



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

Reserved on: 09th October, 2023

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Pronounced on: 04th January, 2024

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FAO (OS) (COMM) 324 /2022

FIVE STAR CONSTRUCTION PVT. LTD.

..... Appellant

Through: Mr. Kawaljit Kochar, Mr. Deepanshu
and Mr. Utkarsh Vats, Advocates.

Versus

ORCHID INFRASTRUCTURE DEVELOPERS PVT. LTD.

..... Respondent

Through: Mr. Manish Sharma, Mr. Ninad
Dogra and Ms. Adya Rao, Advocates.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J.

1. **An Appeal under Section 37 of the Arbitration and Conciliation 1996 read with Section 13 of the Commercial Court Act** has been filed against the Order dated 19.07.2022 passed by the learned Single Judge allowing the Objections under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as "Act, 1996"*) and thereby setting aside the Award dated 10.09.2018 which was partly allowed in favour of the appellant.

2. The respondent Orchid Infrastructure Developers Pvt. Ltd. (*hereinafter referred to as "ORCHID"*) was awarded the Contract vide Letter dated 20.12.2010 for construction of 21 Dwelling Units, (DUs) ORCHID ISLAND at Gurugram on 7 plots bearing numbers 257 to 262 and



261-A for a consideration of Rs.2,21,01,162/- @ Rs.685/- per square foot. A detailed Letter of Award dated 28.12.2010 and the Contract Agreement were consequently executed. According to the terms, the date of Commencement of Work was 28.12.2010 and the date of Completion was tentatively fixed as 31.12.2011.

3. There was a delay in completion of the Project and each party held the other responsible. Disputes thus arose between the parties. ORCHID contended that it has released a mobilisation advance of Rs.11,05,058/- to the appellant Five Star Construction Pvt Ltd. (hereafter referred to as “FIVE STAR”) and had made the payments regularly in terms of the Contract.

4. FIVE STAR, however, repeatedly sought extensions which were granted by ORCHID, though without prejudice to its rights to raise the claims. Thereafter, ORCHID issued Show Cause Notice dated 01.11.2012 to which no satisfactory response was received from FIVE STAR. After multiple exchanges, the contract was extended till 31.12.2012 after which ORCHID refused to grant an extension. Thereafter, a joint meeting was held on 16.01.2013 to resolve this issue. It was amicably and mutually decided between the parties that the ORCHID will complete the balance work without any prejudice to the claims of the appellant herein.

5. FIVE STAR then issued a Final Bill dated 07.05.2013 in response to which ORCHID asked FIVE STAR to depute a suitable person for joint verification of the work done. According to ORCHID, substantial portion of the work was still to be completed and it awarded the project to another Contractor at the cost and risk of FIVE STAR. ORCHID claimed that consequent to the acts of FIVE STAR in not completing the Project in a



timely manner, it was forced to pay “delay penalty” to its clients, on account of delay in handing over possession of the dwelling units.

6. The FIVE STAR invoked arbitration under the Contract and filed a petition under **Section 11 of the Act, 1996** which led to the appointment of the Arbitrator vide letter dated 27.05.2016.

7. **FIVE STAR** raised the following claims :

(a) *Rs.29,60,446 towards expenditure incurred on the work done till 14.01.2013;*

(b) *Past, Pendente Lite and Future Interest; and*

(c) *Cost of Arbitration and Litigation*

8. **ORCHID** while refuting the assertions of FIVE STAR and filed its own **Counter-Claim** qua :

(a) *Rs. 11,51.,370/- including 18 % interest as the mobilization advance payable by the Respondent;*

(b) *Rs.38,01,400/- as liquidated damages as per Clause 1.17 of the Contract Agreement.;*

(c) *Rs.80,36,607 /- as per Clause 1.19 of the Contract Agreement.*

(d) *Costs of arbitration etc.*

(e) *Rs. 10 lacs for inconvenience caused to it.*

(f) *Rs.3,20,000/- cost of employee retention during the extended period.*

(g) *On all the claimed amounts, the interest pendente lite and post award @18% P.A.*

(h) *Costs and expenses amounting to Rs.10 lacs incurred towards payment made to the Center, legal and manpower, costs.*

9. The **learned Arbitrator** on the basis of evidence of both the parties, came to the conclusion that **there was no merit in the Counter-Claim of**



ORCHID. However, the claim of **FIVE STAR** was partly allowed and was awarded a sum of **Rs.4,33,877/-** along with interest @ **12% per annum** vide the impugned Award dated 10.09.2018.

10. Aggrieved, ORCHID filed the petition under Section 34 of the Act, 1996 challenging the partial claim awarded to FIVE STAR. It, however, did not seriously contest the dismissal of its Counter-Claim in the said petition.

11. The **learned Single Judge** considered the rival contentions in detail and observed that the entire premise for grant of Rs.4,33,877/- to the FIVE STAR was the apparent admission of ORCHID in its pleadings. However, it was held that the perusal of entire pleadings failed to disclose any admission of ORCHID. It was further observed that while the learned Arbitrator had come to the conclusion that FIVE STAR had not been able to prove its claim for Rs.29,60,446/- (which included the sum of Rs.4,33,877/-), it still granted the sum of Rs.4,33,877/- which FIVE STAR had claimed by way of **interim relief** and was included in the main claim. Once the main claim itself was held to be not tenable, the sum of Rs.4,33,877/- (which was by way of interim relief) was also not tenable. Therefore, the petition under Section 34 of the Act was allowed and the Award partly granting the claim to FIVE STAR, was set aside.

12. **Aggrieved** by the Order dated 19.07.2022 of the learned Single Judge allowing the petition under Section 34 of the Act, **FIVE STAR has filed the present appeal under Section 37 of the Act.**

13. **The appellant/FIVE STAR has asserted** in the grounds of Appeal, that there was a delay in commencement of the Project on account of various laches on the part of ORCHID in fulfilling its reciprocal obligations. ORCHID failed to handover the site and the Plans on time and the supply of



material was also delayed. The time period of the Contract was thus, extended as per mutual understanding between the parties.

14. It is further claimed that time was not the essence of the Project. ORCHID suddenly terminated the Contract vide letter dated 14.01.2013 indicating that they would be immediately taking over the plots and get the work completed at the risk and cost of FIVE STAR. It is asserted that subsequent thereto, a *joint meeting* was held on 16.01.2013 and it was mutually decided that ORCHID would take over the site and execute the balance work without any prejudice to FIVE STAR. It is stated that this was confirmed by ORCHID vide Letter dated 21.01.2013. FIVE STAR thus, had continued to work at site until **14.01.2013** on the request of ORCHID. The labour of the FIVE STAR however, continued to work on site till 07.05.2013 and completed the Project. It is thus, asserted that the Project was completed by FIVE STAR.

15. FIVE STAR submitted their Final Bill on 7.05.2013, but ORCHID refused to make any payment on the purported ground that the Final financial settlement shall be undertaken only after the entire work was completed. This was absolutely contrary to the Contract and to the mutual understanding between the parties.

16. The **Claim No.1** of FIVE STAR was for recovery of **Rs.29,60,466/-** as the balance amount for the work done till 14.01.2013 though the *Learned Arbitrator* has awarded only Rs.4,33,877/- which was for the work done between 14.01.2013 and 07.05.2013. It is asserted that the *learned Single Judge* fell in error in interpreting paragraph 11.5 of the Award as, while considering Claim No.1 the learned Arbitrator disregarded the Final Bill



dated 07.05.2013. Learned Arbitrator had thus rightly appreciated the facts and awarded Rs.4,33,877/-.

17. Thus, a prayer has been made by appellant/FIVE STAR that the impugned Judgement dated 19.07.2022 be set aside.

18. **It has been submitted by the learned Counsel on behalf of ORCHID** that the learned Single Judge had rightly set aside the Award under Section 34 of the Act, 1996, which requires no interference under Section 37 of the Act, 1996.

19. **Submissions heard.**

20. At the outset, before going into the rival contentions of the parties, it would be pertinent to reiterate the scope of interference under Section 37 of the Act, 1996.

21. The scope of a challenge under Section 34 and Section 37 of the Act, 1996 is limited to the grounds stipulated in Section 34 as held in MMTC Limited v. Vedanta Ltd, (2019) 4 SCC 163. The comprehensive judicial literature on the scope of interference on the ground of Public Policy under Section 34 was postulated in Associate Builders v. DDA, (2015) 3 SCC 49. The Apex Court placed reliance on the judgment of ONGC v. Saw Pipes, (2003) 5 SCC 705 to determine the contours of Public Policy wherein an award can be set aside if it is violative of ‘*The fundamental policy of Indian law*’, ‘*The interest of India*’, ‘*Justice or morality*’ or leads to a ‘*Patent Illegality*’. For an award to be in line with the ‘*The fundamental policy of Indian law*’, the Tribunal should adopt a judicial approach which implies that the award must be fair, reasonable and objective. These grounds require an Arbitral Tribunal to deliver a reasoned award which is substantiated by evidence.



22. It was further held in Associate Builders (supra) that, when a decision is made to set aside an award on the basis of “*public policy*”, the term “*justice*” simply refers to an award that shocks the conscience of the court. A court cannot possibly include what it determines to be unfair, given the circumstances of a case, by replacing the Arbitrator's decision with what it sees as “just”.

23. The ground of “*patent illegality*” is applied when there is a contravention of the substantive law of India, the Arbitration Act or the Rules applicable to the substance of the dispute.

24. The scope of challenge of an arbitral award under ‘*patent illegality*’ as added in Sub-Section 2A of Section 34 vide the Amendment in 2015 has been explained in Ssangyong Engineering and Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131. It was observed that for the sub-Section 2A to be attracted there must be “*patent illegality*” appearing on the face of 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. It was 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.

25. In this backdrop, the present Appeal needs to be considered. The perusal of the record shows that FIVE STAR in its claim had clearly stated that for the Works executed till the date of foreclosure i.e. upto 14.01.2013 a



sum of Rs.29,60,446/- as per the Final Bill, was due and payable. The claim No.1 of FIVE STAR was as under :

“CLAIM NO.1: An amount of Rs.29,60,446/- (Twenty Nine Lakh Sixty Thousand Four Hundred and Fourty Six Only) towards expenditure incurred on execution of works till 14th January 2013 as per final bill.”

26. While dismissing this Claim, the learned Arbitrator had observed as under :

“11.25 It is extremely important to note that the factum of ‘tools and plants and other materials’ (as per the list attached) of the value of Rs.20 lacs’ mentioned in the said reply dated 19.09.2013 Ex.C12, is completely missing from the Statement of Claim as also the evidence of CWI Sh. Praveen Madhok. So, such a conduct of the Claimant cannot be appreciated and it persuades me to believe that at least a portion its Claim No.1 is based on falsehood and as such must be rejected.

11.26 In the Statement of Claim no specific amount has been claimed by the Claimant under Claim No.1 in relation to ‘VARIATION IN BOQ QUANTITY’ although a mention thereof has been made. However CWI Sh. Praveen Madhok in para 6 of his affidavit Ex.CW1/A makes a mention of ‘Detail in r/o Claim No.2, ‘VARIATION IN BOQ QUANTITY’ and is claiming a sum of Rs.25,26,569/-. So, this portion of evidence is nto in accordance with the pleadings and is contrary to Claimant’s own admission as contained in Ex.C12 mentioned above. Also page 48 which is part of Mar-6, the final bill as per the claimant, in respect of the ‘BOQ work done’ the amount mentioned in ‘0’. So, it clear that this amounts to resorting to falsehood and is an effort to mislead even this Tribunal.”

27. **Learned Single Judge** has rightly referred to these observations of the learned Arbitrator to uphold the dismissal of the Claim of respondent



No.1 for Rs.29,60,466/-. Since there is no patent illegality brought forth in the conclusions so arrived at by the learned Arbitrator, no interference is required in this regard, as also observed by the learned Single Judge.

28. **The only grievance** of the appellant/ FIVE STAR was of setting aside the Award of **Rs.4,33,877/- allowed by the learned Arbitrator.**

29. **First and foremost,** it has been rightly observed by learned Single Judge that this amount of Rs.4,33,877/- as per the documents of the claimant itself, was included in the total sum of Rs.29,60,466/- due in the Final Bill for which the Claim No.1 had been raised, wherein it was specifically mentioned that it was pertaining to the Work done till 14.01.2013.

30. **Neither was there any assertion nor any evidence** led on behalf of *FIVE STAR to state that Rs.4,33,877/- which was being claimed by them,* was for the work done by the **labour from 14.01.2013 till 07.05.2013.** In fact, the appellant FIVE STAR had made no separate claim for Rs. 4,33,877/- for any work allegedly continued by labour on site after termination of Contract on 14.01.2013 till 07.05.2013, but it was an amount claimed as an interim relief. The learned Arbitrator's conclusions could have been based only on the Claims raised by the parties. **An Arbitrator cannot award an amount that he may feel is just to a party in the interest of justice, when there is no specific Claim in that regard.** The learned Arbitrator thus, has exceeded his mandate and jurisdiction by awarding a sum of Rs. 4,33,877/-.

31. Not only has the learned Arbitrator given an Award for a non-existent Claim, but has also contrived a value and manufactured a Claim for the work done from 14.01.2013 till 07.05.2013, for which no logic, rationale or calculation exists. It has been explained in Ssangyong Engineering and



Construction Co. Ltd., Civil Appeal No. 4779 of 2019 that a decision which is perverse, may no longer be a ground for challenge under “*public policy of India*” but would certainly amount to patent illegality appearing on the face of the Award. **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**

32. Further, in PSA Sical Terminals Pvt. Ltd. v. The Board of Trustees of Chidambaran Port Trust Tuticorin and others, 2021 SCC OnLine SC 508. the Apex Court held that an Award based on no evidence, shall be perverse.

33. Thus, even if for the sake of arguments; it is accepted that the Claim for work done till 07.05.2013 had existed, there is no basis to presume that the value of the work allegedly performed from 14.01.2013 till 07.05.2013 would be Rs. 4,33,877/-, especially when FIVE STAR in its Statement of Claims had specifically made a Claim of Rs. 29,60,466/- for the work executed till 14.01.2013 which included Rs. 4,33,877/-.

34. In Satluj Vidyut Nigam Ltd v. Iaiprakash Hyundai Consrotium, O.M.P. (COMM) 170/2017 decided on 12.07.2023, it was held that financial Claims based on novel mathematical derivations *without proper foundation in the pleadings and/or without any cogent evidence in support thereof can cause great prejudice to the opposite party*, colouring the Award with perversity. **Therefore, the learned Arbitrator, in the present case, had awarded a sum that was for a non-existing Claim, based on no cogent reasoning or evidence.**

35. We thus, conclude that learned Single Judge has rightly observed that this sum of Rs.4,33,877/- was part of the Final Bill dated 07.05.2013 which was for the work done till 14.01.2013 and was not in respect of any alleged



additional work. The amount of Rs.4,33,877/- formed part of Claim No.1 and once Claim No.1 itself was rejected, this amount which formed part of Claim No.1, could not have been awarded.

36. Pertinently, the appellant had claimed this amount of Rs.4,33,877/- alleging it to be an admitted amount by ORCHID to be awarded to it by way **of interim relief**. The learned Single Judge has in detail considered the entire pleading to conclude that there was no admission, whatsoever, on behalf of the ORCHID towards any amount due and payable to the appellant.

37. The learned Single Judge has considered the contentions of the appellant in the right perspective to conclude that the amount of Rs.4,33,877/- was not payable to the appellant. Thus, the Award given by learned Arbitrator has been rightly set aside under Section 34 of the Act, 1996.

38. We find no grounds to interfere in the findings of the learned Single Judge and the Appeal is hereby, dismissed.

39. Pending applications, if any, are also accordingly disposed of.

**(NEENA BANSAL KRISHNA)
JUDGE**

**(SURESH KUMAR KAIT)
JUDGE**

JANUARY 04, 2024

Ek/Va