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* **IN THE HIGH COURT OF DELHI AT NEW DELHI5**

*Judgement Reserved on: 30th April, 2019*
*Judgement pronounced on: 03rd May,2019*

\+ **FAO(OS) 244/2015**

PCLIT SOLUTIONS PVT. LTD. ....Appellant
Through: Ms. Rishi Mittal, Advocate

versus

MTECH SOLUTIONS ....Respondent
Through: Mr. Avneesh Garg and Mr.M.P.Singh Advocates

**CORAM:**
**HON'BLE MR. JUSTICE G.S. SISTANI**
**HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL**

**SANGITA DHINGRA SEHGAL, J**

1. This is an appeal filed by the appellant under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') read with Section 10 of the Delhi High Court Rules against the order dated 31.10.2014 passed by the learned Single Judge in OMP No. 647/2013 by which the objections filed by the appellant to the award dated 22.08.2012 passed by the Sole Arbitrator stand rejected.

2. Before the rival submissions of the learned Counsel appearing for the parties can be considered, we deem it appropriate to set out the basic facts which led to the dispute between the parties.

3. The brief facts leading to the filing of the present appeal are that the appellant/ PCLIT SOLUTIONS PVT. LTD., who is in the

business of leasing out facilities and services to call centre industry, entered into a Campaign Services Agreement (hereinafter referred as 'CSA) dated 01.11.2006 with the respondent/MTECH SOLUTIONS, a proprietorship concern operating as a BPO(Call Centre) and conducting IT enabled services As per the agreement, the respondent took on lease the entire floor of the premises of the appellant situated at Plot No.21, Electronic City, Sector-18, Gurgaon with 166 calling seats, offices and training room. As per the appellant, the respondent was required to pay $31800 as security deposit under CSA, i.e. $24000 for seats and $7800 for PSTN(telephone calling minutes), but paid the respondent only $25550 as security deposit and requested the appellant to adjust the security deposit against the previous CSA dated 06.09.2006. Appellant started providing the services as per CSA to the respondent from 01.11.2006 but the agreement was terminated on 21.11.2006 when the respondent approached the appellant requesting to terminate the same as they desired to enter into a similar agreement with another entity. Subsequently on 21.11.2006 after termination of the said agreement dated 01.11.2006 an arrangement in the form of "second memorandum of understanding" was reached between the parties as per which the respondent was to have a separate agreement with the another entity (i.e.MS Technocall) in reference to the transfer of security deposit. The respondent, thereafter, approached the appellant to refund the security

deposit amounting to $31800, which the appellant denied and disputes arose between the parties which were referred to a sole Arbitrator, the Award dated 22.08.2012 was passed in favour of the respondent whereby the appellant was directed to refund the security amount along with the interest @ 12% including the cost of litigation, to the respondent. The appellant approached the learned Single Judge under Section 34 of the Act challenging the said award but the same was dismissed. Hence the present appeal.

4. Ms. Risha Mittal, learned counsel for the appellant contends that the learned single judge had erred in passing the impugned order dated 31.10.2014 as the terms of the agreement agreed between the parties are clear and unambiguous and the award passed by the sole Arbitrator is against the public policy of India; that there was no obligation on the appellant to refund the security deposit to the respondent; that soon after termination of the agreement after providing the services as per CSA for 20 days to the respondent, it was agreed between the parties that the security deposit furnished by the respondent will be adjusted towards the services provided; that the "Second Memorandum of Understanding(MoU)/Tripartite Agreement" as alleged to be entered into by the parties after the termination of the first agreement was in reference to bring an end to the agreement dated 01.11.2006 and the security deposit stood transferred to M.S. Technocall; that the award passed by the learned arbitrator is arbitrary and capricious; that considering certain contentions of the appellant as admission was wrongly interpreted by the arbitrator; that the onus of proving that no services were

provided by the appellant herein lies on the respondent; that the finding of the learned arbitrator is based on conjectures and surmises; that the said award dated 22.08.2012 as well as the order dated 31.11.2014 being in contravention to law is liable to be set aside. In order to substantiate the argument, learned counsel relied on the case of ***Associate Builders v. Delhi Development Authority*** reported in ***(2015) 3 SCC 49***, ***Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd*** reported in ***(2005) 5 SCC 705***, ***Delhi Development Authority v. M/S R. S. Sharma & Co.*** reported in ***2008 (11) SCALE.***

5. The learned counsel appearing for the respondent submits that the learned Arbitrator has interpreted the agreement in its right perspective, examined the evidence and rendered the award, which has been rightly upheld by the learned Single Judge. He contends that no grounds have been urged by the learned Counsel for the appellant, which would call for interference in the present proceedings. The scope of interference, while hearing an appeal under section 37 of the Act is even narrower and placed reliance in the case of ***P.C.L Suncon (JV) v N.H.A.I.,2015 SCC Online Del 13192, State Trading Corporation of India Ltd. v. Toepfer International Asia Pte. Ltd.*** reported at ***2014(144) DRJ 220(DB), J.G. Engineers (P) Ltd. v. Union of India***, reported at ***(2011) 5 SCC 758.***

6. We have heard the learned Counsels for the parties and considered their rival submissions.

7. The main issue which arose between the parties was with respect to the security amount which the respondent claimed to

have deposited with the appellant as per CSA and further claimed its refund after the termination of the agreement.

8. The claim petition was filed by the claimant/MTECH Solutions/respondent before the learned Arbitrator and the learned arbitrator after examining the facts and the evidences on record gave its findings, vide award dated 22.08.2012. The learned Arbitrator disapproved the testimonies/evidence led by the appellant on the ground that the same were not supported by any documentary evidence and considered the oral evidence as only hearsay with no evidentiary value. It was concluded by the learned arbitrator that the security deposit of USD 31,800 was paid by the respondent to the appellant by wire transfer as well as by adjustment of security deposit under the earlier agreement which was refundable and held as under:

> *"Thus the position that emerges from the pleadings is as under:- the claimant says that the security deposit of USD 31,800 was paid by wire remittance of USD 25550 and by adjustment of USD 6250 which remained unused in the previous agreement. The respondent says that only some amount was paid when the agreement was signed and there was a request for adjustment of previous security deposit. Thus,* ***the difference between the two versions, as per pleadings is very narrow or almost nil. The respondent does not plead that no adjustment of previous security deposit was made. Nor does the respondent plead what amount was paid by the claimant when the agreement of 1.11.2006(exhibit CW1/3) was entered into. Such vague denial can be interpreted as admission****."*

9. The Award dated 22.08.2017, was thereafter challenged before the learned Single Judge, and the learned Single Judge while acting within the scope of Section 34 of the Act found that none of the ingredients under Section 34 which are necessary to set aside the award of the Tribunal were fulfilled. Based on the finding given by the learned arbitrator, the learned Single Judge passed a detailed order and upheld the award in terms of CSA agreement and observed that the refund of security amount is to be initiated as per clause 4.5 of the said agreement. The learned Single Judge also examined the evidence produced on record and was convinced by the explanation adduced by the learned Arbitrator while acting within its scope of Section 34 of the Act.

10. Learned counsel for the appellant contended that it was agreed between the parties that the security deposit will be adjusted towards the services rendered by the appellant and there was no admission on the part of the appellant to refund the security deposit. In this context, we find from the record that after framing of the issues, the Arbitrator took note of clause 4.5 of Campaign Service Agreement dated 01.11.2006 entered into between the parties wherein, the security deposit required to be deposited by the respondent in pursuance of the service provided by the appellant has been mentioned. Relevant portion of the clause 4.5 of Campaign Service Agreement dated 01.11.2006 is reproduced as under:-

> *"4.5 Client shall deposit and keep deposited with call centre the sum stated in Exhibit 'B' hereto as interest*

*free (refundable/adjustable against the last invoice) security deposit (the security Deposit) for blocking services as per Exhibit 'A' clause 1.1 (a) billable seats with pro-rata increase, should the seats be increased beyond such seats, for due performance and fulfilment client of its obligations.*

11. We also deem it appropriate to reproduce Clause 3 of the Second Memorandum of Understanding dated 01.11.2006 which was disputed by the appellant being executed between by the parties. Relevant portion of the same reads as under:-

> *"(3)Seat deposit amount of $6,250, as envisaged in Agreement (1.a), was merged into the required deposits in Agreement (1.b) Additional amount of $25,550 was wired to complete the required deposit amount of $ 31,800 of Agreement (1.b). Now this amount of $ 31,800 becomes due from PCLIT solutions to MTECH Solutions*."

12. From the perusal of the clause 4.5 of Campaign Service Agreement dated 01.11.2006 we find that the security deposit was interest free, refundable and could be adjusted against any other transaction. Learned Arbitrator also took note of the aforesaid clause alongwith the evidence adduced by him and observed that the '*security deposit was refundable*.' Evidence of CW-2 Mangilal, husband of the proprietor Parvati Devi is vital in this regard. CW-2 deposed *that USD 6,250 was adjusted from the previous agreement and USD 25,550.00 was paid by wire transfer on 09.11.2006*. Record reveals that no documentary evidence has been placed on record by the

appellant to substantiate that security amount was not refundable. Further the e-mail CW2/X-1 sent by the claimant to the appellant alongwith the draft of second Memorandum of Understanding, which was not signed by the parties, was indicative of the fact that there was an outstanding amount of USD 31,800. Further in reply to the claim petition, appellant took a stand that *'the claimant after signing the agreement dated 01.11.2006 only paid some money in respect of security deposit and requested the respondent to adjust the previous security deposit in the present agreement.*" By way of reply to the claim petition, the appellant had admitted that some amount was paid by the claimant to the appellant towards security deposit.

13. Learned counsel for the appellant further contended that as he had provided 20 days service as per CSA to the respondent and the agreement was entered only on 20.11.2006, therefore he is entitled to the amount for the services rendered under CSA. In this connection, from the record, we find the appellant did not produce any documentary evidence to prove that services were provided till 20.11.2016 under CSA to the respondent. It was observed by the learned Arbitrator that *"Sh. Sethi says that his "account people" would know the exact amount payable for 20 days of service provided under the agreement dated 1.11.2006. This suggests that the respondent maintained accounts and there were regular employees for keeping such record or accounts. The respondent therefore could produce its account to*

*prove what services were provided and how much was due from the claimant on that account."*. It was further revealed from the testimony of CW-2 Mangilal that due to internal problems no services were provided by the appellant to the claimant and deposed that *due to internal problem, unknown to the claimant the respondent could not provide any service to the claimant as agreed to by the respondent under CSA dated 01.11.2016.* The view taken by the learned Arbitrator was avowed by the learned Single Judge observing that the non-claimant failed to produce on record any document to support his claim that the appellant had provided 20 days service as per CSA to the respondent.

14. The entire findings of the learned arbitrator was based on the evidence(s) of the witnesses during the arbitral proceedings and the arbitrator has given an elaborative reasoning to elucidate the stand taken by the respondent in its claim. After perusal of the previous findings of the court in the present case as well as the appeal herein, it is apparent from clause 4.5 of CSA and the evidence adduced that the amount of $25550 was paid via bank transfer by the respondent to the appellant and only amount of $5250 was to be adjusted from the previous CSA dated 06.09.2006. It is further apparent from record that security deposit was interest free, refundable and can be adjusted against any other transaction.

15. The position of law stands crystallized today, that findings, of fact as well as of law, of the arbitrator/Arbitral Tribunal are ordinarily not amenable to interference either under Sections 34

or Section 37 of the Act. The scope of interference is only where the finding of the tribunal is either contrary to the terms of the contract between the parties, or, ex facie, perverse, that interference, by this Court, is absolutely necessary. The Arbitrator/ Tribunal is the final arbitrator on facts as well as in law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Sections 34 or 37 of the Act. The Hon'ble Supreme Court in the case of ***P.C.L Suncon (JV) v N.H.A.I.,2015 SCC Online Del 13192***, in para 24 stated that:

> *"24. As a postscript, this Court believes that it is imperative to sound a word of caution. Notwithstanding the considerable jurisprudence advising the Courts to remain circumspect in denying the enforcement of arbitral awards, interference with the awards challenged in the petitions before them has become a matter of routine, imperceptibly but surely erasing the distinction between arbitral tribunals and courts. Section 34 jurisdiction calls for judicial restraint and an awareness that the process is removed from appellate review. Arbitration as a form of alternate dispute resolution, running parallel to the judicial system, attempts to avoid the prolix and lengthy process of the courts and presupposes parties consciously agreeing to submit a potential dispute to arbitration with the object of actively avoiding a confrontation in the precincts of the judicial system. If a court is allowed to review the decision of the arbitral tribunal on the law or on the merits, the speed and, above all, the efficacy of the arbitral process is lost."*

16. The scope of judicial scrutiny and interference by an appellate court under Section 37 of the Act is even more restricted. The Hon'ble Supreme Court in the case of ***McDermott International Inc. v. Burn Standard Co. Ltd. and Ors, (2006)11SCC181*** held as under:

> *"52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc.* ***The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired****. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."*

17. It has been repeatedly held that while entertaining appeals under Section 37 of the Act, the Court is not actually sitting as a Court of appeal over the award of the Arbitral Tribunal and therefore, the Court would not re-appreciate or re-assess the evidence. In the case of ***State Trading Corporation of India Ltd. v. Toepfer International Asia Pte. Ltd***, reported at ***2014(144) DRJ 220(DB),*** in para 16 it has been held as under:

> *"16. The senior counsel for the respondent has in this regard rightly argued that the scope of appeal under Section 37 is even more restricted. It has been so held by the Division Benches of this Court in Thyssen Krupp Werkstoffe Vs. Steel Authority of India and Shree Vinayaka Cement Clearing Agency Vs. Cement Corporation of India 147 (2007) DLT 385. It is also the*

*contention of the senior counsel for the respondent that the argument made by the appellant before the learned Single Judge and being made before this Court, that the particular clause in the contract is a contract of indemnification, was not even raised before the Arbitral Tribunal and did not form the ground in the OMP filed under Section 34 of the Act and was raised for the first time in the arguments."*

18. In the case of ***Steel Authority of India v. Gupta Brothers Steel Tubes Limited,*** reported in ***(2009) 10 SCC 63,*** the Supreme Court has laid down that an error relatable to interpretations of the contract by an Arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award. The Supreme Court has further laid down that the Arbitrator having been made the final arbitraror of resolution of disputes between the parties, the award is not open to challenge on the ground that the Arbitrator has reached a wrong conclusion. The courts do not interfere with the conclusion of the Arbitrator even with regard to the construction of contract, if it is a plausible view of the matter.

19. The Apex Court in ***J.G. Engineers (P) Ltd. v. Union of India***, reported at ***(2011) 5 SCC 758***, demarcated the boundary while explaining the ambit of section 34(2) of the Act. The Court in the aforesaid judgement relied upon the pronouncement of ONGC Ltd. Vs. Saw Pipes , in paragraph 19 , held as under:-

*"27. Interpreting the said provisions, this Court in ONGC Ltd. v. Saw Pipes Ltd.(2003) 5 SCC 705] held that a court can set aside an award Under Section 34(2)(b)(ii) of the Act, as being in conflict with the*

*public policy of India, if it is (a) contrary to the fundamental policy of Indian law; or (b) contrary to the interests of India; or (c) contrary to justice or morality; or*

*(d) patently illegal. This Court explained that to hold an award to be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. It is also observed that an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court, as then it would be opposed to public policy."*

20. In ***Associate Builders vs. Delhi Development Authority,*** reported at ***(2015) 3 SCC 49***, the Supreme Court while further explaining the scope of judicial intervention under the appeal in the Act held as under:-

*"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 score1. 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 and 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."*

21. This Court, time and again has emphasized on the narrow scope of section 37. In the case of ***MTNL Vs. Fujitshu India Private Limited,*** reported at ***2015 (2) ARBLR 332 (Delhi),*** the division bench held as under:

*"The law is settled that where the Arbitrator has assessed the material and evidence placed before him in detail, the court while considering the objections under Section 34 of the said Act does not sit as a court of appeal and is not expected to re- appreciate the entire evidence and reassess the case of the parties. The jurisdiction under section 34 is not appellate in nature and an award passed by an Arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the court to interfere with the award merely because in the opinion of the court, another view is possible. The duty of the court in these circumstances is to see whether the view taken by the Arbitrator is a plausible view on the facts, pleadings and evidence before the Arbitrator. Even if on the assessment of material, the court while considering the*

*objections under section 34 is of the view that there are two views possible and the Arbitral Tribunal has taken one of the possible views which could have been taken on the material before it, the court would be reluctant to interfere. The court is not to substitute its view with the view of the Arbitrator if the view taken by the Arbitrator is reasonable and plausible Jhang Cooperative Group Housing Society v. P.T Munshi Ram & Associates Private limited: 202(2013) DLT 218.*
*The extent of judicial scrutiny under section 34 of the Act is limited and scope of interference is narrow. Under section 37, the extent of judicial scrutiny and scope of interference is further narrower. An appeal under section 37 is like a second appeal, the first appeal being to the court by way of objections under section 34. Where there are concurrent findings of facts and law, first by the Arbitral Tribunal which are then confirmed by the court while dealing with objections under section 34, in an appeal under section 37, the Appellate Court would be very cautious and reluctant to interfere in the findings returned in the award by the Arbitral Tribunal and confirmed by the court under section 34."*

22. In the case of ***Mahanagar Telephone Nigam Ltd. vs Finolex Cables Limited FAO(OS) 227/2017*** reported at ***2017(166)DRJ1***, it was held as follows:-

*"It is apparent, therefore, that, while interference by court, with arbitral awards, is of it being injudicious, contrary to the law settled by the Supreme limited and circumscribed, an award which is patently illegal, on account Court, or vitiated by an apparently untenable interpretation of the terms of the contract, requires to be eviscerated. In view thereof, the decision of the ld. Single Judge that reasoning of the arbitral award in this regard was based on no material and was contrary to the contract, cannot be said*

*to be deserving of any interference at our hands under Section 37 of the Act. In a pronouncement reported at MTNL v. Fujitshu India Pvt. Ltd. (FAO(OS) No. 63/2015), the Division Bench of this court has held that "an appeal under Section 37 is like a second appeal, the first appeal being to the court by way of objections under Section 34". Being in the nature of a second appeal, this court would be hesitant to interfere, with the decision of the learned Single Judge, unless it is shown to be palpably erroneous on facts or in law, or manifestly perverse."*

23. Having regard to the law laid down by this Court as well as the Apex Court in number of decisions rendered and applying the law laid down to the facts of the present case, we do not find any merit in the appeal. Hence, we find no reason to interfere in the impugned order passed by learned Single Judge under Section 34(2) of the Arbitration and Conciliation Act, 1996. Resultantly, the appeal is dismissed.

**SANGITA DHINGRA SEHGAL, J.**

**G.S.SISTANI, J.**

**MAY 3, 2019**
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