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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 28.05.2024

+ **O.M.P. (COMM) 480/2023**

UNION OF INDIA EXECUTIVE ENGINEER A-DIVN. CPWD.

..... Petitioner

Through: Ms. Manisha Agrawal Narain, CGSC,
Mr. Sandeep Singh Somaria and Ms.
Khushi Mangla, Advs.

versus

M/S ROSHAN REAL ESTATE PVT. LTD. Respondent

Through: Ms. Anusuya Salwan, Mr. Rachit
Wadhwa, Ms. Simran Sakunia and
Ms. Sonika Singh, Advs.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

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

I.A. 30600/2024

1. This is an application filed under Section 151 of the CPC seeking early hearing of the petition.
2. It is stated by Ms. Narain, learned CGSC for the petitioner that there is an urgency in the matter and the petition should be taken up for hearing.
3. For the said reasons, issue notice.
4. Ms. Salwan, learned counsel accepts notice for the respondent and has no objection to the application being allowed.
5. The application is allowed and the petition is taken up for hearing today.

I.A. 23579/2023

6. This is an application filed under Section 5 of the Limitation Act



seeking condonation of delay of 25 days in filing the petition.

7. Ms. Narain, learned CGSC for the petitioner states that even though it is stated in the application that the delay is of 25 days, in fact it is a delay of 29 days.

8. She states that the corrected award was received by the petitioner on 27.06.2023 and the petition was filed on 25.10.2023. Hence, the petition is filed on the 119th day.

9. Even though the present application is cryptic and no reasons have been stated as to why the delay beyond 90 days should be condoned except the statement that various legal opinions were required from concerned authority.

10. Issue notice.

11. Ms. Salwan, learned counsel accepts notice on behalf of the respondent and opposes the present application.

12. I am of the view that even though the reasons are cryptic and do not explain in detail the reasons for delay of 29 days, however in the interest of justice, I have proceeded to hear the petition on merits.

13. For the said reasons, the application is allowed and the present petition has been taken up for hearing today.

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14. The brief facts are that after successful bidding, the petitioner and the respondent entered into an Agreement bearing 78/EE/AD/2018-19 for development work i.e. landscaping, pathways, roadways, parking etc. in the Samadhi area along Mahatma Gandhi Marg, New Delhi. The General Condition of Contract (GCC) was an integral part of the agreement between the parties. The respondent completed the work on 24.12.2018 and



submitted its final bill on 27.03.2019.

15. As the said amount was not paid, the respondent invoked the arbitration clause and the Sole Arbitrator was appointed to adjudicate the disputes. The respondent filed its statement of claim and the petitioner filed its statement of defence.

16. The learned Sole Arbitrator *vide* Impugned Award dated 03.06.2023 allowed the claims of the respondent to the tune of Rs. 1,52,18,688/- alongwith 10% interest.

17. The respondent claimed Rs. 6.46 crores for claim No. 1 whereas the Arbitral Tribunal allowed the claim for an amount of Rs 1,15,77,085/- only. The said claim has been only challenged by the petitioner in the present petition.

18. It is stated by Ms. Narain, learned CGSC that while allowing the said claim, the Tribunal has totally misinterpreted the Clause 12.2.A of GCC. The said clause reads as under:-

“12.2.A For Project and original works:

In the case of extra item(s) items that are completely new, and are in addition to the items contained in the contract), the contractor may within fifteen days of receipt of order or occurrence of the item(s) claim rates, supported by proper analysis which shall include invoices, vouchers etc. and Manufacturer's specification for the work failing which the rate approved later by the Engineer in charge shall be binding and the Engineer in charge shall within prescribed time limit of the receipt of the claims supported by analysis of the rates submitted by the contractor, determine the rates on the basis of the market rates and the contractor shall be paid in accordance with the rates so determined, failing which it will be deemed to have been approved.”



19. She states that the learned Arbitrator in paragraph 8.4.6.16 of the impugned award has categorically come to a finding that both the parties were unable to comply with the requirements of Clause 12.2.A of the GCC. Hence, she states that the Arbitral Tribunal misinterpreted the terms of the contract and has wrongly allowed the claim No. 1.

20. I have learned counsel for the parties.

21. In the present case, the petitioner has only challenged the claim No. 1 allowed by the Arbitral Tribunal. Ms Narian, learned CGSC has stated that the learned Arbitrator has wrongly awarded the claim no. 1. The paragraph 8.4.6.16 of the Award reads as under:-

“8.4.6.16. A careful and combined reading of relevant documents available on arbitral record, this Tribunal is of the considered opinion that both the parties have not followed the contractual provisions covered under Clause 12 and analysis of rates for the EI/SI/DI items though submitted/not submitted but no quotation /bill were submitted by the claimant in support of rates.”

22. The Arbitral Tribunal at paragraph 8.4.6.6 records that the documents relied upon by the respondent shows that the rates for extra items were approved by the Engineer-in-Charge in whose presence the whole work was executed. Further, the Arbitral Tribunal in 8.4.6.7 also records that the Superintending Engineer on 25.03.2019 approved the extra item statements. For perusal, paragraphs 8.4.6.6 and 8.4.6.7 reads as under:-

“8.4.6.6. The claimants also relied on the documents filed by them on pages 97 to 147 in their rejoinder which shows that the rates were approved by the engineer in charge, in whose presence the whole work was executed and who was one of the



officer who visited the stone quarry at Telangana and other places with other officers, approved the quarry and stone, and was also well aware about the rates etc. The letter dated 25/03/2019 evidence filed at page 97 of the claimants rejoinder and from pages 98 to 147 are the statement as well as analysis of rates duly signed by the officers of the respondents office are part of the enclosures. The letter indicate the rates proposed by the E.E to S.E on 25.03.2019 with all supporting documents.

8.4.6.7. The letter dated 25/03/2019 addressed to the Superintending Engineer in the list of enclosures sent with the letter shows as under:

- 1. Approved extra item statement I & II*
- 2. Approved deviation statement No. I & II*
- 3. Analysis of rates (With Invoice)*
- 4. Copy of agreement.”*

23. Thereafter, the Arbitral Tribunal after analysing the entire documentary evidence has come to a finding at paragraph 8.4.6.20 wherein it has been stated as under:-

“8.4.6.20. The Tribunal decides that the rates proposed by the Executive Engineer who has actually executed the work are more reliable and nearer to the market rates. The Tribunal decide that the rates proposed by the then E.E vide his letter dated 25.03.2019 with reduction of 10% can be taken as market rate.”

24. I am of the view that the Arbitral Tribunal has correctly appreciated the Clause 12.2.A of GCC and has analysed, considered and thereafter arrived at the rates for the extra items executed by the respondent. The Arbitral Tribunal has also not awarded the entire amount of Rs. 6.62 crores as claimed by the respondent but has awarded Rs 1.15 crores which is based on the analyses of the extra items as well as the market rates for extra items



performed by the respondent.

25. The Hon'ble Supreme Court in *Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131* has observed as under:-

“37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the 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.

38. Secondly, it is also made clear that reappreciation 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.

39. To elucidate, para 42.1 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would



certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, 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. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be



characterised as perverse.”

26. With the limited scope, this Court while exercising section 34 jurisdiction cannot re-appreciate the evidence and take a different view, if the view taken by the Arbitral Tribunal is reasonable and borne out from the records.

27. In the present case, the Arbitral Tribunal has relied upon the rates approved by the Engineer in charge and approved by the Superintending Engineer of the respondent. Relying upon these rates for the extra items performed by the respondent, is reasonable and justified.

28. I find no reasons to interfere with the impugned Award as the learned Arbitrator has correctly appreciated the terms of the contract and the evidence placed before him. No ground has been made out to set aside the impugned Award.

29. For the said reasons, there is no merit in the petition and the same is dismissed.

JASMEET SINGH, J

MAY 28, 2024/NG