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

% *Date of decision:*, 10.10.2017

\+ O.M.P. (COMM) 363/2017

DR. BABA SAHEB AMBEDKAR HOSPITAL..... Petitioner
Through Mr.Sanjoy Ghose and Mr.Rhishabh Jetley, Advs. for GNCTD

versus

GORKHA SECURITY SERVICES ..... Respondent
Through Mr.Onkar Nath, Adv.for respondent

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

IA No.11454/2017 (delay in filing the petition)

For the reasons stated in the application the delay in filing the petition is condoned. Application stands disposed of.

IA No.11457/2017 (delay in re-filing the petition)

For the reasons stated in the application the delay in re-filing the petition is condoned. Application is disposed of.

O.M.P. (COMM) 363/2017 & IA No.11455/2017 (stay)

1. This petition is filed under section 34 of the Arbitration and Conciliation Act, 1996 seeking to impugn the Award dated 31.3.2017 passed by the learned Arbitrator. Some of the relevant facts are that the petitioner awarded a contract to the respondent for a period of one year commencing 27.3.2006 to 26.3.2007 vide letter dated 25.3.2006 for providing security

services in the premises of the petitioner hospital. An Agreement dated 27.3.2006 was executed between the parties. As per the Agreement the respondent was required to deploy 80 security guards and 3 security supervisors each round o'clock in the premises of the hospital. This figure was later on changed. On expiry of the original term of the agreement the period has been extended w.e.f. 27.3.2007 and thereafter w.e.f. 27.3.2008. The contract was further extended upto 31.5.2011 or till a new contract was finalized. The contract came to an end on 30.4.2011. Hence, the respondent has provided services in terms of the Agreement from 27.3.2006 to 30.4.2011. It was the case of the respondents that commencing November 2009 till April 2011 an amount of Rs.1,54,12,819 remains due and payable to the respondent for its dues.

2. As disputes arose between the parties the respondent invoked the arbitration clause and approached this Court for appointment of an Arbitrator. This Court on 20.8.2015 appointed a Sole Arbitrator.

3. The Sole Arbitrator has now given her Award dated 31.3.2017 in favour of the respondent for Rs.1,54,12,819/- as outstanding dues and Rs.2,99,140/- on account of security amount wrongly withheld plus interest. A perusal of the Award would show that the petitioner raised three main defences before the learned Arbitrator as to why the bills raised by the respondent were not payable. Firstly, it was submitted that a major theft took place in the hospital in September 2009. Hence, it was urged that the respondent was to compensate the petitioner for the losses suffered of Rs.71,46,471/-. Secondly, it was urged that the respondent had not provided details of EPF, ESI in respect of employees deployed by it in the hospital.

Thirdly, it was urged that mere raising of bills does not entitle the respondents to the bills unless supporting documents are submitted.

4. The learned Arbitrator rejected the said pleas raised by the petitioner. As far as the allegation of theft is concerned, the Award holds that though the theft took place in September 2009 a Show Cause Notice was issued to the respondent on 28.5.2010. It was further concluded that the petitioner had placed on record an enquiry report regarding the theft in surgical consumable store which report does not anywhere hold the security personnel of the respondent guilty or liable. Hence, the Award holds that the loss that may have been suffered by the petitioner is not attributable to the respondent and the petitioner cannot unauthorisedly deduct Rs.71,46,471/- from the amount payable to the respondent.

Regarding non-compliance of EPF/ESI/Minimum Wages Act the Award notes that depository challans of EPF/ESI and Service Tax are placed on record by the respondents. The Award also notes that all the necessary documents were made available to the petitioner and that there was no requirement for the respondent to submit the EPF/ESI record of each individual person employed in the petitioner hospital. It was stated that even at best if there is a violation of the statutory provisions by the respondent or violation of the terms and conditions of the Agreement by the respondent the remedy of the petitioner was to cancel the contract and forfeit the security and not withhold dues of the respondent for legitimate services provided. On the third aspect the Tribunal rejected the same as being baseless and accordingly passed an Award.

5. I have heard learned counsel for the parties.

6. Learned counsel for the petitioner relies upon Clauses 4 of the terms and conditions to submit that in case of a theft the respondent was bound to compensate the petitioner for the loss. He submits that a theft having taken place for which an FIR has also been lodged the learned Arbitrator has wrongly noted that there was no negligence on the part of the staff of the respondent and has wrongly ignored the losses caused to the petitioner by the theft. It is urged that there was an absolute liability to compensate the petitioner in case of theft/burglary and there is complete misinterpretation of the terms of the contract by the learned Arbitrator.

7. The relevant clauses 4 and 5 of the terms and conditions (Annexure II) of the Agreement read as follows:-

> 4. The contractor shall compensate in full the loss sustained by the department on account of any theft, burglary and any other kind of intrusion in building/area given for security. The amount of loss to be compensated by the contractor shall be determined by the Pr. Employer or on his behalf by authorized nominee. Same shall be binding on the contractor.
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> 5. The contractor shall also be fully responsible for any loss of materials & property etc. on the Dr. BSA Hospital attributable to the negligence or failure of the security personnel in complying with the prescribed procedure. All such losses suffered by the Dr. BSA Hospital on this be compensated in full by the contractor. The decision of Pr. Employer in this regard shall be binding on the contractor."

8. It is pleaded by the learned counsel for the petitioner that in terms of clause 4 above, there is an absolute liability on the respondent in the eventuality of theft or burglary or any other kind of intrusion in the building,

the loss is to be compensated by the respondent. He submits that in the case of theft, clause 5 is not attracted but clause 4 is attracted and the learned arbitrator has wrongly dealt with the plea of the petitioner as if clause 5 is in issue.

9. From a perusal of the award, it appears that no such plea of reliance on clause 4 has been raised before the learned arbitrator. A perusal of the reply to the statement of claim filed by the petitioner before the learned Arbitrator will show that no such plea was raised before the learned Arbitrator. In fact what was pleaded there was that in view of clause 5 of the Agreement, the respondent is liable to pay Rs.71,46,471/- for the loss occasioned to the petitioner due to the theft. The relevant para of the reply reads as follows:-

> "6. It is further submitted that as per the term and condition of the tender which are accepted by the Claimant, it is clearly mention in clause 5 of the Annexure-II (Terms & Conditions) "the contractor shall also be fully responsible for any loss of materials and properly etc. of the Dr. BSA Hospital attributable to the negligence or failure of the security personal in complying with the prescribed procedure. All such losses suffered by Dr.BSA Hospital on this be compensated in full by the contractor, the decision of Pr. Employer in this regard shall be binding on the contractor". The loss to respondent hospital due to theft is of Rs.71,46,471/- (Rupees Seventy One Lac Forty Six Thousands Four Hundred Seventy One Only) which has to be compensated fully by the Claimant as the decision of the respondent(Principle employer) in this regard shall be binding on the contractor."

10. The petitioner cannot now raise a fresh plea before this court.

11. I may also note that the evidence on record does not show any theft having taken place on account of intrusion. Hence, the petitioner took no

such plea before the learned Arbitrator regarding application of clause 4 to the facts of the case.

12. As per Clause 4 in case a loss is sustained by the petitioner on account of any theft or burglary or any other kind of intrusion in the building/area given for security the amount of loss has to be compensated by the respondent. In the present case the so called theft has occurred in September 2009. Nearly nine months later on 28.5.2010 the petitioner has woken up and issued a Show Cause Notice to the respondent pointing out to the theft in September 2009. The untold delay in issuing the Show Cause Notice raises a strong suspicion that there appears to be no theft as envisaged in Clause 4 of the Agreement.

13. Reliance was also placed on an undated Enquiry Report submitted by the Committee constituted by the petitioner. A perusal of the report would show that the conclusion is that there is no theft by any outsider or that the loss is on account of any intrusion in the building in the area given for security. The report seems to only note that certain employees who were Nursing Attendants on Contract have been visiting the Surgical Store in the late afternoon alongwith the store keeper. It is quite clear that as there is no intrusion in the building or theft or burglary as provided under clause 4 of the terms and conditions. As there has been loss of material i.e. surgical consumer store, the case of the petitioner was at best covered under clause 5, namely, that the Contractor was responsible for any loss of material and property attributable to the negligence or failure of the security personnel. In the present case no such evidence was found by the learned Arbitrator which would lead to a conclusion that any of the staff of the respondent was guilty

of negligence or failure on account of which any loss was suffered by the petitioner.

14. I may also note that the so called theft took place on September 2009. The contract of the respondent was further extended w.e.f. 27.3.2010 on the same terms and conditions vide letter dated 13.5.2010 upto 31.5.2011 or till a new contract was finalized. Hence, despite allegations of loss by theft caused by the acts of the respondent in September 2009 the petitioner has thereafter again extended the services of the respondent. It is manifest that even as on March 2010 when the contract was extended, the petitioner did not consider the respondent as liable in any manner.

It is in these circumstances that the learned arbitrator has recorded a finding of fact that there has been no negligence on the part of the respondent or his employees. The learned arbitrator is the master of facts.

15. In the above context, reference may be had to the judgment of the Supreme Court in the case of ***Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49*** where the Court held as follows:

> "31……The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where-
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> 1. a finding is based on no evidence, or
> 2. an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or
> 3. ignores vital evidence in arriving at its decision,
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> such decision would necessarily be perverse.
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> 32. A good working test of perversity is contained in two judgments. In **H.B. Gandhi, Excise and Taxation Officer-**

cum-Assessing Authority v. Gopi Nath & Sons,1992 Supp (2) SCC 312 at p.317, it was held:

> 7. .....It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.

In Kuldeep Singh v. Commr. of Police, (1999) 2 SCC 10 at para 10, it was held:

> 10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

33. It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R.Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.(2012) 1 SCC 594, this Court held:

> 21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.
> ……."

16. There is no merit in the pleas of the petitioner. The present petition is accordingly dismissed.

(JAYANT NATH)
JUDGE

OCTOBER 10, 2017
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