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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. 724/2011

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Judgment dated 15.11.2011

MCD

..... Petitioner

Through: Mr.Himanshu Upadhyaya, Advocate

versus

BHARAT LAL & ANR

..... Respondent

Through: Mr.Sanjay Bansal, Advocate

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J (ORAL)

1. Mr.Sanjay Bansal, counsel for the respondent has appeared on an advance copy and submits that he does not wish to file any reply. With the consent of counsel for the parties, this matter is taken up for final hearing and disposal.
2. By this petition under Section 34 of the Arbitration & Conciliation Act, petitioner has challenged the award dated 10.06.2011. Counsel for the petitioner submits that the learned arbitrator had earlier rendered his award on 26.05.2003. On the objections filed by the respondent herein, claim No.5 and 7 were remanded back to the arbitrator, who has now passed the award on 10.06.2011.
3. Brief facts, to be noticed for disposal of the present objections, are that the respondent was awarded the work of construction of staff quarters at Moti Nagar Hospital, WZ-SH construction of 'H' Typed

Quarters. The respondent accepted all the terms and conditions of the contract. Stipulated period of commencement of work was fifteen months i.e. 15.5.1993.

4. Counsel for the petitioner submits that learned arbitrator has not assigned any legal reasons while deciding the claims No.5 and 7 and thus the decision of the arbitrator is liable to be set aside. It is contended that as per the settled law the arbitrator has to assign reasons while passing the award in favour of a party. It is further submitted that admittedly it is the claimant (respondent herein), who had not performed his obligations as per the contract and he did not complete the work on time, which resulted in loss to the petitioner. It is submitted that the arbitrator has granted benefit under clause 10 (cc) of the Agreement to the respondent and awarded him 50% of the amount as claimed by him, while holding that the respondent was also responsible for the delay in completing the work. It is further submitted that the respondent did not even raise a bill under clause 10 (cc) of the agreement and in the absence of any bill the arbitrator could not award any amount, much less 50% of the amount claimed.
5. Counsel for the respondent submits that learned arbitrator has rightly considered the claim of the respondent and in fact should have awarded the entire amount as claimed and not just 50%, for the reason that the respondent was not in any way responsible for the delay in completion of the work which is evident from the fact that no damages were levied on the respondent for delay attributable to the respondent in terms of the agreement. It is submitted that in case the delay was caused by any act of the

respondent, the petitioner would have invoked clause 2 of the agreement and would have levied liquidated damages on the respondent. Counsel further submits that in an identical matter pertaining to clause 10 (cc) where the arbitrator had awarded 50% of the claim, the objections (O.M.P. No.173/2010) filed by the petitioner were dismissed. Copy of the judgment dated 07.04.2010 dismissing the objections (O.M.P. No.173/2010) have been placed on record. Counsel for the respondent has relied upon the judgment dated 07.04.2010 passed in *MCD Vs. Prabhulal & Anr.* and more particularly paragraph 6 of the same, which is reproduced below:

“6. As far the basis of award of amount under the said Claim No.5, I find that Arbitrator has awarded 50% of the amount claimed on the basis of the escalation formula namely Clause 10CC. In my opinion, in the present case the Arbitrator has indicated the thought process on the basis of which he has awarded the claim. The Arbitrator is entitled to make some estimation while awarding claims. In fact, a Division Bench of this Court in D.D.A. vs. Bhagat Construction Pvt. Ltd. reported in (2004) 3 ALR 548 has held that Court will not substitute its opinion for that of the Arbitrator. It was also held that it was well settled principle of law that an Arbitrator need not disclose with mathematical precision the breakup of the amount awarded. If the award shows application of mind and a view which is plausible, it should not be interfered with. In this connection, I may also refer to the observations of this Court in Kochhar Construction Works Vs. Delhi Development Authority and Anr. reported in 74 (1998) DLT 118 wherein this Court has held as under:-

“13.7. It is evident from the foregoing that while it may not be necessary to give the actual calculations but the reasons must disclose the thought process indicating

nexus between the material on record and the conclusions arrived at. However there is bound to be some estimation even in cases of reasoned award based on the experience and qualification of the Arbitrator especially the technically qualified Arbitrators”

6. Counsel for the respondent further submits that in another matter (O.M.P. No.153/2010) between the same parties, the respondent had filed objections to the award in which the arbitrator had only granted 50% of the amount claimed under clause 10(cc). It is submitted that learned single judge had allowed the objections and appeal filed by the MCD against the order, being FAO(OS)No.232/2011 stands dismissed and thus the order has attained finality.
7. It is submitted that in the case of *MCD Vs. Bharat Lal.*, O.M.P. No.153/2010, this court has modified the award of the arbitrator and approved the reasoning wherein it has been stated that once the arbitrator has found the petitioner entitled to claim escalation under Clause 10(cc), there was no justification in restricting the award only 50% to that amount and he could not have reduced the amount unilaterally. He further relies on the observations of the Court in O.M.P. No. No.153/2010 wherein the arbitrator has rejected the stand of the department that the claimant had to produce vouchers to justify the claim under Clause 10 (cc).
8. I have heard counsel for the parties and carefully perused the award dated 10.06.2011. The arbitrator has dealt with claim no.5 in the following manner:

“Claim No.5: Under this claim the claimant has claimed

Rs.11,06,655.92 under clause 10-cc. Escalation is paid under clause 10-cc on the value of the work executed during stipulated period as well validly extended period. In the present case stipulated date of completion was 19.5.1993 but actual date of completion was 24.06.1996 and thus there was almost 3 years and one month delay in completion of work. From the record it transpires that neither the claimant applied for extension nor the respondents extended contract period finally by a written order, however, the work continued till date of completion which can be termed at this stage as a tacit extension of contract period till the actual date of completion. It is also true that the claimant never applied for extension of time or even the bills as per provision of the contract the claimant did not submit any bill for work executed or even bill under clause 10-66. It is also a matter of fact that no compensation was levied under clause 2 of the agreement. It appears that the Respondents did not suffer any damages due to delay in completion of the work. Clause 2 is operated only to recover liquidated damages if suffered. Clause 2 is not required to be operated to justify delays. However, grant of extension of time upto actual date of completion is considered that the contractor is; not responsible for any delay. In the present case extension of time till actual date of completion was not granted without levy of any completion under clause 2 of the agreement. In this respect both the parties are at fault. Under such circumstances whether enlargement of contract period can be termed as validity extended period. In fact it got extended by conduct of both the parties. Under such circumstances, it can be presumed only that contract period was validly extended. Considering both the parties lacking in its respective actions, I award 50% amount under clause 10-cc, on value of work executed and claimed by the claimant. The award amount works out to Rs.5,53,328.00 (i.e. 50% of 11,06,655.92). Accordingly, I direct the Respondents to pay this amount in satisfaction of claim No.5.”

9. A bare reading of the award would show that the arbitrator has come to a specific finding that the time was extended by the conduct of

both the parties. The arbitrator has also come to the finding that the respondent (petitioner herein) did not suffer any damages due to delay in completion of the work and in case they had suffered any damages, they would have recovered the same under Clause 2. The arbitrator has also observed that grant of extension of time upto the actual date of completion would clearly establish that the contractor is not responsible for the delay, although he has also observed that both the parties are at fault, but it seems that it is for the reasons that he has given benefit under clause 10 (cc) to the respondent but by awarding only 50% of the amount claimed.

10. Under Claim 7 the respondent had claimed a sum of Rs.5,83,908/- as damages suffered during prolongation of contract period for maintaining his establishment like Engineer, Head Mistri, Supervisor, Chaukidars, Vibrator, etc. This claim of the respondent was dealt with by the Arbitrator in the following manner:

“Claim No.7: Under this claim the claimant has claimed Rs.5,83,908.00 as damages suffered during prolongation of contract period for maintaining establishment, like Engineer, Head Mistri, Supervisor, Chaukidars, Vibrator, etc. The claimant has given the details of claimed amount in Annexures ‘D’ annexed with the statement of claim. Unfortunately no evidence has been adduced to show that the said staff and vibrator was engaged and paid at the rate as claimed. Therefore, except for an Engineer that too pay for 50% of extended period, balance claim for other staff and vibrator is not considered as justified.

Accordingly, I award Rs.57,000.00 for 19 months @ Rs.3000/- p.m. for an Engineer. The rest of the claim is rejected.

In addition to amounts awarded under claim No.5 i.e.

Rs.5,53,328.00 and Rs.57,000.00 under Claim No.7 I also award 12% interest on the awarded amounts of claim No.5 & 7 from the date of earlier award i.e. 26th March 2003 till the actual date of payment.”

11. Out of the claim of Rs.5,53,328/- the Arbitrator has only awarded Rs.57,000/- to the respondent towards the salary of Engineer and that too only 50%. The Arbitrator has come to a finding that since no evidence was adduced to show that other staff and Vibrator was engaged major portion of the claim of the petitioner was rejected. I find no infirmity with the reasoning of the learned Arbitrator.
12. As the counsel for the petitioner is unable to justify that on account of the delay, if any by the respondent, petitioner has either suffered any damages or the petitioner had fixed the liability on the respondent for the delay, a bare reading of clause 10 (cc) of the Agreement would also show that the contractor would be given benefit of this clause, provided there is delay in completion of the work and such delay is not attributable to the contractor and only after the contractor has not been held liable under Clause 2 for delay. Since the arbitrator has come to a finding in favour of the contractor on both these issues and in view of the stand taken by the arbitrator, I find no infirmity in the award.
13. It is trite law that the scope of interference in an Arbitral Award under Section 34(2) of the Arbitration and Conciliation Act is extremely limited. The interference by a Court in an Arbitral Award is open only in those cases where the Award is contrary to either the substantive provisions of law or the contractual provisions and/or is

opposed to public policy [See *Delhi Development Authority v. R.S.Sharma & Co.*: (2008) 13 SCC 80]. Even otherwise, it is settled law that this court is not a court of appeal, neither this court can substitute its view with respect to the view of the arbitrator, provided the finding of the arbitrator is not illegal or perverse or against the provisions of any act. A reading of the Award shows that the Arbitrator has decided the matter fairly and the view taken by the Arbitrator is reasonable and cogent. Accordingly, the objections are dismissed.

G.S.SISTANI,J

NOVEMBER 15, 2011

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