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

Reserved on: 19th January, 2023
Pronounced on: 25th January, 2024

\+ **O.M.P. (COMM) 456/2022**

MS K S JAIN BUILDERS ..... Petitioner

Through: Ms. Minakshi Jyoti, Mr. Dharaveer Singh and Mr. Vikas Singh, Advocates with Mr. Sanjeep Jain, AR.

versus

INDIAN RAILWAY WELFARE ORGANIZATION ..... Respondent

Through: Mr. Sulaiman Mohd. Khan, Ms. Taiba Khan, Mr. Bhanu Malhotra and Mr. Gopeshwar Singh Chandel, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

J U D G M E N T

SANJEEV NARULA, J.

1. The Petitioner (claimant in arbitration), despite being the successful party in the arbitration, remains discontent with the arbitral award, dated 7th July, 2022, rendered by a Sole Arbitrator. Their challenge is directed towards the findings on two specific claims i.e., Claims No. 4 and 5, that were only partially allowed. Petitioner asserts that these findings exhibit 'patent illegality' and that the impugned award is in conflict with 'the most basic notions of morality and justice,' and 'fundamental policy of Indian

Law'. Conversely, the Respondent argues that the award is faultless, and the grounds of the Petitioner's challenge do not fall under any of the permissible criteria outlined in Section 34 of the Arbitration and Conciliation Act, 1996 ("the Act"). This encapsulates the core controversy for this court's consideration.

2. The dispute between the parties originated from the Award of Contract ("LoA") dated 12th April, 2016. This contract, valued at INR 33,52,66,929/-, involved the construction of a residential complex in Village Miranpur-Pinvat, Pargana-Bijnor, Tehsil & District Lucknow, Uttar Pradesh, and was to be completed within thirty months from the issuance of the LoA. Petitioner claims they were prepared to commence work, but Respondent obstructed the initiation, citing delays in the approval of building plans. Further, they claim that the cost of project was further reduced because Lucknow Industrial Development Authority ("LIDA") had approved only 126 Dwelling units as against 144 Dwelling units for which the Tender was initially floated by the Respondent. Work began only after the necessary approvals and environmental clearance were obtained, which led to the signing of an agreement on 15th February 2018, following the approval of plans by the LIDA. As per this agreement, the period of 30 months for completion of work would commence from the date of submission of Bank Guarantee i.e., from 02nd February, 2018.

3. Petitioner further contends that, despite lapse of two years and seven months from the date of acceptance of the offer (LOA) and nine months following the agreement dated 15th February 2018, the work could not be commenced as Respondent only informed them of the receipt of environmental clearance on 13th November 2018. Subsequently, although

they commenced the work in earnest, it faced frequent interruptions due to Respondent's failure to supply the required quantity of steel. They argue that as per Clause 5.3 of the Special Conditions of Contract ("SCC"), Respondent was obligated to supply reinforcement steel for the execution of work at no additional cost. Petitioner's repeated requests for supply of the necessary construction steel went unheeded. In September 2020, Petitioner urged Respondent to address the issue of material supply or face arbitration but received no response. Instead, on 28th October 2020, Respondent unilaterally postponed the project, citing the Covid-19 pandemic and a recession in the real estate sector. This was followed by contract termination on 02nd February 2021, on grounds of force majeure due to the global pandemic.

4. Petitioner subsequently initiated arbitration, filing claims for substantial losses, which included resource engagement and loss of profits. The outcome of these claims was as follows:

S. No.	*Claim number*	*Claim Amount Rs.*	*Awarded amount Rs.*
1	*Claim no.1 – declaratory in nature*	*Nil*	*NIL*
2	*Claim no.2 towards bill no.6 for work done.*	*7,64,872.00 And interest @15% from 18/03/2020 till the date of payment.*	*Bill no.6 (final Bill) for the work done settled between the parties and paid to the claimant during arbitration proceedings. Hence, now no dispute /claim on this account.*
3	*Claim no.3 towards escalation*	*1430000.00 And interest @15% per annum from 18/03/2020 till the date of payment.*	*Escalation bill settled between the parties and paid to the claimant during arbitration proceedings. Hence, now no dispute /claim on this account.*
4	*Claim no. 4*	*73,00,295.00*	*45,29,089.00*

	towards actual expenses at site.	*(with applicable GST and interest @15% p.a. From the date of filing of the claim till actual payment.*	
5	*Claim no. 5 towards loss of profit on undone work as work was closed in between by the Respondent.*	*3,85,57,064.00*	*86,01,230.00*
6	*Claim no. 6 towards arbitration costs.*	*22,08,607.00 As per actuals submitted in final conclusive statement dated 2/3/2022.*	*11,04,303.00*
Total against claims 4,5 and 6		*4,82,73,966/- + interest*	*1,42,34,622.00*

5. Respondent's counterclaims were dismissed, and no award was granted in their favour. To summarize, the Claimant was successful in securing an award of INR 1,42,34,622/- along with an interest of 8% per annum from the date of the award's publication until the date of payment.

6. The challenge in the present petition, as clarified by Petitioner in the written submission is confined to award of claim in respect of Claim no. 5, which are as under:

> *"10.4.5 The AT has already made detailed deliberations in para 9.4 to 9.4.3 above on the breach of contract and considered that the breach of contract has been on the part of the Respondent. As per section 73 of The Indian Contract ACT-1872 the party who has breached the contract is liable to compensate the other party for damages they suffered due to the breach. Extract is as under-*
>
> *xxx xxx xxx*

Now the question comes whether the loss of profit due to breach on the part of the Respondent comes within the premises of damages under this section 73. In AT s opinion, expecting the profit on completion of work is a natural out come of the contract known to both parties, closing the contract for no fault of the contractor as per Respondent's letter dated 28/10/2020, that too after continuing the contractor engaged for a period of completion and even beyond is certainly has caused loss of profit to the contractor.

xxx *xxx* *xxx*

10.4.7 In accordance with the discussion therein, the AT has given its finding on Issue No 1 and 2 above and held that the Project was closed on account of default of the respondent in getting clearances and in not supplying the reinforcement steel and that the delay occasioned in the completion of work was on account of default of the Respondent.

10.4.8 For claiming damages due to breach of contract on the part of the respondent, the claimant made claim on account of loss of profit @ 15% on balance unexecuted work. But in terms of clause 4.3(iii) of GCC of IRWO , it is seen that there is a stipulation for overhead and profits in the cost estimate to the tune of 10%.

10.4.9 In view thereof the AT deems it appropriate to award to the Claimant compensation to loss of profit which would have been earned by the Claimant on completion of the contracted work. As per para 4.3(iii) of GCC of IRWO provision of 10% is for overheads and profits , treating both parts equal means 5% is for profit. Also the scope of work in works contract is approx and therefore may go under reasonable variation without any claim whatsoever on that account. In the instant case there is a specific provision in contract agreement in clause 2.4.1 for reduction in scope of work upto 25% of contract value. So, it can be inferred that Respondent could reduce the scope of work to the tune of 25%. Keeping that in mind , the reduced scope of work could have been for an amount of Rs. 27,12,80,107.00 X 0.75=Rs.20,34,60,080.25. Value of work executed is admittedly Rs. 1,42,33,015.00. Accordingly, the balance value of work comes to Rs.20,34,60,080.25-1,42,33,015.00= Rs.18,92,27,065.25

***FINDINGS**: Accordingly, the amount of profit portion inbuilt in the cost of work can be estimated to Rs 86,01,230.00 i.e. 5 % of (18,92,27,065.25/1.10 =17,20,246,04.772) and is viewed as payable to the claimant by the Respondent. The issue no. 5 and claim no. 5 are accordingly decided."*

CONTENTIONS

7. Ms. Minakshi Jyoti, counsel for Petitioner, argues as under:

7.1 The impugned award violates Section 34 of the Act, specifically Section 34(2)(b)(ii) and Section 34(2A), as it contravenes the fundamental policy of Indian law, conflicts with the most basic notions of morality or justice and suffers from patent illegality. It thus warrants interference by this Court.

7.2 Petitioner submitted comprehensive evidence to support its claims, all of which are meticulously examined in the impugned award. Nonetheless, it is perplexing that Claims no. 5 was only partially upheld. While the Arbitral Tribunal has extensively reviewed the evidence, they have seemingly overlooked crucial documents. Furthermore, the tribunal applied contract terms that were not only irrelevant but also not pleaded or argued by Respondent. This approach has resulted in a manifest illegality, evident on the face of the record.

7.3 Arbitral tribunal has contradicted its own findings in the operative part of award and has applied terms of the contract which were not applicable to the facts and disputes between parties.

7.4 Arbitral tribunal has committed the illegality in reducing the claim under the head ‘Loss of profits’ at the rate of 10% of the value of work by relying upon Clause 4.3(iii) of the General Conditions of Contract (“GCC”) of Indian Railways Welfare Organisation (“IRWO”), which was in respect of additional, altered or substituted work. This Clause did not govern Claim no. 5. Petitioner had placed relevant evidence to establish that rate of return of 15% in favour of contractors’ profit had been duly factored in the scope of work. Respondent did not deny the rate of 15% as contractors’ profit but submitted that 15% is inclusive of overheads at the rate of 7.5% and contractors’ profit is 7.5% only. Respondent had filed CPWD circular

No./DG/MAN/150 and DG/MAN/184 regarding 7.5% contractors' profit and 7.5% overheads. It was the admitted case of Respondent that for the said project, contractors' profit was 7.5%. Arbitral tribunal could thus not rely on Clause 4.3(iii) of GCC of IRWO. Thus, finding at paragraph 10.4.8 is completely erroneous and was not even the case of Respondent. Further, application of Clause 2.4.1 of GCC at paragraph 10.4.9 of impugned award, for reduction of the scope of work up to 25% of the contract value is also grave error apparent on the face of record and reflects non-application of mind. Even assuming the Clause 2.4.1 of GCC could have been applied, although not pleaded or argued, Arbitral Tribunal committed grave error by overlooking the fact that the contract value was already reduced by Respondent by 23% and hence, further reducing the total value of the project by 25% was an error apparent on the face of it. Thus, Petitioner was entitled to loss of profit on the balance amount of work value at the rate of 7.5%, as admitted by Respondent and as per CPWD analysis of rates.

8. Counsel for Respondent, on the other hand, has strongly defended the impugned award by arguing that none of the grounds urged by Petitioner can be entertained considering the narrow scope of interference of this Court under Section 34 of the Act. Accepting any of the grounds would amount to re-appreciation of evidence which is not permissible under Section 34 of the Act.

ANALYSIS AND FINDINGS

9. At the outset it is important to set out the prayer sought by Petitioner:

> "*a) Set aside Part Arbitral Award dated 07.07.2022 disallowing the balance amount payable under Claim No 4 and Claim No 5*"

10. On 19th January 2024, when the matter was relisted for clarifications,

counsel for Petitioner stated that while the petition originally contested the findings of the Arbitral Tribunal with respect to Claim no. 4, they are no longer pursuing this challenge. Regarding Claim no. 5, the Counsel provided the following clarification:

> *"3. ...*
> *The counsel for Petitioner clarifies that the portion of the claim which has been awarded by the Arbitrator has already been paid by the Respondent, and also accepted by the Petitioner. Therefore, Petitioner's challenge is limited only to the part of the claim that was partially disallowed."*

11. Subsequently, through an application [I.A No. 1614/2024], the counsel sought to retract her earlier submission. She contended that her afore-noted response to the Court's query, was incorrect and that Petitioner has challenged the entirety of the award pertaining to Claim no. 5.

12. To ensure a comprehensive evaluation of the issues surrounding Claim no. 5, the Court is now poised to address the two scenarios presented in light of counsel's varying stand. This includes an examination of the challenge to Claim no. 5, specifically concerning the disallowed portion of the claim, and also an assessment of the situation in which the challenge encompasses the entirety of the findings.

13. The prayer to set aside the award *qua* Claim no. 5 to that extent which it has been disallowed is not tenable. It is undisputed fact that on 18th August, 2022, Petitioner has already received the awarded amount under Claim no. 5. This acceptance would estop them from challenging the award as held in ***Sporty Solutionz Pvt. Ltd v. Badminton Association of India and another***,[1]

> "*A person who accepts cost payable under the award or any other benefit*

[1] O.M.P. (COMM) 316/2017

> *under the award dehors the claim on merits cannot repudiate part award detrimental to him because the order is to take effect in its entirety. See Sri Tushar Kanti Roy v. The Eighth Industrial Tribunal, Kolkata and Ors. 2013 (2) CLJ (CAL) 620; Cauvery Coffee Traders vs Honor Resources (2011) 10 SCC 420 and Rajasthan State Industrial Development & Investment Corpn.* v. Diamond & Gem Development Corpn. Ltd., (2013) 5 SCC 470."

14. That apart, Petitioner's challenge only to the disallowed portion of the said claim cannot be entertained for following additional reasons:

14.1 In the Supreme Court's ruling in ***National Highways Authority of India v. M. Hakeem & Anr.***,[2] it was held that the Court cannot modify an arbitral award under Section 34 of the Act. Although, this judgment does not preclude the Court from partially setting aside an award, but altering or modifying an award is not permissible. Thus, while considering a petition for partial annulment, the Court must employ the doctrine of severability of the arbitration award, arising from the principle encoded in Section 34 (2)(a)(iv) of the Act. This principle enables the court to annul distinct and autonomous segments of the award, provided such segments are separable and do not affect the remaining parts of the award.

14.2 In the present case, Claim no. 5, concerning loss of profits, involves a dispute over the quantum of damages awarded by the Arbitrator. Petitioner seeks to set aside the award to the extent that their claims have been under-awarded. However, the Court finds this approach untenable. The determination of the specific damages determined as 5% of the value of the balance work is closely linked with the rationale for awarding damages at a particular rate. Consequently, the decisions pertaining to the denial of the claimed damages are inseparable from the logic employed in determining

[2] (2021) 9 SCC 1

the awarded rate in favour of Petitioner.

14.3 Thus, the interconnected nature of the findings and reasoning underscores the tribunal's holistic approach in resolving the dispute. The Arbitral Tribunal, in its expertise, has assessed these claims in a manner where the individual elements are not just related but are dependent on each other for their rationale. Dissecting these elements for the purpose of partial annulment would not only undermine the integrity of the tribunal's decision-making process but also lead to a piecemeal and potentially incongruous adjudication. The Court, therefore, must tread cautiously, respecting the tribunal's cohesive assessment of the claims, and refrain from fragmenting an award where the contested components are not distinctly separable. This approach aligns with the scheme of the Act and the jurisprudence relating to finality of arbitral awards. Hence, in the absence of clear, independent grounds for setting aside parts of the award pertaining to Claim no. 5, the Court finds it prudent to uphold the Tribunal's decision in its entirety.

15. Alternatively, the Court has also considered whether Petitioner has been able to establish any grounds to set aside the entirety of award *qua* Claim no. 5, under section 34 of the Act.

16. As discussed above, the Arbitral Tribunal awarded 5% in damages (representing contractors' profits) based on the reduced work value. Petitioner challenges this, arguing that Clause 2.4.1 of the GCC, integral to the contract agreement, should not have been applied. They also argue that Clause 4.3(iii) of the GCC was inapplicable for calculation of contractors' profit. Instead, they suggest that the Respondent ought to have adhered to the Government of India's Central Works Department Analysis of Rates, 2016 ("CPWD"). Further, the Petitioner posits that the award rate should

have been at least 7.5%, as per the referenced CPWD circulars.

17. The court finds no merit in the above grounds. It is a settled legal precedent that if the Arbitral Tribunal's view is plausible, intervention is not warranted.[3] Petitioner's contention that the impugned award is in conflict with the 'public policy of India' and suffers from 'patent illegality' is misconceived. Petitioner's ground that the Arbitrator applied terms of contract which are inapplicable and not pleaded by Respondent, therefore amounting to contravention of 'fundamental policy of Indian law' and 'the most basic notions of justice or morality', is not tenable as the Arbitrator needs to look at the contract as a whole while determining the rate of 'loss of profits.' Therefore, the grounds urged by the Petitioner do not attract the definition of 'public policy of India', which has been extensively interpreted by the Supreme Court[4] as well as codified in Explanation I to Section 34(2)(b)(ii) of the Act. In assessing the issue of loss of profits, the tribunal's determination of a 5% rate for damages, even assumed to be contentious, does not rise to the level of patent illegality. The calculation of lost profits in such cases is inherently speculative and often based on hypothetical scenarios. Therefore, Arbitral Tribunal's decision to award a 5% rate as damages, falls within the realm of its power. Moreover, Petitioner's claim was grounded not in any demonstrated actual losses, but in assumptions of potential profits that might have been realized. Such speculative assertions, without concrete evidence of actual losses, do not provide a sufficient basis to classify the tribunal's award as patently illegal.

18. It is crucial to recognize that the threshold for determining patent

[3] *Konkan Railway Corpn. Ltd V. Chenab Bridge Project* (2023) 9 SCC 85
[4] See, *Associate Builders v. DDA* (2015) 3 SCC 49*; Indian Oil Corpn. Ltd. v, Shree Ganesh Petroleum*

illegality is high. It involves more than just an erroneous application of law; it requires an egregious error that is blatant and fundamental to the issue at hand. In this case, while the Petitioner may disagree with the tribunal's application of a specific contractual provision or its decision to award only 5% in damages, these actions do not necessarily constitute a gross miscarriage of justice or a violation of the core principles of law. The tribunal's award, based on its assessment of the hypothetical loss of profits, remains within the permissible bounds of its interpretative and decision-making authority.

19. Besides, the Arbitral Tribunal's decision to assess damages at a rate of 5% represents a finding of fact, grounded in the material presented during the arbitration. The mere reference to circulars by Respondent does not automatically entitle Petitioner to a loss of profit at a rate of 7.5%. Notably, the project in question has been terminated. Under these circumstances, the tribunal deemed it reasonable to award damages at 5% of the reduced work value. Such a determination is both reasonable and justified. Thus, given this context and the tribunal's careful consideration of available facts and evidence, there appears to be no substantial basis for judicial interference with the tribunal's award. It reflects a balanced and reasoned assessment, falling within the acceptable bounds of arbitral decision making, and does not exhibit any characteristics of patent illegality or contravention with public policy of India, that would necessitate setting aside the impugned award under the principles established in Section 34 of the Act.

20. Petitioner also contended that the non-consideration of certain documents or overlooking the admitted case of Respondent with respect to

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(2022) 4 SCCC 463.

contractors' profit, in the subject project, amounts to the patent illegality. However, this also cannot be accepted as a ground to set-aside the award. The Proviso to section 34(2A) of the Act clearly states that "an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence." In ***Ravindra Kumar Gupta & Co. vs. Union of India***,[5] the Supreme court has clearly held that courts cannot reappreciate evidence under section 34 of the act and that the Arbitrator is the sole judge of the quality and quantity of evidence. The role of this Court is not to re-assess or re-evaluate the evidence presented before the Arbitral Tribunal. The Court also cannot replace the Arbitrator's findings and opinion with its own, as this would overstep the bounds set by Section 34 of the Act. Unless there is a clear indication of arbitrariness or a gross misinterpretation of facts leading to a miscarriage of justice, the Court must refrain from intervening in the tribunal's factual determinations. In this case, the tribunal's decision to award a specific amount under Claim no. 5 appears to be a well-considered assessment, based on the analysis of the presented evidence. Therefore, these findings do not exhibit any such flaws that would render them open to challenge under the specified grounds of Section 34 of the Arbitration Act.

21. For the foregoing reasons, there is no merit in the present petition. Accordingly, the petition is dismissed.

SANJEEV NARULA, J

JANUARY 25, 2024/*d.negi*

[5] (2010) 1 SCC 409