$~OS-58

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

% *Date of decision: 12.09.2017*

\+ O.M.P. (COMM) 336/2017

M/s.FEDDERS ELECTRICAL & ENGINEERING LIMITED
... Petitioner

Through Mr.P.S.Bindra and Ms.Rishika Arora, Advs.

versus

M/s. AHLUWALIA CONTRACTS (INDIA) LIMITED.
.... Respondent

Through Mr.Rishi Kapoor and Mr.Raunak Satpathy, Advs.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. This petition is filed under section 34 of the Arbitration and Conciliation Act, 1996 seeking to impugn the Award dated 6.6.2017 passed by the learned Arbitrator in the proceedings held under the aegis of the Delhi International Arbitration Centre.

2. Some of the brief facts are that the respondent issued a work order dated 22.4.2009 on the petitioner for supply, installation, testing and commissioning of HVAC work of Radisson Hotel at Jaipur for contract value of Rs.2,56,36,182/-. Subsequently the contract value was changed/enhanced. It is the contention of the petitioner that the petitioner raised bills amounting to Rs.2,84,07,444/-. The respondent paid to the claimant Rs.1,96,72,780/- apart from TDS Certificate amounting to Rs.3,17,855/-. After adjusting the payments received the petitioner states that an outstanding amount of Rs.84,40,761/- remained payable by the

respondent to the petitioner. As the respondent did not pay the alleged dues of the petitioner on 15.12.2012 the petitioner issued a notice under the Companies Act, 1956 for winding up of the company.

3. Subsequently in a petition filed before this court under section 11 of the Act the learned Arbitrator was appointed. Before the learned Arbitrator the petitioner filed a Statement of Claim reiterating the above submissions and seeking an Award against the respondent for a sum of Rs.1,21,12,490/-. By the impugned Award the learned Arbitrator has dismissed the claim petition of the petitioner.

4. A perusal of the Award would show that the learned Arbitrator framed following issues:-

> "i. Whether time was the essence of the contract? If so, whether the Claimant had not completed the work allotted to it within time and had in fact abandoned the site without completing the work allotted to it? OPR
> ii Whether the claim lodged by the Claimant is barred by time? OPR
> iii Whether the Claimant had raised 7th RA Bill? OPC
> iv. Whether the claimant had supplied and installed the material contracted for and had further carried out the testing and commissioning of HVAC System as per the work order? OPC .
> v. Whether the Claimant is entitled to payment of Rs.1,21,12,490/" as prayed for? OPC
> vi. Whether the Claimant is entitled to payment of interest on the above amount and if so, at what rate? OPC
> vii. Whether the respondent had agreed to increase the rates as per email dated 16.04.2010? OPC
> viii. Relief."

5. On issues No.1 and 4 the learned Arbitrator held that the respondent itself has acquiesced in the delay and therefore it cannot derive any benefit

from the said breach by the claimant. On issue No.(iv) as to whether the petitioner/claimant had executed the work and completed the same the learned Arbitrator held that the petitioner failed to prove that it had actually supplied and used the material as per work order for which bills were raised by it. The award also concluded on facts that the petitioner had not completed the work assigned to it and had abandoned it and left the same in an incomplete/unfinished manner. On issue No.(iii), namely, as to whether the petitioner had raised the 7th R.A.Bill, the learned Arbitrator held that the petitioner failed to lead evidence that the said bill was verified or certified as per clause 6 of the Agreement. In the absence of verification or certification the bill could not have been raised. Hence, the award holds that the petitioner had not raised R.A.Bill No.7 and had only raised R.A.Bill Nos.1 to 6. On issue No.(v) as to whether the petitioner is entitled to payment of Rs.1,21,12,490/- the learned Arbitrator held that the petitioner had raised RA Bill No.1 to RA Bill No.6 to the extent of 70% of the value of these bills and for no further amount. It was held that the petitioner had abandoned the project and left it at an unfinished stage and no joint measurement was carried out by the parties. The Arbitrator hence held that the claim sought by the petitioner was not payable.

6. I have heard learned counsel for the parties.

7. Learned counsel for the petitioner Shri Pawan Bindra, Advocate, has submitted as follows:-

(i) He submits that the learned Arbitrator has completely ignored the main averments in the claim petition and has misread the bills of the petitioner. He submits that the petitioner had raised 7 R.A.Bills totalling a sum of Rs.2,84,07,444/-. However, at the time when the bills were raised the

petitioner was entitled to only 70% of the amount of the bills, the balance being payable subsequently. Hence, he urges that the learned Arbitrator has wrongly noted that the petitioner has raised bills only of 70% of the value and for no further amount. He stresses that the bills were for the full amount but only on the date of raising of the bill 70% was payable and balance subsequently. Hence, he submits that the award is erroneous.

(ii) He further submits that the learned Arbitrator completely ignored that testing of the equipment could not take place because the work of other sub contractors engaged by the respondent was not complete. He relies upon the cross-examination of CW-1 Shri Arvinder Singh Bamrah who has stated that air handling units were not supplied by the respondents and hence the tests could not be carried out. He submits that the learned Arbitrator has completely ignored this fact.

(iii) He further vehemently submits that while the work was being carried out there was no protest by the respondent about any delay or the fact that the work is incomplete. It is only as an afterthought that once the petitioner has issued notice for winding up of the respondent company that this plea has been raised.

8. Learned counsel for the respondent relies upon the terms of payment of the contract which provided that 70% of the payment shall be made on supply of material at site, 15% was to be paid against installation of material, 10% against testing and commissioning of the system and 5% after successful handing over and completion of defect liability period. He submits that from the cross-examination of the witnesses of the petitioner it is manifest that installation and testing of the work was not carried out and hence the petitioner is not entitled to 30% payment which is being claimed.

Further he stresses that the learned Arbitrator has recorded findings of fact and there are no grounds to challenge the same before this court.

9. I may deal with the contentions of learned counsel for the petitioner. The first contention of the learned counsel for the petitioner is that the learned Arbitrator has misread the bills noting that only the bills of the value of 70% of the amount claimed by the petitioner had been raised. In the course of the arguments, learned counsel for the petitioner laid emphasis on a sentence in para 40 of the Award which reads as follows:-

> ".. That being the position, it is established that the claimant had raised bills RA1 to RA6 to the extent of 70% of the value of these bills and for no further amount."

Based on the above, the petitioner claims that the learned Arbitrator has ignored that the bills for the full value had been raised and not for 70% of the value.

10. The aforesaid observation relied upon by the learned counsel for the petitioner in para 40 of the Award has to be read in the context of the admitted position that as per the contract the terms of payments were as follows:-

> "3.**Terms of Payment**
> 70 % against the supply of material at site on pro-rata basis.
> 15 % against installation of material at site on pro-rata basis.
> 10 % against testing and commissioning of the system on pro-rata basis.
> 5% after successful handing over and after completion of Defect Liability period of 12 months."

11. The learned Arbitrator in the first para of the award itself has

reproduced the plea of the petitioner about existence of 7 RA bills and that bills for total amount of Rs.2,84,07,444/- has been raised. The learned Arbitrator has also noticed letter dated 31.1.2011 (Ex.CW-1/15) by which communication the petitioner had demanded a sum of Rs.2,84,07,444/-. In the light of the above facts, it is quite clear that the learned Arbitrator was fully aware about the claim of the petitioner. Merely relying upon some stray sentence in the Award where it has been stated that the petitioner had raised RA Bills RA 1 to RA 6 to the extent of 70% of the value does not lead to a conclusion that the learned Arbitrator has not gone into the contentions of the petitioner, namely, that the petitioner is claiming its dues based on 7 RA bills totalling Rs.2,84,07,444/-, out of which, after deducting payments received and TDS the balance amount claimed is Rs.84,40,761/-. On a reading the Award as a whole, it is quite clear that the plea of the learned counsel for the petitioner is entirely misplaced.

12. Regarding the plea of the petitioner that the testing could not take place on account of the defaults of the other sub-contractors is concerned in this context reference may be had to the cross-examination of CW 1 Shri Arvinder Singh Bamrah. Relevant portion of which reads as follows:-

> Q 10. Do you have the light testing and balancing of air report documents?
>
> A. There are no documents with regard to light testing and balancing of air report. Vol. our scope was ducting and insulation over ducting, whereas duct insulation is carried out on successful completion of light and smoke test. The entire duct had been insulated by us.
>
> To carry out balancing test of ducting, air was required to be passed out through the duct with the help

of air handling units and since air handling units were not supplied by the Respondent, therefore, this test was not carried out.

Q11. Have you placed any document on record whereby you had demanded supply of air handling units from the Respondent?

A. No. Since it was very clear from the beginning of the receipt of the Work Order that the air handling units were to be supplied by the Respondent.

"Q16. Have you placed on record any document showing that the HVAC system was successfully installed, tested and commissioned and was handed over to the Respondent thereafter?

A. No document with respect to the installation, testing and commissioning as well as successfully handing over of the HVAC system has been placed on record by us. Vol. since our scope of work was restricted to ducting, piping, valves etc., no document was required to be executed.

It is incorrect to suggest that a document in the aforesaid regard was required to be executed."

13. It is quite clear from the above cross-examination that the petitioners have never protested that the equipment that was to be arranged by the other Sub contractor is not available and hence testing and commissioning cannot be completed. The contention that testing and commissioning could not take place on account of non completion of the work of the other sub contractors had to be proved by the petitioner. No credible evidence to that effect has been led. Reference may be had to the evidence led by the petitioner. He has led the evidence of Sh.Arvinder Singh Bambrah/CW-1 and evidence by way

of affidavit has also been filed of Sh.Manjul Gupta. A perusal of the evidence by way of affidavits of these two witnesses would show that there is no averment in their affidavits that they have installed, tested and commissioned HVAC work. There is also no averment in the said affidavits that there were any impediments in carrying out the testing or commissioning of the work.

14. The learned Arbitrator in view of the above evidence and cross-examination of Mr.Bamrah has held that as a matter of fact, that the petitioner has not carried out balance testing of ducting. He also notes the cross-examination of Mr.Bamrah whereby he states that the petitioner does not have any document showing installation, testing, commissioning, and successful handing over of the HVAC System. The learned Arbitrator relies on evidence on record to conclude that the petitioner has not completed the work assigned to it and has abandoned it and left the same in an incomplete and unfinished manner. Based on the evidence on record specially the evidence of the witnesses of the petitioner the conclusions are a plausible conclusions.

15. The third contention of the petitioner, is that the respondents did not protest about incomplete work of the petitioner, till service of legal notice, based on the evidence on record the learned Arbitrator has come to a conclusion that the petitioners have abandoned the project and left it unfinished. The Award also concludes that the petitioner has failed to prove that a sum of Rs.1,21,12,490/- was payable by the respondent. It is manifest that there are findings of fact recorded by the learned Arbitrator based on the evidence on record and the cross-examination of Mr.Bamrah, including the above submission of the petitioner. Merely because the Award does not

specially deal with this contention of the Petitioner does not mean that the Award has ignored any vital evidence.

16. Findings of fact recorded by an Arbitrator are not subject to challenge. In ***Associate Builders vs. DDA, AIR 2015 SC 620*** it was held by the Supreme Court 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-
>
> 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, such decision would necessarily be perverse.
>
> 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.
> ……."

17. Submissions of the learned counsel for the petitioner do not lead to a conclusion that the findings of fact recorded by the learned Arbitrator are based on no evidence or that the learned Arbitrator has ignored vital evidence or that the decision of the learned Arbitrator would necessarily lead to a conclusion of being perverse. Essentially the argument of the Petitioner seeks to challenge the findings of fact of the Arbitrator as though the present court was hearing an appeal from the Award passed by the learned Arbitrator.

18. There is clearly no merit in the contentions of the petitioner. The present petition being devoid of merits is dismissed.

JAYANT NATH, J

SEPTEMBER 12, 2017/n