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

FAO 432/2010

Reserved on : 17.02.2023
Date of Decision : 22.03.2023

IN THE MATTER OF:

MUNICIPAL CORPORATION OF DELHI ..... Appellant
Through: Ms.Tanu Priya Gupta, Advocate

versus

NATRAJ CONSTRUCTION COMPANY ..... Respondent
Through: Mr.Rajeev Kumar and Mr.Mohd. Sarfaraj, Advocates.

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

MANOJ KUMAR OHRI, J.

1. The appellant is aggrieved with the judgment dated 01.05.2010 passed by learned ADJ-04, North District, Delhi in C.S. No.15/2010, whereby the objections filed by the appellant under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter, referred to as the *'Act'*) were dismissed and the Award dated 06.11.2009 upheld.

2. Notably, the appellant floated a tender for providing and fixing Retro-Reflective Sign Board on Maharshi Parshuram Marg in C-29 II, Delhi. The respondent participated in the tender and was awarded the work vide Work-Order No.933/EE/RD1/RZ/TC/03-04/31/11 dated 09.03.2004. The contractual amount was Rs.3,16,899/- and the time for completion of work was three months. Indisputably, the respondent completed the work within time i.e. 22.05.2004 and submitted a bill for an amount of Rs.2,93,857/-. On 30.11.2004,

the appellant cleared the said bill and passed a sanction order for an amount of Rs.2,66,398/-. The said amount however was not paid for the reason that the CBI had registered an FIR with respect to the sub-standard quality of work in cases relating to fixation of Retro- Reflective Sign Board and the officials of the appellant-Corporation as well as the respondent were named as accused persons therein.

The respondent invoked the arbitration clause in the agreement between the parties, resulting in passing of the Award on 06.11.2009, whereby its claim of Rs.2,93,857/- for the work done and refund of earnest money of Rs.7,750/- was allowed. The Arbitrator also awarded interest @ 15% per annum on the above amounts from 01.05.2007 till the date of award. In addition, Rs. 73,000/- were directed to be paid towards cost of the arbitration proceedings. The objections filed by the appellant under Section 34 of the Act came to be dismissed vide the impugned judgment.

3. Ms. Tanu Priya Gupta, learned counsel for the appellant, contended that as per Clause 25 of the Contract Agreement, any challenge was required to be raised by the respondent within 120 days of 30.11.2004, whereas the arbitration proceedings were initiated much later and thus, the claim was time barred. It was next contended that the learned ADJ ought to have interfered with the impugned award in terms of sub-section 2(a)(v)(b), Section 34 of the Act for the reason that the matter was under investigation by the CBI. In support, learned counsel referred to the decisions in National Insurance Co. Ltd. *v.* Sujir Ganesh Nayak & Co. and Another reported as **(1997) 4 SCC 366,** DDA *v.* K.C. Chibber & Co. reported as **2009 SCC OnLine Del 2110** and Sushil Kumar Bhardwaj *v.* Union of India reported as **2009 SCC OnLine Del 4355**.

4. Learned counsel for the respondent contended that the grounds raised in the present appeal are beyond the scope of Section 37 of the Act. It was

submitted that the Work Order in the present case was never under CBI investigation and the charge-sheet filed consequently was in relation to some other Work Order. In support of his submissions, learned counsel placed reliance on the following decisions:

i. Municipal Corporation of Delhi *v.* Natraj Construction Company reported as **2012 SCC OnLine Del 2501**;

ii. Swiss Timing Limited *v.* Commonwealth Games 2010 Organizing Committee reported as **(2014) 6 SCC 677;**

iii. ADTV Communication Pvt. Ltd. (Formerly Aez Infratech Pvt. Ltd.) *v.* Vibha Goel & Ors. reported as **2018 SCC OnLine Del 8843;** and

iv. Delhi Airport Metro Express Private Limited *v.* Delhi Metro Rail Corporation Limited reported as **(2022) 1 SCC 131**.

5. There is no gainsaying that the jurisdiction of this Court under Section 37 of the Act is limited in scope. In this regard, it is deemed expedient to advert to the decision in State of Jharkhand and Others *v.* HSS Integrated SDN and Another reported as **(2019) 9 SCC 798,** where the Supreme Court observed as follows:-

> *"**7.** As held by this Court in a catena of decisions, the award passed by the Arbitral Tribunal can be interfered with in the proceedings under Sections 34 and 37 of the Arbitration Act only in a case where the finding is perverse and/or contrary to the evidence and/or the same is against the public policy. (See Associate Builders v. DDA, etc.)*
> ***7.1.** In the present case, the categorical findings arrived at by the Arbitral Tribunal are to the effect that the termination of the contract was illegal and without following due procedure of the provisions of the contract. The findings are on appreciation of evidence considering the relevant provisions and material on record as well as on interpretation of the relevant provisions of the contract, which are neither perverse nor contrary to the evidence in record. Therefore, as such, the first appellate court and the High Court have rightly not interfered with such findings of fact recorded by the learned Arbitral Tribunal."*

6. The scope of Section 37 of the Arbitration Act was further analysed in MMTC Limited *v.* Vedanta Limited reported as **(2019) 4 SCC 163,** where it was held:-

> *"**14.** As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings."*

7. Recently, in Haryana Tourism Limited *v.* Kandhari Beverages Limited reported as **(2022) 3 SCC 237**, the Supreme Court was in seisin of a fact-situation similar to the case at hand. The appellant therein had accepted the tender filed by the respondent however, disputes arose between the parties during pendency of the contract and led to appointment of an Arbitrator. Aggrieved by the Arbitrator's Award, the respondent filed objections under Section 34 of the Arbitration Act before the concerned ADJ, which was dismissed. Against the order of the learned ADJ as well as the Award of the Arbitrator, the respondent preferred an appeal before the Punjab and Haryana High Court under Section 37 of the Arbitration Act, which was allowed.

Assailing the order of the High Court, the appellant approached the Supreme Court. While setting aside the order of the High Court and restoring the Award of the Arbitrator and order of the learned ADJ, the Supreme Court delineated the scope of Section 37 of the Arbitration Act and observed thus:-

> *"**8.** So far as the impugned judgment and order passed by the High Court quashing and setting aside the award and the order passed by the Additional District Judge under Section 34 of the Arbitration Act are concerned, it is required to be noted that in an appeal under Section 37 of*

the Arbitration Act, the High Court has entered into the merits of the claim, which is not permissible in exercise of powers under Section 37 of the Arbitration Act.

9. *As per settled position of law laid down by this Court in a catena of decisions, an award can be set aside only if the award is against the public policy of India. The award can be set aside under Sections 34/37 of the Arbitration Act, if the award is found to be contrary to, (a) fundamental policy of Indian Law; or (b) the interest of India; or (c) justice or morality; or (d) if it is patently illegal. None of the aforesaid exceptions shall be applicable to the facts of the case on hand. The High Court has entered into the merits of the claim and has decided the appeal under Section 37 of the Arbitration Act as if the High Court was deciding the appeal against the judgment and decree passed by the learned trial court. Thus, the High Court has exercised the jurisdiction not vested in it under Section 37 of the Arbitration Act. The impugned judgment and order passed by the High Court is hence not sustainable."*

8. From a perusal of the judicial dicta cited hereinabove, it is discernible that the scope of interference under Section 37 of the Arbitration Act is narrow. Before interfering with an Award passed by the Arbitral Tribunal, which in fact has been concurred with by the First Appellate Court, this Court shall be circumspect and refrain from reassessment or re-examination of the merits of the case, as though it were a Court of Appeal against the Award.

9. Insofar as the appellant's contention regarding the claim having been time barred is concerned, it is noted that the same is of no merit in view of amended Section 28 of the Indian Contract Act. In this regard, reference may profitably be made to the decision in Pandit Construction Company *v.* Delhi Development Authority & Anr. reported as **2007 SCC OnLine Del 993,** where also plea of limitation was taken by pressing a clause similar to Clause 25 of the Agreement between the present parties. Relevant excerpt from the captioned decision is extracted below:-

*"**13.** The second question which arises is whether there can be such limitation of a period of 90 days in view of the provisions of Section 28(b)*

of the Indian Contract Act, 1872 (hereinafter referred to as the said Act) read with Article 137 of the Limitation Act, 1963.

14. *Learned counsel for respondent no. 1, to support the conclusion arrived at by the learned arbitrator, relied upon the judgment of the Supreme Court in National Insurance Co. Ltd. v. Sujir Ganesh Nayak & Co. Ltd., AIR 1997 SC 2049. This case was decided on 21.3.1997. The Supreme Court drew a distinction between the agreement which in effect curtails the period of limitation and an agreement which provides for the forfeiture or the waiver of the right itself if no action is commenced within the period stipulated by the agreement. The first was held to be void as offending under Section 28 of the said Act but the later was held not to be a clause which shall fall within the mischief of the Section 28 of the said Act. It was, thus, held that curtailment of the period of limitation is not permissible in view of Section 28 of the said Act but extinction of the right itself unless exercised within the specified time is permissible and can be enforced.*

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19. *It may be noticed that the amendment brought by the Amendment Act 1 of 1997 to Section 28 of the said Act clearly sought to obliterate the distinction arising from the provisions of the earlier Section 28 as it stood unamended in respect of the extinguishment of a right of any party on expiry of a specified period and the same was declared as to be void under the provisions of Section 28 of the said Act. It is this aspect which weighed with Md. Shamim, J. while delivering the judgment in Hindustan Construction Corporation (supra). Once again in J.K. Anand's case (supra), it was held that the valuable rights of a contractor to claim the amount due in respect of the claim not being made within 90 days from the date of the final bill as per clause 25, deprived the contractor of a very valuable right and the said provision could not be upheld in view of the provisions of Section 28(b) of the said Act. Reliance in this behalf was placed on the judgment of Hindustan Construction Corporation (supra). S.K. Mahajan, J. in Union of India (supra) also followed the same line of reasoning.*

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22. *In Explore Computers Pvt. Ltd. v. CALS Ltd. & Anr., 131 (2006) DLT 477 : 2006 (90) DRJ 480, I had the occasion to consider the effect of the amendment of Section 28 of the said Act. In the said case, the judgment of the Supreme Court in National Insurance (supra) was also noticed. It*

would be useful to extract the relevant discussion in the said judgment as under:

> *"48. The effect of the amendment of Section 28 thus made it clear that any clause extinguishing the right of a party or discharging any party from the liability in respect of any contract on expiry of specific period so as to restrict the time period would be void.*
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> *49. Learned counsel referred to the judgment of the learned single Judge of this court in Union of India v. Simplex Concrete Piles India, 108 (2003) DLT 732 : 2004 (72) DRJ 53 where one of the questions raised was in respect of the arbitration clause in an agreement requiring the claim to be filed within 90 days from the date the final bill was raised for payment. It was held that the said clause in the arbitration agreement limiting the time during which a claim can be made by a party would be clearly against public policy and would be void under Section 28 of the Contract Act. Learned counsel for defendant no. 2 on the other hand contended that the bank was within its right to curtail the period within which a claim could be filed through suit or a legal proceeding against a bank within one month of the expiry of the bank guarantee. Learned counsel in this behalf referred to the judgment of the Supreme Court in National Insurance Co. Ltd v. Sujir Ganesh Nayak & Co. and another, AIR 1997 SC 2049; It was held that an agreement which curtails the period of limitation and prescribes a shorter period than prescribed by law would be void as offending Section 28 of the Contract Act. This was so because such an agreement would seek to restrict a party from enforcing his right in court after the period prescribed under the agreement expires even though the period prescribed by law for enforcement of his relief has yet not expired.*
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> *50. However, there was possibility of agreements which do not seek to curtail the time for enforcement of the right but which provide for forfeiture or waiver of a right itself if no action is commenced within the period stipulated by the agreement and such a clause would not fall within the mischief of Section 28 of the Act.*
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> *51. After discussing the effect of the various judgments, it was observed in Para 17 as under:*

"From the case law referred to above the legal position that emerges is that an agreement which in effect seeks to curtail the period of limitation and prescribes a shorter period than that prescribed by law would be void as offending Section 28 of the Contract Act. That is because such an agreement would seek to restrict the party from enforcing his right in Court after the period prescribed under the agreement expires even though the period prescribed by law for the enforcement of his right has yet not expired. But there could be agreement which do not seek to curtail the time for enforcement of the right but which provides for the forfeiture or waiver of the right itself if no action is commenced within the period stipulated by the agreement. Such a clause in the agreement would not fall within the mischief of Section 28 of the Contract Act. to put it differently, curtailment of the period of limitation is not permissible in view of Section 28 but extinction of the right itself unless exercised within a specified time is permissible and can be enforced. If the policy of insurance provides that if a claim is made and rejected and no action is commenced within the time stated in the policy the benefits flowing from the policy shall stand extinguished and any subsequent action would be time-barred. Such a clause would fall outside the scope of Section 28 of the Contract Act. This in brief, seems to be the settled legal position. We may now apply it to the facts of this case." (emphasis supplied)

53. On a conspectus of the aforesaid judgments, two aspects have to be noted. The first is that it is the terms of the bank guarantee which have to be given due weight and the second is the distinction which is sought to be carved out in National Insurance Company case (supra) between a clause curtailing the period of limitation being void under Section 28 of the Contract Act and a clause which provides for forfeiture or waiver of a right if no action is commenced within the period stipulated by the agreement. Insofar as the second aspect is concerned, it cannot be lost sight of that the judgment in National Insurance Company Case (supra) was delivered on 23.03.1997 and thus related to the provisions of Section 28 as it stood prior to the amendment because that was the substantive law in force at the time when the cause of action had arisen. The amendment to section 28 was made with effect from 08.01.1997 and it is not disputed that the cause of action in respect of the subject matter in the present suit

arose after the amendment. Sub clause (b) of the amended section 28 deals with the clauses which extinguish the rights of any party thereto or discharge any party from any liability being void under the said Section. Thus the scope of Section 28 has been widened whereby clause (a) deals with the position prior to the amendment alone and clause (b) is in addition.

54. In view of the amended Section coming into force, the distinction sought to be carved out earlier by the legal pronouncements would not hold good.

55. In my considered view it is not open for defendant no. 2 to contend that if any suit or claim is not filed within one month of the expiry of the bank guarantee, the right of the plaintiff to institute any legal proceedings itself is extinguished. Such a plea would fly in the face of the amended Section 28 as defendant no. 2 cannot be discharged from the liability nor can the rights of the plaintiff be extinguished by inclusion of the clause providing so. I am thus of the considered view that to the extent there is restriction on any suit or claim being filed by the plaintiff beyond a period of one month from the expiry of the bank guarantee, the said clause would not prohibit the plaintiff from instituting the suit as it would be barred by the provisions of the amended Section 28 of the Contract Act."

23. *A reading of the aforesaid, thus, makes it clear that unless a judgment considers the ramifications of the amendment of Section 28 of the said Act, the same would not apply to cases where the cause of action has arisen after the amendment has taken place. The aim and object of the introduction of the amended section cannot be ignored which is a mandate of the legislature.*

24. *I am, thus, of the considered view that the legal pronouncement in Explore Computers Pvt. Ltd. (supra), in any case, covers the case fully in respect of the aspect of limitation and in view of the said pronouncement, the reasoning of the learned arbitrator cannot be sustained that the claim is barred by time. The award to the extent it holds that the claim of the petitioner is barred by time is, thus, liable to be set aside."*

10. In M/s. Smart Commodity Broker Pvt. Ltd. *v.* Beant Singh reported as **2017 SCC OnLine Del 10591**, this Court reiterated the position of law surrounding amended Section 28 of the Indian Contract Act as follows:-

> ***"7.*** *Learned counsel for the appellant/petitioner again argued that the claim petition was barred by limitation, however, I would like to note that Section 28 of the Indian Contract Act, 1872 stood amended by Act 1 of 1997 with effect from 8.1.1997 whereby any contract by which a party reduces the period of limitation as provided under the law, then such contract cannot have the effect of extinguishing the rights of the party to approach proper forum/court within the period being statutory limitation period. In other words, party by contract cannot limit the limitation period which is otherwise provided by law.*
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> ***8.*** *A Learned Single Judge of this Court in the case of Biba Sethi v. Dyna Securities Limited 2009 (3) Arb. LR 494 has examined similar provisions of the National Stock Exchange and on examining the same it has been held that the lesser period of limitation provided would be hit by Section 28 of the Indian Contract Act and other reasons.*
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> ***9.*** *...Obviously, a time barred claim cannot be referred to arbitration but that is not the issue in the present case because the issue is whether arbitration could be invoked after the one year period of limitation provided under Bye-Law 15.11 of the MCX. Therefore, on facts the judgment in the case of Debjyoti Gupta (supra) is distinguishable because it does not touch the aspect as to how a lesser limitation period than one provided under the Limitation Act would time bar the reference to arbitration and which would otherwise be in violation of Section 28 of the Indian Contract Act and so held by the Learned Single Judge in the case of Biba Sethi (supra).*
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> ***10.*** *The judgment in the case of Sharad P. Jagtiani (supra) does not at all deal with the issue of whether the provisions of the Bye-Laws if provided for a lesser limitation period then provided under the Limitation Act the same would have the effect of dismissing the reference to arbitration. At the cost of repetition, the issue is that if the Bye-Law's provide a lesser limitation period than as provided under the Arbitration & Conciliation Act, and which is a period of three years under Article 137 of the Limitation Act, it is the larger period of limitation as per Article 137 of the Limitation Act which applies for seeking of reference of disputes to*

arbitration and not a lesser period as provided under the Bye-Laws, and as held in Biba Sethi's case (supra).

11. *I may note that the above discussion is in addition to the adapting and agreeing with the conclusions of the Arbitrator that the period of limitation as per Bye-Law became three years subsequently and which procedural provision will have retrospective application. The view of the Arbitrator is one possible view in law and cannot be interfered with in Section 34 objections."*

11. In view of the amended Section 28 of Indian Contract Act therefore, the appellant cannot be permitted to press Clause 25 of the Contract Agreement and restrict the period of limitation for invoking arbitration clause to 120 days. The contention being meritless is rejected.

12. The second contention raised in the present case is as to whether the arbitral proceedings could have been continued once the CBI investigation was pending, and that the Award passed was liable to be set aside for being in conflict with the public policy of India.

13. During the course of submissions, learned counsel for the appellant had referred to the chargesheet and to the appellant's seizure memo to submit that the present Work Order was seized during investigation by the CBI.

A perusal of the chargesheet would show that though during investigation, the CBI seized a number of documents, the chargesheet was filed only in relation to Work Order bearing No.850 dated 09.02.2004. Pertinently, the Work Order in the present case being Work Order No.933/EE/RD1/RZ/TC/03-04/31/11 dated 09.03.2004 was seized during investigation but was neither made part of the chargesheet nor relied upon.

14. Moreover, in his submissions, learned counsel for the respondent alluded to the fact that till date, no sanction has been granted by the appellant for prosecution of its official(s).

15. Considering that the chargesheet filed by the CBI is not in relation to the present Work Order, the appellant's contention that the Award is in conflict with the public policy of India is misconceived. Pertinently, during the investigation, the CBI had seized documents pertaining to other Work Orders as well and one such Work Order which did not form part of the allegations in the chargesheet was the subject matter of another award which came to be challenged before the Division Bench of this Court in Natraj Construction Company (Supra). In the said case, the learned Arbitrator had rejected the claim of the respondent. In proceedings under Section 34 of the Act, a similar challenge was raised with respect to the pendency of the CBI investigation to deny the payments for the work executed under the Work Order. However, the Corporation admitted that the work was completed but at a different site. The learned Single Judge, with the consent of the Corporation, set aside the Award holding that the respondent was entitled to the said amounts.

16. At this stage, this Court may also profitably refer to the judgment of the Supreme Court in Swiss Timing Limited (Supra), wherein the Court considered various eventualities when criminal and arbitral proceedings are pending side by side. The Court observed as under:

> *"**28.** To shut out arbitration at the initial stage would destroy the very purpose for which the parties had entered into arbitration. Furthermore, there is no inherent risk of prejudice to any of the parties in permitting arbitration to proceed simultaneously to the criminal proceedings. In an eventuality where ultimately an award is rendered by the Arbitral Tribunal, and the criminal proceedings result in conviction rendering the underlying contract void, necessary plea can be taken on the basis of the conviction to resist the execution/enforcement of the award. Conversely, if the matter is not referred to arbitration and the criminal proceedings result in an acquittal and thus leaving little or no ground for claiming that the underlying contract is void or voidable, it would have the wholly undesirable result of delaying the arbitration. Therefore, I am of the opinion that the Court ought to act with caution and circumspection whilst examining the plea that the main contract is void or voidable. The*

> *Court ought to decline reference to arbitration only where the Court can reach the conclusion that the contract is void on a meaningful reading of the contract document itself without the requirement of any further proof."*

In view of the decision rendered in Swiss Timing Limited (Supra), reference to the decision in K.C. Chibber & Co. (Supra) is of no avail to the appellant.

17. Coming back to the facts of the present case, the Work Order relates to the year 2004. The appellant has contended that the learned ADJ ought to have interfered with the Award as the matter was under CBI investigation. However, a perusal of the chargesheet shows that the present Work Order was not mentioned therein. There is no denial that the work under the Work Order was executed. The second contention, as noted above, relates to pendency of CBI proceedings which are concededly for a different Work Order. In this regard, note is also taken of the following observations recorded by the learned Arbitrator on the issue at hand:

> *"12. ...As regards the CBI investigation and the prosecution, if any, it would be pertinent to notice that the Office Order dated 09.03.2005 issued by the Commissioner, MCD, a copy whereof is filed by the MCD with its reply which states that certain lacunae in the circulars issued by the MCD have resulted in the controversy relating to putting up of signboards. It further records that MCD has already constituted an Urban Graphic Forum, which is examining and finalizing the designes for these boards. At the same time, the CBI is proceeding on the assumption that the reflective sign boards were to be as per the specifications ASTM-4956-01, Type-IX. Whereas there is no such stipulation set out in the work order of this case. Thus, whatever may be the perspective of CBI, in my considered view, in the given circumstances of this case, there is just no justification for the stay of these proceedings on account of the CBI intervention or to deny the payment for the work done for which the Bill was passed but payment is not made, which is the admitted position even as per the status of the case in the MCD records. However, it is for the concerned court dealing with the CBI intervention to take an appropriate view in the matter."*

18. Considering the scope of Section 37 of the Act, the arbitral proceedings cannot be set aside.

19. I find no merit in the appeal. The same is dismissed.

(MANOJ KUMAR OHRI)
JUDGE

MARCH 22, 2023