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

Date of Decision: 16.07.2024

+ **O.M.P. (COMM) 513/2018 & I.A. 17305/2018**

DELHI JAL BOARD

.....Petitioner

Through: Mr. Sanjay Poddar, Sr. Adv with Mr.
Govind Kumar, Mr. Shivam, Ms. Asha Gopalan,
Advs.

versus

M/S ENVIROTECH OVERSEAS INDIA LTD.

.....Respondent

Through: Mr. Sujeet Kumar Mishra & Mr.
Pankaj Balwan, Advocates

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+ **OMP (ENF.) (COMM.) 144/2018**

M/S ENVIROTECH OVERSEAS LTD.

.....Decree Holder

Through: Mr. Sujeet Kumar Mishra & Mr.
Pankaj Balwan, Advocates

versus

DELHI JAL BOARD

.....Judgement Debtor

Through: Mr. Sanjay Poddar, Sr. Adv with Mr.
Govind Kumar, Mr. Shivam, Ms. Asha Gopalan,
Advs.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

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

O.M.P. (COMM) 513/2018

1. This is a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 ("**1996 Act**") seeking setting aside of the impugned Arbitral Award dated 31.12.2017 passed by the Arbitral Tribunal.
2. The facts are that the petitioner floated a tender for rehabilitation of



1600 Dia Trunk Sewer from Harsh Vihar to Haiderpuri Sewage Pumping Station. The respondent participated in the same and was declared as the successful bidder. On 11.11.2002, the contract was entered into between the parties.

3. The respondent was to carry out the work of maintenance for a period of 10 years with effect from 01-07-2006 and hence the first CCTV footage of the maintenance of the sewer lined stretching 3.63 km was to be submitted with the petitioner by 30.06.2011.
4. The petitioner repeatedly asked the respondent to desilt the stretch between manhole 48 to 52 of the sewer line and also to submit CCTV footage. *Vide* letter dated 16.09.2011, the petitioner extended the date of completion of maintenance work upto 31.12.2011.
5. On 20.12.2011, the petitioner directed the respondent by invoking clause 6 of the Contract to indemnify the petitioner for breaches committed by the respondent. On 11.04.2012, the petitioner by invoking clause 13 of the contract foreclosed the contract and directed the respondent to stop the work at the stretch and hand over the site within 30 days.
6. On 12.06.2013, the respondent invoked arbitration in terms of clause 25 of the Agreement and on 06.10.2015, the arbitrator was appointed to adjudicate the disputes between the parties.
7. The Sole Arbitrator passed the impugned Arbitral Award dated 31.12.2017 wherein 2 of the claims of the respondent were allowed and all other claims were rejected. In addition, the counter-claims of the petitioner were also rejected. Hence the present petition.
8. *Vide* Order dated 06.02.2019, stay on the impugned Award was granted



subject to the deposit of the Awarded Amount before the Court.

9. Mr. Poddar, learned senior counsel appearing for Delhi Jal Board has argued that the findings in the impugned Award are contradictory as on the one hand, the learned arbitrator comes to a finding that the contract was rightly foreclosed by the petitioner for breaches committed by the respondent and on the other hand, award's compensation to the respondent.
10. He further argues that the learned Arbitrator has wrongly rejected Counter Claim No. 1 of the petitioner which was towards failure of the respondent to desilt the drain and not providing CCTV footage.
11. He further states that since the learned Arbitrator has held that the petitioner has rightly foreclosed the contract on account of non-performance of obligations by the respondent, the counter claims of the petitioner should have been awarded in favour of the petitioner.
12. I have heard learned counsels for the parties.
13. The law is well settled on the scope of deciding section 34 petition. For the sake of brevity, reliance is placed on ***Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131*** and the relevant paras are extracted below:-

“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.”

- 14.** The two claims which were allowed by the learned Sole Arbitrator read as under:-

“Issue no. 1: Whether claimant is entitled to release of security deposit of Rs.50 lakh as per terms of the agreement? OPC



Issue no 2: Whether claimant is entitled for payment of an amount of Rs.96 lakh towards outstanding bills due and payable by respondent? OPC”

Claim No. 1

- 15.** The argument of the learned senior counsel for the petitioner, as regards allowing of claim No.1 is concerned, is that the learned Sole Arbitrator failed to appreciate clause 6 of the Contract which is reproduced below:-

“6. GUARANTEE

In order to guard against defects and sub-standard quality, 10% of the amount of the work subject to a maximum of Rs. 50 lacs will be recovered from the contractor's Bill and this amount will be retained for a period of one year after completion of work. The amount will be refunded to the contractor after one year, if no defect is noticed in the work, on submission of the bank guarantee for equivalent amount valid for a further period of four years. The contractor will also furnish the Indemnity Bond/Guarantee Agreement (Refer page 63-64) Undertaking to make good any defect in the functioning of the pipe line during a period of ten years after maintenance period of the work at his own risk and cost. This condition supersedes all other conditions of defect liability period and security deposit.”

- 16.** It is argued that in terms of clause 6, the petitioner was entitled to retain



the amount of Rs. 50 lakhs as the contractor/respondent was to furnish an indemnity bond for the said sum to meet the defects which in the present case were never cured. Hence, the petitioner was entitled to be indemnified by the respondent for the same.

17. Before deciding the above contention, it is necessary to reproduce the findings made by the learned Sole Arbitrator with respect to claim No. 1 which reads as under:-

"Security deposit is governed by clause 31 of General Conditions and clause 6 of Special Conditions of Contract which are reproduced below:

"31. Security deposit: The amount of security deposit shall be deducted @ 10% subject to a maximum of Rs. 50 lacs from the running bills payable for the civil work done. Earnest money deposited at the time of tender will be treated as a part of security deposit."

"6. GUARANTEE

.....

Completion Certificate dated 23.02.2007 (Annexure C-4) issued by respondent says that "the company has completed the work satisfactorily within extended period of completion i.e. 30.06.2006. The company is now maintaining the sewer line for a period of 10 years as provided in the Contract commencing from 01.07.2006." Respondent has not alleged that any defect in the work was noticed during the period of one year after completion of work. Accordingly, the Security deposit was required to be refunded on 01.07.2012. This,



however, was to be done on submission of bank guarantee for equivalent amount valid for a further period of four years. Respondent alleges that claimant failed to submit bank guarantee which was a prerequisite for refund of security deposit. Claimant has failed to show that it had submitted the same. However, there is no justification for retaining security deposit even after elapse of four years for which the bank guarantee was to be provided. Therefore, claimant is entitled to release of security deposit of Rs.50 lakhs on 01.07.2011 when the period of five years (1 +4) expired. This Issue is, therefore, decided in favour of claimant and against respondent.

- 18.** In the present case, the completion of maintenance work under the Contract was extended till 31.12.2011. The petitioner on 11.04.2012 invoked clause 13 of the Contract and foreclosed the Contract.
- 19.** The learned Sole Arbitrator relied upon the Completion Certificate dated 23.02.2007 issued by the petitioner, wherein the petitioner themselves had stated that *“The company has completed the work satisfactorily within extended period of completion i.e. 30.06.2006.”* The Completion Certificate further observed that the respondent is maintaining the sewer line for a period of 10 years commencing from 01.07.2006.
- 20.** The security deposit was for a particular purpose i.e. for the civil works done. Once there is a completion certificate granting satisfactory performance of the civil works under the Contract by the respondent, there was no reason or basis for the petitioner to retain the said amount.



In case the respondent failed to give an indemnity bond, the remedy of the petitioner lied elsewhere and not in retaining the security deposit. The said fact has rightly been appreciated by the learned Sole Arbitrator which needs no interference.

Claim No. 2

21. Learned senior counsel for the petitioner argues that in the present case, the respondent failed to carry out desilting of the entire stretch of sewer line in the first five years of maintenance and also failed to provide CCTV footage of the desilting carried out for 800 mtrs. out of 3.63 kms. The same is violative of Clause 5 of the Contract which reads as under:-

“5. MAINTENANCE OF SEWER LINE:

The agency shall maintain the sewer line for 7 years after satisfactory completion. Maintenance shall include desilting, CCTV survey atleast twice during the period of 7 years (first CCTV survey to be carried in first three years) and further repairs to sewer line if required. Level of silt at any time shall not exceed 5% of the capacity.”

22. He further states that running bills of Rs. 6 lakhs per month were raised without providing CCTV footage which was the only way to ascertain whether maintenance was being properly carried out as per terms and conditions of the Contract.
23. The findings with regard to claim No. 2 by the learned Sole Arbitrator are as under:-

“As per respondent's own certificate, the work of maintenance of rehabilitated trunk sewer started w.e.f.



01.07.2006. Bills for the maintenance work were raised at the agreed rate on half yearly basis and were also paid for the work done up to 31.12.2010. Payment against bills dated 5.7.2011 for Rs. 32,25,000/-, dated 11.1.2012 for Rs. 32,25,000/-, and dated 24.7.2013 for Rs. 21,50,000/-, totaling Rs. 86 lacs. (Ex. CW1/7A), pertaining to the period from 01.01.2011 to 30.04.2012 has not been made. Respondent's plea is that claimant failed to complete the CCTV survey of the entire length i.e. 3.63 Km of the rehabilitated T/sewer which it was required to do by 30.6.2011 and, therefore, it is not entitled for any payment for the balance period of maintenance from 1.1.2011 to 30.4.2012. Respondent has not denied that claimant had performed the job of maintaining the sewer line during this period. Its only allegation is that CCTV survey of the entire length was not completed within the prescribed period and that there was settlement in a limited range between manhole no. 48 and 49. Thus, there may be some deficiency in the work carried out by claimant, reasons for which it has tried to explain in its submissions, there is no provision in the Contract which entitles respondent to withhold the entire amount of maintenance bills. In a commercial contract relief, penalty and damages cannot go beyond what is provided in the Contract. In case the deficiencies in work were considered serious respondent could have foreclosed the work, as it did in April 2012, earlier also. But once the



services of contractor have been availed of it cannot be deprived of the payment there for. The tribunal sees no justification in withholding payment for the work done up to 30.04.2012 and claimant is entitled to it. This Issue is, thus, decided in favour of claimant and against respondent. It is seen that though the amount outstanding has been shown as Rs.96 lakhs in the statement of claims, the amount of outstanding bills (Annexure-7) total up as Rs.86 lakhs.”

24. In the present case, the payments of bill dated 05.07.2011 for Rs. 32,25,000, dated 11.01.2012 for Rs. 32,25,000 and dated 24.07.2013 for Rs. 21,50,000 for the period from 01.01.2011 to 30.04.2012 has been withheld. Admittedly, the petitioner had the right to foreclose the Contract for any deficiency as per clause 13 of the Contract. The petitioner chose neither to foreclose the Contract nor to levy any damages upon the respondent, but continued to permit the respondent to perform its obligations upto 11.04.2012.
25. The petitioner has not denied that the respondent had performed the job of maintaining the sewer line from 01.11.2011 to 30.04.2012 and only CCTV survey of limited range between manhole No. 48 and 49 was not provided. The petitioner has withheld an amount of Rs. 86 lakhs from the bills raised by the respondent towards penalty/damages for failure to perform the contractual obligations by the respondent. If that were to be allowed, the petitioner would be a Judge in its own cause and decide on its own as to what is the damage caused/what is the penalty to be levied on the Contractor/respondent for failure to provide CCTV footage between manhole No. 48 and 49. The same cannot be



permitted.

26. The petitioner is required in law to show the damages suffered and/or the basis of penalty for which it could withhold/set off the bills of the respondent for the damage caused/loss incurred by the petitioner. In the absence of there being any material to this effect and in the absence of there being any provision in the Contract for the petitioner to set off the bills of the respondent, the same cannot be allowed. If the respondent did not perform its contractual obligations, the petitioner was very much within its right to foreclose the contract earlier which it did not do so. The contract does not provide the petitioner to levy any damages. Hence the only remedy available to the petitioner was to aver and prove the loss suffered by the petitioner on account of non-performance of the contractual obligations by the respondent. The same was not done.
27. The bills were duly raised for the work performed, and the learned Sole Arbitrator has correctly held that the same were wrongly withheld by the petitioner and must be paid. Hence, there is no infirmity in the findings of Claim No. 2 arrived by the learned Sole Arbitrator.
28. The argument of learned senior counsel that the Sole Arbitrator has arrived at a finding that the Contract was rightly foreclosed by the petitioner and still granted compensation to the respondent is bereft of merits as the Claim Nos. 1 and 2 allowed by the learned Sole Arbitrator are only with respect to the security deposit and outstanding bills due and payable to the respondent respectively. The issue No. 4 and 5 which deal with the issue of Contract rightly foreclosed by the petitioner have been answered in favour of the petitioner. The issue No.



4 and 5 reads as under:-

“Issue no. 4: Whether claimant is entitled for Rs.2,28,75,000/- as loss and damages arising out of foreclosure of Contract due and payable by respondent?

OPC

Issue no. 5: Whether respondent has any justification in foreclosure of Contract agreement as per terms of Contract? OPR”

- 29.** In issue No. 4, learned Sole Arbitrator placing reliance on Clause 13 of the Contract has rightly observed that the Engineer in Charge is entitled to curtail the work for any reason whatsoever and the contractor/respondent shall have no claim whatsoever on account of profit or advantage which the respondent may have derived from the execution of the work. It was further observed that the respondent did not object to the foreclosure of the Contract by the petitioner.
- 30.** In issue No. 5, the Sole Arbitrator has held that the respondent had valid reasons to foreclose the Contract and the respondent failed to perform its obligation. However, relying on Clause 13 of the Contract, the Sole Arbitrator did not award any compensation to the respondent. For the sake of perusal, Clause 13 of the Contract reads as under:-

“Clause 13 No compensation for alteration in or restriction of work to be carried out.

If at any stage the Engineer-in -Charge shall for any reason whatsoever not require the whole work thereof as specified in the tender to be carried out, the Engineer-in-Charge shall



give notice in writing of the fact to contractor, who shall have no claim to any payment or compensation, whatsoever on account of any profit or advantage which he might have derived from the execution of the work in full, but which he did not derive in consequence of full amount of work not having been carried out; neither shall he have any claims for compensation by the way of alternations having been made in the original specification, drawing, designs and instructions which shall involve any curtailment of work as originally contemplated.”

Counter Claims

31. The last ground urged by the learned senior counsel for the petitioner is that the counter claims of the petitioner have been wrongly rejected by the learned Sole Arbitrator without giving any reasons.
32. The counter claim of Rs. 7,97,88,011/- was towards recovery on account of desilting and CCTV survey, the learned Sole Arbitrator has held as under:-

“9. The Issues discussed above touch upon all claims and counter claims except counter claim no. 1 which needs to be discussed separately The counter claim is Rs.7,97,88,011/- towards recovery on account of desilting and CCTV survey. This counter claim is vague, and superfluous. Respondent has neither referred to any tender condition or provision of the Contract Agreement under which this counter claim has been raised nor has it shown any expenditure incurred to rectify/remove any deficiency in the work carried out by



claimant. It is amusing that though the total amount which claimant would have received for the remaining period if contract had it not been foreclosed is Rs. three crore, respondent is claiming a sum of Rs. 7,97,88,011/- as damages. Therefore, this counter claim is held as not admitted.”

33. In the entire arbitral record, there is no document to show that the petitioner has incurred any expense much less Rs. 7,97,88,011/- towards desilting or CCTV survey.
34. In order to succeed to a claim for expenses incurred, the learned Sole Arbitrator has correctly held that there is no document to show expenditure incurred to rectify/remove any deficiency in the work carried out by the respondent. Hence, the counter claims have been rightly rejected by the learned Sole Arbitrator.
35. For the foregoing reasons, the present petition is devoid of merits, and is accordingly dismissed.
36. Pending application(s), if any, are disposed of.
37. Since the matter is heard and decided on merits, Mr. Mishra, learned counsel for M/s Envirotech Overseas India Ltd. did not press the objection with regard to the petition being *non-est* filing. This issue has not been adjudicated and is left open.

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38. This is the enforcement petition filed under section 36 of 1996 Act seeking enforcement of Arbitral Award dated 31.12.2017.
39. As Section 34 petition filed by Delhi Jal Board has been dismissed today, there is no stay operating against the Award dated 31.12.2017.



40. In this view of the matter, there is no impediment in enforcing the Arbitral Award dated 31.12.2017. The decree holder/its nominee is at liberty to withdraw the entire awarded amount lying deposited in this Court along with this accrued interest.
41. Further, if there is any shortfall in the amount, the same be communicated to the judgment debtor within 2 weeks after the withdrawal of the said amount and the said deficient amount be released to the decree holder within 2 weeks thereafter.
42. For the said reasons, the petition is disposed of along with pending application(s), if any.
43. In case the order passed today is not complied with, the decree holder is at liberty to revive the said petition.

JASMEET SINGH, J

JULY 16, 2024 / (MSQ)
(Corrected and released on 30.07.2024)

Click here to check corrigendum, if any