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

+ O.M.P. (COMM) 502/2020 & I.A. 9272/2020(Stay), I.A. 15949/2021(Interim Stay)

NEW DELHI MUNICIPAL COUNCIL Petitioner

Through: Mr. Abhinav Bajaj, ASC with
Mr. Saksham Ojha, Advs.

Versus

DECOR INDIA PVT. LTD. Respondent

Through: Mr. Raj Shekhar Rao, Sr. Adv.
with Mr. Vikas Mishra and Mr.
Sanchit, Advs.

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+ OMP (ENF.) (COMM.) 24/2021

DECOR INDIA PVT. LTD. Decree Holder

Through: Mr. Raj Shekhar Rao, Sr. Adv.
with Mr. Vikas Mishra and Mr.
Sanchit, Advs.

Versus

NEW DELHI MUNICIPAL COUNCIL Judgement Debtor

Through: Mr. Abhinav Bajaj, ASC with
Mr. Saksham Ojha, Advs.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

ORDER

% **16.02.2023**

I.A. 15948/2021 in O.M.P.(COMM) 502/2020

1. By means of the present application, the Petitioner seeks the inclusion of additional grounds in support of its challenge to the impugned award. The principal petition under Section 34 of the **Arbitration and Conciliation Act, 1996¹** questions the correctness of

the Award dated 16 March 2020. As per the averments made in the instant application, the Petitioner asserts that the Respondent in connection with the Agreement of 09 February 2009 has been ultimately found guilty under Section 420 of the **Indian Penal Code, 1860**² and Section 13(2) read with Section 13(1)(d) of the **Prevention of Corruption Act, 1988**³ vide judgment dated 03 October 2018. It is averred that the **Special Judge - Central Bureau of Investigation, New Delhi** [“CBI Court”] while convicting the Respondent has recorded categorical findings to the effect that the Respondent had obtained the tender dishonestly and by misrepresentation and concealment of facts. The judgment is stated to have been rendered by the CBI Court on 03 October 2018.

2. The proceedings before the Arbitral Tribunal commenced pursuant to its constitution by this Court in terms of its order dated 04 May 2012. The Award ultimately came to be rendered on 16 March 2020. In light of the judgment rendered by the CBI Court, the Petitioner seeks the introduction of a ground which essentially relates to the award of the tender itself and of the same having been obtained by concealment of material facts and the Respondent practicing deception. It is accordingly averred that the Award of the tender, the execution of the Agreement and the arbitration proceedings in relation to the same stand vitiated due to fraud and corruption.

3. The proposed ground RR is reproduced hereinbelow: -

“That the present tender has been obtained by practicing misrepresentation, concealment of facts and by keeping officials of NDMC under deception. This is clear from the judgment dated 03.10.2018 by Hon'ble CBI Court. Hence the awarding of tender, execution of agreement dated 09.02.2009 and the arbitration proceedings in relation to the same stand vitiated due to fraud and corruption and the same being oppose to public policy, the present award is liable to be set aside”.

4. The Petitioner asserts that the amendment is relevant to the dispute which arises and imperative for adjudication of the issues involved. It is further asserted that the facts relating to the judgment dated 03 October 2018 recently came to the knowledge of the petitioner and thus necessitating the filing of the present application. The relevant averments made in respect of the above as set forth in Para 5 are reproduced hereinbelow: -

“5. The aforesaid facts regarding judgment dated 03.10.2018 was not in the knowledge of the petitioner inasmuch as the petitioner is not a party to the proceedings before the concerned CBI Court. However, subsequent to filing of the present petition, the petitioner came to know about the proceedings which culminated into judgment or conviction dated 13.10.2018.”

5. At the outset, it must be noted that apart from the vague and unsubstantiated assertions which are made in Para 5, the Petitioner has failed to place on the record any material particulars which may indicate as to when it first derived knowledge of the judgment dated 03 October 2018. The Petitioner has also failed to either aver or establish that despite the exercise of due diligence, the factum of the judgment of conviction was not in their knowledge.

6. Quite apart from the above, it becomes pertinent to observe that the proposed ground was neither pressed before the Arbitral Tribunal nor does it constitute a part of the challenge raised to the impugned Award in the present petition. It is in the aforesaid backdrop the Court is called upon to consider whether the application is liable to be granted.

7. The principles which would govern the grant of amendments on a Section 34 petition were succinctly explained by the Supreme Court in **State of Maharashtra v. Hindustan Construction Co. Ltd.**⁴, as follows:-

“29. There is no doubt that the application for setting aside an

arbitral award under Section 34 of the 1996 Act has to be made within the time prescribed under sub-section (3) i.e. within three months and a further period of thirty days on sufficient cause being shown and not thereafter. Whether incorporation of additional grounds by way of amendment in the application under Section 34 tantamounts to filing a fresh application in all situations and circumstances. If that were to be treated so, it would follow that no amendment in the application for setting aside the award howsoever material or relevant it may be for consideration by the court can be added nor existing ground amended after the prescribed period of limitation has expired although the application for setting aside the arbitral award has been made in time. This is not and could not have been the intention of the legislature while enacting Section 34.

30. More so, Section 34(2)(b) enables the court to set aside the arbitral award if it finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force or the arbitral award is in conflict with the public policy of India. The words in clause (b) “the court finds that” do enable the court, where the application under Section 34 has been made within prescribed time, to grant leave to amend such application if the very peculiar circumstances of the case so warrant and it is so required in the interest of justice.

31.*L.J. Leach & Co. Ltd.* [AIR 1957 SC 357 : 1957 SCR 438] and *Pirgonda Hongonda Patil* [AIR 1957 SC 363 : 1957 SCR 595], seem to enshrine clearly that courts would, as a rule, decline to allow amendments, if a fresh claim on the proposed amendments would be barred by limitation on the date of application but that would be a factor for consideration in exercise of the discretion as to whether leave to amend should be granted but that does not affect the power of the court to order it, if that is required in the interest of justice. There is no reason why the same rule should not be applied when the court is called upon to consider the application for amendment of grounds in the application for setting aside the arbitral award or the amendment of the grounds in appeal under Section 37 of the 1996 Act.

32. It is true that, the Division Bench of the Bombay High Court in *Vastu Invest & Holdings (P) Ltd.* [(2001) 2 Arb LR 315 (Bom)] held that independent ground of challenge to the arbitral award cannot be entertained after the period of three months plus the grace period of thirty days as provided in the proviso to sub-section (3) of Section 34, but, in our view, by “an independent ground” the Division Bench meant a ground amounting to a fresh application for setting aside an arbitral award. The dictum in the aforesaid decision was not intended to lay down an absolute rule that in no case an amendment in the application for setting aside the arbitral award can be made after expiry of period of limitation provided therein.

33. Insofar as *Bijendra Nath Srivastava* [(1994) 6 SCC 117] is concerned, this Court did not agree with the view of the High Court

that the trial court did not act on any wrong principle while allowing the amendments to the objections for setting aside the award under the 1940 Act. This Court highlighted the distinction between “material facts” and “material particulars” and observed that amendments sought related to material facts which could not have been allowed after expiry of limitation. Having held so, this Court even then went into the merits of objection introduced by way of amendment. In our view, a fine distinction between what is permissible amendment and what may be impermissible, in sound exercise of judicial discretion, must be kept in mind. Every amendment in the application for setting aside an arbitral award cannot be taken as fresh application.”

8. Significantly, however and while dealing with the facts which obtained in **Hindustan Construction**, the Supreme Court observed as follows: -

“35. The question then arises, whether in the facts and circumstances of the present case, the High Court committed any error in rejecting the appellant's application for addition of new grounds in the memorandum of arbitration appeal.

36. As noticed above, in the application for setting aside the award, the appellant set up only five grounds viz. waiver, acquiescence, delay, laches and res judicata. The grounds sought to be added in the memorandum of arbitration appeal by way of amendment are absolutely new grounds for which there is no foundation in the application for setting aside the award. Obviously, such new grounds containing new material/facts could not have been introduced for the first time in an appeal when admittedly these grounds were not originally raised in the arbitration petition for setting aside the award. Moreover, no prayer was made by the appellant for amendment in the petition under Section 34 before the court concerned or at the appellate stage.

37. As a matter of fact, the learned Single Judge in para 6 of the impugned order has observed that the grounds of appeal which are now sought to be advanced were not originally raised in the arbitration petition and that the amendment that is sought to be effected is not even to the grounds contained in the application under Section 34 but to the memo of appeal. In the circumstances, it cannot be said that discretion exercised by the learned Single Judge in refusing to grant leave to the appellant to amend the memorandum of arbitration appeal suffers from any illegality.”

9. It is thus manifest from the ultimate conclusions recorded in **Hindustan Construction** that the Supreme Court found that notwithstanding it being permissible for an amendment being introduced in a Section 34 petition, new and material facts could not

have been introduced when admittedly those grounds were neither raised in the original arbitration petition or for that matter before the Arbitral Tribunal itself.

10. While dealing with an identical controversy, a learned Judge of the Calcutta High Court in **Prakash Industries Limited vs. Bengal Energy Limited and Another**⁵ held as follows: -

“18. The prayer for amendment was rejected by the Supreme Court in *Hindustan Construction* (cited by both parties) as the grounds were found to be new without having a foundation in the application for setting aside. *Hindustan Construction* was a case concerning an amendment for bringing in additional grounds of the Arbitral Tribunal exceeding its jurisdiction in awarding a percentage for hidden expenses and committing an error of jurisdiction in granting the claim pertaining to revision of rate, etc. The Supreme Court gave an expansive construction in favour of allowing amendments in applications under Section 34 for incorporation of additional grounds and held that leave to amend an application can be granted in “very peculiar circumstances” if the court finds that such liberty is required to be given in the interest of justice. Relying on *L.J. Leach & Co. Ltd. v. Jardine Skinner & Co.* (AIR 1957 SC 357) and *Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil* (AIR 1957 SC 363), the Court reiterated that although amendments, where a fresh suit on the amended claim would be barred by limitation, would be declined as a matter of rule, this would not affect the court's power to allow amendment if required in the interests of justice. The Supreme Court was also of the view that the principle of *Leach v. Skinner* would apply to an application for amendment of the grounds in a setting aside application. Most significantly, in *Hindustan Construction*, the Court considered the relevance of *Vastu Invest* and *Bijendra Nath Srivastava*, (both cited on behalf of the respondent) and held that the dictum in *Vastu* was not intended to lay down an absolute rule that amendment would not be allowed in any application for setting aside of an Arbitral Award after expiry of the period of limitation provided under 34(3). The Supreme Court explained the decision in *Bijendra Nath Srivastava* as calling for a sound exercise of judicial discretion keeping in view the distinction between amendments which are permissible and those which are not.

19. It should be reiterated that although *Hindustan Construction* spoke in favour of an expansive view of amendments in the interest of justice, the proposed amendments in that decision were ultimately disallowed since they were found to constitute new grounds which did not have a

foundation in the original application. In the present case, the grounds relating to the Sale of Goods Act cannot be traced to the existing grounds and would therefore constitute new grounds in that sense (as opposed to *Venture Global*, where subsequent facts, disclosed after the passing of the Award, were allowed as having a causative link with the facts, constituting the Award). In the considered view of this court, the test for allowing or rejecting an amendment to existing grounds in an Arbitration Petition is whether the proposed grounds would necessitate filing of a fresh application for setting aside of the Award. As several of the new grounds also do not have a foundational basis in the existing petition, the petitioner cannot enter through the ‘amplification’ route as has been contended and if the amplification recourse fails, the petitioner has no other statutory cushion to fall back on under the existing law.

20. In the present case, the grounds relating to the provisions of the Sale of Goods Act and related grounds concerning the issues of damages are new grounds which would take the application for amendment outside the purview of “*amplification*” of the existing grounds as contended by the petitioner. Since this Court is inclined to follow the dictum of *Fiza* and *Emkay* in that an application for setting aside will ordinarily not require anything beyond the record of what was before the Arbitrator, the present amendment is not one which should be permitted.”

11. Bearing in mind the aforesaid principles that have been enunciated in the aforementioned two decisions and when this Court tests the proposed amendments on that pedestal, it finds that the ground which is proposed to be introduced is clearly a new case which has no foundation in the original petition. It is thus not an expansion or amplification of a ground which may be said to form part of the challenge to the Arbitral Award. The application for amendment has come to be preferred long after the original petition itself came to be instituted before this Court on 07 October 2020. While it may still be open for the Petitioner to assail the Arbitral Award on the ground of fraud based on material facts that form part of the record and so existed before the Tribunal, the introduction of these new facts would clearly not be merited. Suffice it to note that even in **Hindustan Construction**, the Supreme Court had referred to the imperative of

peculiar circumstances existing and the amendments being warranted in the interest of justice. The proposed amendments fail to meet those tests as propounded.

12. Consequently, the application shall stand dismissed.

O.M.P. (COMM) 502/2020

Let the present petition be put down for final disposal on 26.04.2023.

OMP (ENF.) (COMM.) 24/2021

List along with O.M.P. (COMM) 502/2020 on the date fixed.

YASHWANT VARMA, J.

FEBRUARY 16, 2023

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