* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% ***Reserved on: 4th July,2023***
Pronounced on: 23rd August, 2023

\+ **FAO (COMM) 48/2022**

CASA2 STAYS PRIVATE LIMITED ..... Appellant
Through: Mr. Tishampati Sen, Ms. Riddhi Sancheti, Mr. Anurag Anand & Mr. Himanshu Kaushal, Advocates.

versus

BBH COMMUNICATIONS INDIA PRIVATE LIMITED
..... Respondent
Through: Mr. Amit Tyagi & Mr. Mukul Tyagi, 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. The present Appeal under **Section 37(1)(b) of the Arbitration and Conciliation Act, 1996** *(hereinafter referred to as the* "Act, 1996"*)* read with Section 13(1A) of the Commercial Courts Act, 2015 has been filed on behalf of the appellant, against the Judgment dated 19.02.2022 of the learned District Judge, Commercial Court-02, South District, Saket, New Delhi, wherein the Objections under Section 34 of the Act, 1996 filed by the appellant against the Arbitral Award dated 20.10.2020 and Additional Arbitral Award dated 17.12.2020 passed by the learned Arbitrator, was dismissed.

2. The **facts in brief** are that the respondent, a Company engaged in

the business of Advertising and other related works, entered into the contract with the appellant-Company engaged in the Hospitality business under the brand name of *"Fab Hotels"*. The Agreement dated 26.04.2018 was executed between the parties, wherein the respondent had agreed to provide advertising services as detailed therein. The term of the Contract was from 19.03.2018 till 18.06.2018 for a period of three months. Some of the relevant terms of the Agreement dated 26.04.2018 are as under: -

> *"1. The services were to be provided by the respondent to the appellant for a sum of Rs. 1,55,00,000/-, 50% of the amount was payable before the commencing of project and the balance on the completion of work as per the Purchase Order.*
>
> *2. Anything in addition to the agreed scope as per Schedule I, would be charged extra subject to the prior approval by the client.*
>
> *3. The GST and Government taxes were payable additionally, but either party could terminate the Contract upon the material breach by either party. In case, the breach was not cured within the period of 10 days from the receipt of notice from the non-defaulting party.*
>
> *4. All the invoices were payable within 30 days of invoice date. In case, there was no dispute in respect of the said invoices. However, if a dispute or query on invoice had to be raised and communicated to the agency within 5 working days of the presentation of the invoice, failing which, the invoice vide which amount was claimed, was to be assumed correct and due for payment . Interest @ 12% per annum was chargeable on the overdue amount."*

3. Admittedly, a sum of Rs. 91,45,000/- (inclusive of GST at18%) (50% of the contract amount) was paid in advance. The respondent after handing over master TVC to the appellant, raised invoice for the

remaining 50% amount i.e., Rs. 77,55,000/- + 18% GST totalling to Rs. 91,45,000/-. The appellant admittedly paid a sum of Rs. 69,60,000/- in the Bank Account of the respondent and retained the balance amount of Rs 20,65,000.

4. The respondent immediately brought this to the notice of the appellant *vide* e-mail dated 05.07.2018 and sought clarification and confirmation about the balance amount which was confirmed, acknowledged and admitted by the respondent's official, namely, Mr. Nishant Gupta *vide* E-mail dated 06.07.2018 and by another official, namely, Mr. Sandeep Thukral *vide* his e-mail dated 09.07.2018. Yet, the amount was not paid.

5. The claimant/respondent has further stated that apart from these amounts, there were additional works done for which separate Purchase Orders, were raised upon the appellant. The details of the Purchase Orders are as under: -

S. No.	Purchase Order No.	Date	Remarks & Amount	Invoice Raised& Date
1.	CASA/APR/08	25.04.2018	Travel expenses of Ms. Reema Asrani for sum of Rs. 12,980/-	Rs. 7,042/-
2.	CASA/APR/11	27.04.2018	Rs. 1,52,220/-	Rs. 1,18,598/- & 13.07.2018
3.	CASA/APR/008	13.07.2018	2 HD copies of electronic upload for sum of Rs. 6,041/-	Rs. 6,041/- & 18.05.2018
4.	CASA/JUN/11	13.06.2018	Production in 6 languages and royalty (Hindi & English) and caller tune for TVC for sum of Rs. 4,30,700/-	Rs. 4,30,700/- & 22.06.2018
5.	CASA/JUN/24	20.06.2018	TVC in Tamil, Bengali and	Rs, 82,010/-

			Malyalam languages for of sum Rs. 82,010/-	& 11.07.2018
Total				Rs. 6,44,391/-

6. The total amount thus found due from the appellant came to Rs. 27,09,392/- along with interest @ 12% being Rs. 5,35,368/- upto January, 2020. Despite making demands for due amount, the appellant failed to pay the amount. Left with no option, the respondent invoked Arbitration in terms of Clause 16 of the Agreement dated 26.04.2018.

7. The appellant in its **Statement of Defence** did not dispute the execution of the Agreement or advance payment of 50% of the Contract amount i.e.Rs. 91,45,000/-. It was also not denied that the balance amount of Rs. 91,45,000/- remained out of which, an amount of Rs. 69,60,000/- was paid as a goodwill gesture but it is denied that deduction of Rs. 20,65,000/- was made in view of the shortcomings and the failure of the respondent to provide the services in terms of the Agreement.

8. The main contention raised by the appellant before the learned Arbitrator was that the TVC and other deliverables under the Agreement were not delivered by the respondent within the agreed time-frame. The Out of Home (OOH) and print execution had not been delivered even by July, 2018 and the respondent resiled from taking responsibility for execution of OHH.

9. Further, the respondent coerced the appellant into giving additional costs for the approval of music and other items before the appellant's advertising campaign which was to go live on an online platform, namely, Hotstar. It was contended that the respondent unilaterally changed the background music without caring for the appellant's view. These issues

delayed the campaign by two to three weeks.

10. Moreover, the respondent changed the scope of work without transparency and without approval from the appellant and, therefore, the final TVC delivered was different from the presentation made while entering into the contract.

11. It was submitted that the appellant wanted to negotiate directly with the Production House engaged by the respondent for some outdoor photo shoot which was outside the scope of the TVC. However, the respondent withdrew their support completely and did not render the requisite assistance to the appellant. The respondent also retaliated by charging the maximum amount for travel and stay for completing the work under the Agreement by seeking approval from the appellant for the best 5-Star accommodations. It was the stance of the appellant that the respondent ought to have limited these expenses.

12. It was further submitted that the respondent raised Invoices for extra charges for re-recording the advertisement in certain languages and that it did not deliver the product in some cases. The appellant, thus claimed that the respondent was not entitled to the balance amount.

13. **The learned Arbitrator** considered the e-mails that formed the foundation for the rival contentions and were not disputed by both the parties, made the following awards: -

> *"the claimant is held entitled to Rs. 27,09,392/- as principal amount and @ 12% amount as interest on this amount from 1.9.2018 to 29.2.2020 amounting to Rs. 4,87,690/-. The claimant is entitled to 10% interest from 1.3.2020 to 20.10.2020 on Rs. 27,09,332/- amounting to Rs. 1,,73,100/-. The total amount payable by the respondent to claimant*

comes to Rs. 33,70,182/-. In case the respondent pays this amout within 60 days of this order, no further interest to be paid. In case of failure of respondent to pay the amount, the respondent would be liable to pay 10% interest on the awarded amount of Rs. 33,70,182/- w.e.f. 21.10.2020 till realization."

14. An additional Award dated 17.12.2020 was made by the learned Arbitrator in the following terms: -

"The claimant is entitled to following costs: -
a) Arbitrators fee paid by the claimant.
b) Venue booking charges and steno charges paid by the claimant.
c) Counsel fee to the tune of Rs. 1 lac."

15. Aggrieved by the Award dated 20.10.2020 and additional Award dated 17.12.2020, the appellant preferred an Objection under Section 34 of the Act, 1996 before the learned Commercial Judge who dismissed the same *vide* Judgment dated 19.02.2022. Thus, the appellant has preferred the present appeal.

16. **Submissions heard**

17. The main grounds agitated in the present Appeal under Section 37(1)(b) of the Act, 1996 are **firstly,** the appellant was not given an opportunity to address the oral arguments in terms of Section 24 of the Act, 1996 and which amounts to violation of principle of natural justice, resulting in miscarriage of justice.

18. **Secondly,** vital evidence by way of additional E-mails dated 29.06.2018 and 29.06.2018 have been ignored and overlooked by the learned Arbitrator while adjudicating the claim of the respondent.

19. Now coming to the **first** objection, the importance of the rule of *audi alteram partem* in arbitration proceedings is axiomatic from a reading of Section 34(2) (a) (iii)of the Act, 1996 which sets out the grounds for setting aside an Award which includes circumstances where a *party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings* ***or was otherwise unable to present his case.*** The Apex court in *Ssangyong Engineering and Construction Co. Ltd. vs National Highway Authority of India*, 2019 15 SCC 131 reiterated *"the right to a hearing"* as a ground to set aside an arbitral award.

20. Now coming to the facts in hand, the assertion of the appellant that no opportunity to present its case was given, has also been vehemently countered. It has been pointed out that learned counsel for the respondent that the learned counsel for the appellant was always available on the dates fixed by the learned Arbitrator. The record shows that the matter had been fixed *via* e-mail dated 13.08.2020 on 02.09.2020 for oral final arguments, on which date, learned counsel for the appellant sought an adjournment on account of ill-health which was not objected to by the counsel for the respondent. The matter was consequently adjourned to 14.09.2020 at 03:00 P.M. for final arguments. No time limit was fixed for addressing the arguments by either party. Only after the arguments were concluded by the counsel for the respondent, did the appellant's counsel seek an adjournment on the ground that she had another arbitration listed at the same time and she would thus, be unable to address the arguments on the said date.

21. Despite the belated information, the learned Arbitrator while

appreciating the difficulty of the counsel for the appellant to address the oral arguments, gave opportunity to both the parties to submit their written arguments within two weeks. However, the appellant failed to submit the written arguments and made a request for further time *vide* e-mail dated 27.09.2020. Accordingly, the learned Arbitrator gave further indulgence by granting an extension *vide* his e-mail dated 28.09.2020; yet, no written arguments were filed on behalf of the appellant.

22. The entire conduct as narrated above, reflects that the learned Arbitrator being fully conscious of the principle of natural justice, had given multiple opportunities to the learned counsel for the appellant to address arguments. The claim of the appellant that there has been denial of opportunity to address arguments, is bereft of any merit.

23. Pertinently, the dispute *inter se* parties was based on the documents. With that being the case, merely because the oral arguments were not addressed by the appellant, does not lead to inevitable denial of principles of natural justice, without further explaining if any pertinent aspect was left unconsidered. A reference may be made to the observations of the Hon'ble Supreme Court in the case of *Sohan Lal Gupta vs. Asha Devi* (2003) 7 SCC 492, wherein it was observed that principles of natural justice should not be stretched too far.An Arbitrator has a right to manage the proceedings and to give directions to the parties to be present on a particular date, time and place and this would be sufficient compliance of the principles of natural justice. It was further observed that even otherwise, no party has absolute right to insist on his convenience in every respect. The matter is within the discretion of the Arbitrator and Court can

intervene only in the event of positive abuse. Similar observations have been made by Kerala High Court in the case of *Impex Corporation And Ors. vs Elenjikal Aquamarine Exports* AIR 2008 Ker 119.

24. Therefore, the Arbitrator had given an opportunity to the appellant to address the oral arguments, but the same is not availed by the party. Moreover, the appellant also failed to file written arguments despite two opportunities. In the aforesaid circumstances it cannot be held that there was denial of principle of *"audi altrem partem"*. Sufficient opportunities were granted though not utilized by the appellant.

25. The **second** objection is connected with the first limb of arguments. It is claimed that because no opportunity of addressing the arguments was availed by the appellant, the true facts on the merit of the case could not be considered.

26. It was argued that the e-mails sent on 28.06.2018 and 29.06.2018 have not been considered and also significant aspects of non-compliance of the terms of the Agreement by the respondent have been overlooked.

27. This argument also does not have any basis. The learned Arbitrator had considered the rival contentions and noted that the Agreement specifically contained the list of deliverables. The appellant neither in its Statement of Defence nor in its Reply to the Notice dated 29.08.2019 claimed that the deliverables were not delivered in time. In fact, the exchange of e-mails between the appellant and the respondent on 19.05.2018 reflected that the 60-second Master Film for YouTube/Digital was sent to the appellant for their record as well. The appellant-Mohit Gupta *vide* E-mail dated 19.05.2018, in fact, acknowledged the work by

writing *"Thanks Yashi. Great work in delivering this. Keep it up"*. The e-mail dated 20.5.2018 of the appellant reflected that pre-launch screening was done by the appellant to its full satisfaction.

28. The learned Arbitrator therefore, rightly concluded that the e-mails dated 19.05.2018 and 20.05.2018 of the appellant reflected the due execution of the work under the Agreement. The appellant has also referred to the two E-mails dated 28.06.2018 and 29.06.2018 which read as under: -

> *"E-mail dated 28.06.2018*
>
> *Yashi Vikram <Yashi. vikram@bbh-india.in> 28 Jun 2018 12:36*
> *To Mohit, Mohit, Shreekant, Vaibhav, S.*
>
> *Hi Mohit*
>
> *Sending across a presentation with 5 shots that we recommend to capture through the still shoot: (not legible)*
>
> *Basis approval on these, we will brief the production house/photographers.*
>
> *Once the project is awarded for a photographer, we will get into the nitty-gritty of the shoot (cast, costume, location etc.) through a PPM.*
>
> *The break-up of film production post is attached.*
> *Let us know about Marudhar.*
>
> *Thanks.*
>
> *E-mail dated 28.06.2018*
>
> *Yashi Vikram <Yashi. vikram@bbh-india.in> 28 Jun 2018 13:29*
> *To Mohit, Mohit, Shreekant, Vaibhav, S.*
>
> *Hi Mohit*
>
> *Awaiting way forward to this.*
> *Have lined up the photographers already.*
>
> *Thanks.*

E-mail dated 29.06.2018

Yashi Vikram <Yashi. vikram@bbh-india.in> 29 Jun 2018 19:36
To Mohit, Mohit, Shreekant, Vaibhav, S.

Hi Mohit

Sending across a presentation with 5 shots that we recommend to capture through the still shoot.

Basis approval on these, we will get into the nitty-gritty of the shoot (cast, costume, location etc.) through a PPM.

The break-up of film production post is attached.

Let us know about Marudhar.

Thanks.

E-mail dated 29.06.2018

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To Mohit, Mohit, Shreekant, Vaibhav, S.

Hi Mohit

Awaiting way forward to this.

Have lined up the photographers already.

Thanks."

29. The learned Arbitrator had duly appreciated the evidence to arrive at the conclusion that though reference was made by the appellant to the E-mails dated 28.06.2018 and 29.06.2018, but neither of those e-mails had any mention of the incomplete work.

30. The learned Arbitrator has also considered the dues under Invoices for five Purchase Orders which were raised for the additional work that was carried out by the respondent. These additional Purchase Orders were in terms of the Clause 5 (f) of the Contract between the parties. Again, the appellant has not been able to produce any evidence or document to show that the work specified in those five Purchase Orders, were not done

by the respondent or that respondent was not entitled to the amounts under the Purchase Orders.

31. The appellant took a plea that the Final Invoice dated 13.07.2018was exorbitantly priced. The Invoice was in reference to the Purchase Order dated 27.04.2018 which quoted the price at Rs.1,52,220. It is not disputed that five Purchase Orders were approved and not questioned by the appellant. The final Invoice dated13.07.2018for a sum of Rs.1,18,598 was raised, based on the Purchase Order 27.04.2018 and was much less than the initial quotation. Further, in terms of the Contract, if there was any objection to any of the invoices, it had to be taken within five days. The learned Arbitrator has rightly appreciated the rival contentions while passing the impugned Award.

32. The Objections taken by the appellant have been rightly found to be without merit in the Petition under Section 34 of the Act, 1996 by the learned Commercial Judge, who has in detail, considered the aforesaid contentions.

33. Neither before the learned Commercial Judge in the Objections under Section 34 of the Act, 1996, nor in the present Appeal has the appellant been able to show any perversity in the findings of the learned Arbitrator. Axiomatically, the Petition under Section 34 of the Act, 1996 and the present Appeal seeks re-appreciation of the evidence, which is not permissible.

34. The Supreme Court in *Anglo American Metallurgical Coal vs MMTC Limited*,(2021) 3 SCC 308 found that any attempt to challenge an order issued under Section 34 of the Act, 1996 is prohibited from going

beyond the parameters outlined in Section 34 of the Act, 1996. In other words, the court is not permitted to independently evaluate the merits of the award; instead, it must just confirm that the court's use of its authority under Section 34 of the Act, 1996 has not gone beyond what is allowed under the Statute. Therefore, this Court must be extremely cautious and hesitant to disrupt such concurrent conclusions in cases where an Arbitral Award has been made and validated by the Court under Section 34 of the Act, 1996. Further, it is beyond the scope of Section 37 of the Act, 1996 for courts to re-appreciate the evidence when the arbitrator has passed a reasoned award by drawing plausible conclusions based on the evidence and interpretation of the law as held in *Delhi Airport Metro Express Pvt. Ltd. Vs. Delhi Metro Rail Corporation Ltd.* (2021) SCC OnLine SC 695. Given the settled law on the re-appreciation of evidence, the onus of establishing any perversity in the finding of the learned Arbitrator was on the Appellant, which it has clearly failed to discharge.

35. We find no merit in the present appeal challenging the impugned Judgment dated 19.02.2022 under Section 34 of the Act, 1996, Arbitral Award dated 20.10.2020 and Additional Arbitral Award dated 17.12.2020 passed by the learned Arbitrator, and the same is hereby dismissed.

(NEENA BANSAL KRISHNA)
JUDGE

(SURESH KUMAR KAIT)

JUDGE

AUGUST 23, 2023/*S.Sharma*