claim. Therefore, this Tribunal directs the Respondent No.1 to release the security deposit to the tune of Rs. 22,49,1641- in favour of Claimant. (B)”

Claim 3:

x) CONCLUSION: As enumerated above, the parties to the agreement through their conduct modified the scope of work in the agreement and extended the same. Further, there's a noting made by the Respondent No.1 in the RA Bills "to be considered later" meaning thereby that the Respondent No. 1 had agreed to make the payment but at a later stage. The Respondent No. 1 never disputed the additional construction work done by Claimant or the amount raised in the RA Bills for extra work before filing of SOC. Therefore, equity is in favour of Claimant and hence, this Tribunal directs the Respondent No.1 to make the payment for the additional work on 1st & 2nd Floor of the construction site to the tune of Rs.15,02,440/- (C).

Claim 5:

iv) The agreement between the parties was for a fixed sum and fixed scope of work, therefore, any extra or additional item/work done by the Claimant, though without admitting the same, is outside the scope of the agreement.

...

vi) Moreover, a bare perusal of Para 50 of SOC indicates that the Claimant is claiming GST for a work allegedly undertaken by it in 2015-2016, whereas the GST regime was introduced in India w.e.f. 01.07.2017. Hence, the present claim is not only false and frivolous but also beyond the scope of the present Agreement and barred by limitation.

vii) CONCLUSION: As enumerated above, the parties to the agreement through their conduct modified the scope of work in the



agreement and extended the same. Further, there's a noting made by the Respondent No. 1 in the 4th RA Bills are to be considered on the next bill. Not be paid in this Bill" meaning thereby that the Respondent No. 1 had agreed to make the payment but at a later stage. The Respondent No. 1 never disputed the additional construction work carried by Claimant or the amount raised in the RA Bills for extra work before filing of SOC. The argument of the Respondent No. 1 is legally correct that in January 2017, GST was not applicable, hence Respondent No. 1 is not liable to pay the said GST.

Therefore, equity is in favour of Claimant and hence, this Tribunal directs the Respondent No.1 to make the payment for the additional work on account of the construction at the society office to the tune of Rs. 9,99,000/- only (D).

Claim 11: (interest)

“While passing the said Award, this Tribunal had relied upon the judgment of the Hon'ble Supreme Court in **Inder Singh Rekhi v Delhi Development Authority**[1988 AIR SC 1007, Para 4], wherein the Court has held that:

“Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Dispute entails a positive element and assertion of denying. not merely inaction to accede to a claim or a request. Whether in a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the case.”

Therefore, the amount becomes due and payable to the Claimant when the final bill was raised i.e., 10.06.2019 and disputed by the Respondent No.1. Hence, it is clarified that the interest of 9% per annum will be calculated from 10.06.2019.”

4. The law regarding jurisdiction of the court at the stage of Section 34 of the Arbitration and Conciliation Act is very well defined as held in **Ssangyong Engineering and Construction v. National Highways**



*Authority of India*¹ and *Dyna Technologies Private Limited v. Crompton Greaves Limited*². The court at this stage cannot sit in appeal over the award passed by the learned arbitrator. The grounds as mentioned in Section 34 of the Arbitration and Conciliation Act are very clear. The court can interfere in the award passed by the learned arbitrator only if the award was induced or affected by fraud or corruption or was in violation of Section 75 and Section 81 of the Arbitration and Conciliation Act. The award can also be set aside if it is in conflict with the fundamental policy of Indian law or if it is in conflict with the most basic notions of the morality or justice.

5. The concept of fundamental policy of Indian law has also come up for consideration before the Apex court in *ONGC Ltd. v. Western Geco International Ltd.*³, where it was inter-alia held as under:

“35. What then would constitute the “fundamental policy of Indian law” is the question. The decision in ONGC [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression “fundamental policy of Indian law”, we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other

¹ (2019) 15 SCC 131

² (2019) 20 SCC 1

³ 2014 (9) SCC 263



authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a “**judicial approach**” in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of **natural justice**. Besides the celebrated **audi alteram partem rule** one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. **Non-application of mind** is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.



39.No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of **Wednesbury principle** [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223; (1947) 2 All ER 680 (CA)] of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

40.It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest.”

6. After the concept of ‘fundamental policy’ was elaborated upon in **Renusagar Power Co. Ltd. v. General Electronic Co.**⁴ with respect to the Foreign Awards (Recognition and Enforcement) Act, 1961, **ONGC Ltd. v. Saw Pipes Ltd.**⁵ touched upon the same in terms of Domestic Awards. The Supreme Court, in **McDermott International**

⁴ 1994 Supp (1) SCC 644

⁵ (2003) 5 SCC 705



*Inc. v. Burn Standard Co. Ltd.*⁶, established that what constitutes public policy as a ground of challenge is seen in accordance to nature of transaction and material on record; the concept has now been further defined by a catena of judgments.⁷ It is set out that, the learned arbitral tribunal as an authority exercising its power, must adopt a judicial approach such that it is deals with matters in a bona fide reasonable and fair manner without being influenced by any other extrinsic circumstances. The second is that the authority must not stray from the principles of natural justice in arriving at their decision. Thus, the arbitral award must demonstrate the application of mind through disclosure of reasoning and natural justice principles such as ‘*audi alteram partem rule*’ necessitate to be followed. The third requisite is that the award must not be perverse as defined by the *Wednesbury principle* such that it may not be so that no reasonable person would conclude the same.

7. Further, it has also become a common practice to invoke ‘perversity’ when challenging arbitral awards under Section 34. The ground of perversity which is often being claimed under the head “patent illegality” also has different connotations from that inferred in the present petition. The expression “perverse” refers to findings which are not supported by the evidence on record, or are against the law, or suffer from the vice of procedural irregularity. The court has to see

⁶ (2006) 11 SCC 181

⁷ Associate Builders vs. DDA (2015) 3 SCC 49, MMT Limited v. Vedanta Limited, 1 (2019) 4 SCC 163 and Indian Oil Corpn. Ltd. v. Shree Ganesh Petroleum, (2022) 4 SCC 463



whether some irrelevant or extraneous material has been considered or that some inadmissible material has been taken into consideration. An award has been defined to be perverse in *Associate Builders vs. DDA*⁸ if (i) it contains a finding based on no evidence or an (ii) the arbitral tribunal takes into account material which is irrelevant or extraneous to the decision; or (iii) it ignores crucial evidence.

8. The averment that as per the petitioner, the learned arbitrator has not appreciated the evidence correctly is an insufficient ground to set aside the award. The award can also not be interfered with only because another view can be taken on the material on record. There is no breach of fundamental policy of Indian law in the impugned award. A perusal of the award indicates that it is a well-reasoned order taking into consideration all facts and circumstances as submitted by both parties. I consider that there is no illegality or perversity in the award.
9. The petition along with the pending application is dismissed.

DINESH KUMAR SHARMA, J

APRIL 3, 2024

rb/aj

⁸ (2015) 3 SCC 49