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

Date of Decision: 29.10.2021

+ FAO (COMM) 176/2021 & CMs 39035-36-37-38/2021
M/S TANEJA VIDYUT CONTROL PVT. LTD. Appellant
Through: Mr.Abhay Singh, Adv.

versus

M/S ANANT RAJ INDUSTRIES LTD. Respondent
Through: Ms.Biji Rajesh, Adv.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This appeal has been filed under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Order dated 27.09.2021 passed by the learned District Judge (Commercial-02) South District, Saket Court, Delhi, dismissing the petition filed by the petitioner appellant under Section 34 of the Act, being OMP (COMM) 30 of 2020.
2. By way of the above petition filed under Section 34 of the Act, the appellant had challenged the Arbitral Award dated 16.07.2020 passed by the learned sole Arbitrator, allowing the claim preferred by the respondent, directing payment of ₹20 lakhs alongwith interest at the rate of 18% per annum from the date of filing of the Claim Petition, that is, 21.10.2011, till the date of realisation of the payment.

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The learned Sole Arbitrator further directed that in case the appellant fails to pay the said amount within a period of three months from the date of pronouncement of the Award, it will bear interest at the rate of 24% per annum (*pendente lite* and future interest). The learned Sole Arbitrator also awarded a cost of ₹ 05 lakhs in favour of the respondent.

3. The dispute between the parties arose out of a Work Order dated 11.07.2011, by which the respondent had awarded the work of execution of electrical work at its Housing Project Kapashera, New Delhi for 27 blocks with basement, stilt, four-storeys and lift machine room to the appellant. The respondent had, in terms of the said Work Order, released an advance of ₹ 20 lakhs towards mobilization advance to the appellant.

4. The respondent terminated the Work Order vide its letter dated 28.05.2012 alleging that despite receiving the mobilization advance, the appellant had failed to mobilize the resources in terms of men and material at the site and thus failed to commence and execute the entrusted work.

5. The appellant resisted the claim by contending that since the civil construction of only four units at basement and stilt parking with the ground floor in two units/blocks were constructed by the respondent till January 2012, there was no occasion for the appellant to carry out electrical work. The appellant further contended that it had carried out conduiting electrical pipes in the constructed basement, stilt and ground floor portion for the only constructed ten units in four blocks and was ready and willing to perform its part of the contract,

however, the stage of electrical work was not reached. The appellant further contended that the respondent was carrying out unauthorized construction without any sanctioned building plan and hence, the appellant had to stop the work intermittently due to the fault of the respondent.

6. The learned Sole Arbitrator vide the Award dated 16.07.2020, allowed the claim of the respondent as mentioned hereinabove. The learned Sole Arbitrator in his Award has held as under:

“16. I find that the two major issues to be decided at the outset are (i) Whether the Respondent, carried out the work at the worksite in question in consonance with the terms of the Work order dated 11.07.2011 (Exhibit PW1/2), and (ii) Whether the termination letter dated 28.05.2012 (Exhibit PW1/9) issued by the Claimant terminating the Work Order dated 11.07.2011 (Exhibit PW1/2) awarded in favour of the Respondent was legal, valid and in accordance with law. Hence before proceeding with the respective Claims and Counter Claims, I find it appropriate to decide these issues first.

I am proceeding to decide the first issue, i.e., Whether the Respondent carried out the work at the worksite in question in consonance with the terms of the Work order dated 11.07.2011 (Exhibit PW1/2)?

16. It is the case of the Claimant that the Respondent failed to carry out the work even after repeated request, however, it is the case of the Respondent that they have carried out part of the work, i.e., conduiting electrical pipes in the constructed basement, stilt and ground floor portion as the civil contractor only constructed ten units in four blocks.

17. That the burden of proof is on the Respondent to prove that they have carried out

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work at site and hence entitled to the amount as claimed by them in their Running Bill. In order to prove the same the Respondent placed on record 1st RA Bill dated 15.02.2012 as Exhibit RW1/7 and the attendance register of the Respondent's staff worked at the project site and their salary sheet from August 2011 to January 2012 as Exhibit RW1/4 Colly. The Claimant denied the receipt of both these documents and also raised objection qua the authenticity and admissibility of these documents in law.

18. On close perusal of Exhibit RW1/7, it appears that Exhibit RW1/7 is an unsigned document and no one has signed the said document on behalf of the Respondent. Further there is no evidence on record to show that the said document was ever served upon the Claimant. The Respondent in its Counter claim admitted that no RA Bill was raised till the passing of the interim Order by the Hon'ble High Court of Delhi on 02.02.2012 in OMP 91/2012. The Respondent's only witness RW1, Mr. Abhinav Kad, failed to establish in his evidence that he has personal knowledge with regard to the RA Bill, Exhibit RW1/7. He further stated that no receipt was issued by the Claimant for the said running Bill. Further RW1 categorically in his cross examination admitted that he has no personal knowledge about the measurement book, RA Bills, proof of payment of civil contractor M/s Sarvodaya Builders etc. The Respondent failed to examine any other witness to establish the authenticity of the Exhibit RW1/7. Hence I hold that Exhibit RW1/7 is not proved in evidence and cannot be admissible.

19. The Respondent also placed on record Exhibit RW1/4, the attendance register of the Respondent's staff worked at the project site and their salary sheet from August 2011 to January 2012 to show that the Respondent deployed employees at the worksite during the

month of August 2011 till January 2012. Even this document does not bear any signature of any person. During the cross examination of RW-1, he deposed that Mr. Gurdeep Singh, the site in-charge of the Respondent was maintaining the attendance register, however neither Mr. Gurdeep Singh was examined nor produced any documents to prove that Mr. Gurdeep Singh was the site in-charge of the Respondent at the relevant time. Further, no evidence has been produced to substantiate the factum of deployment of the Respondent's employee at the worksite or payment made to them. Further, I also noticed that as per the said document, Exhibit RW1/4, the Respondent mentioned that there are 4-5 employees present at site every day from August 2011 till January 2012 for almost 6 months, whereas it is the case of the Respondent themselves that the civil construction was at the initial stage and the stage of the electrical work was not actually reached. Hence it does not inspire confidence why the Respondent deployed so much manpower at site without any substantial work at site. In view of the above mentioned analysis of Exhibit RW1/4, I am of the considered view that Exhibit RW1/4 is not a reliable evidence.

20. That as per the Exhibit PW1/2, the material has to be brought at site with the permission of the site in-charge. No proof has been produced by the Respondent to establish the fact that it has brought any material at site or even the Respondent sought the permission of the Claimant or the concerned site Engineer of the Claimant. Further the Respondent was supposed to raise monthly bills before 7th of every month, however during the period of civil work carried by the claimant at site no bill was raised by the Respondent. The Respondent filed on record only one RA bill dated 15.02.2012 which was raised after the dispute arose between the parties. Further, the said RA Bill neither bear the signature of

the author of the bill nor carry any acknowledgment on behalf of the Claimant. No explanation whatsoever is available on record why monthly bill has not been raised as per the contract especially when the Respondent claimed that its site in-charge was available at site from August 2011.

22. Hence considering the overall facts and circumstances, I hold that the Respondent miserably failed to prove that they have carried out any work at site.

Now, I proceed to decide the second issue, i.e., Whether the termination letter dated 28.05.2012 (Exhibit PW1/9) issued by the Claimant terminating the Work Order dated 11.07.2011 (Exhibit PW 1/2) awarded in favour of the Respondent was legal, valid and in accordance with law.”

7. The challenge to the said Arbitral Award has been dismissed by the Impugned Order, which is in challenge before us in the present appeal.

8. The learned counsel for the appellant submits that the Impugned Award was liable to be set aside as having been induced/affected by fraud. He submits that even prior to the award of work in favour of the appellant, the building for which the respondent had issued the Work Order was booked for unauthorized construction by the Municipal Corporation of Delhi on 14.02.2011. The Work Order was, therefore, issued to the appellant for carrying out illegal work and could not be enforced. He submits that the respondent has intentionally suppressed the above fact from the appellant and the arbitrator, thereby procuring the Award by Fraud. In support of his submission, he places reliance

on the judgment of the Supreme Court in *Venture Global Engineering v. Satyam Computer Services Ltd. & Anr.*, (2010) 8 SCC 660, to contend that even though the fraud has been unearthed after the passing of the Award, the Award is liable to be set aside on the said ground.

9. The learned counsel for the appellant further submits that the Award of Interest granted in favour of the respondent is unreasonable and unjustified. He submits that not only the rate of interest awarded is exorbitant, but also the Award of Interest *pendente lite* is unreasonable inasmuch as there is a huge delay in concluding the Arbitral proceedings. He submits that such delay was not attributable to the appellant and, in fact, the appellant had been making complaints to the Arbitrator of such delay being caused by the respondent.

10. We have considered the submissions made by the learned counsel for the appellant, however, we find no force in the same.

11. Admittedly, the plea of construction not being carried out due to the same being stopped by the Municipal Corporation of Delhi was pleaded by the appellant before the Arbitral Tribunal. Arbitral Tribunal, however, on consideration of the evidence led before it found that it was the appellant who had failed to mobilize resources even after taking the mobilization advance from the respondent. It is indeed surprising that the appellant was at the site of construction, however, it did not plead the illegality of the contract itself before the learned Sole Arbitrator. The same clearly came as an afterthought to the appellant once the Arbitral Award was pronounced against it. The

judgment of the Supreme Court in *Venture Global Engineering* (supra) is, therefore, clearly is of no avail to the appellant.

12. It is also to be kept in mind that the jurisdiction of a Court hearing challenge to an Arbitral Award under Section 34 of the Act is extremely limited and the Court does not sit in appeal over the Arbitral Award. The power of the Court under Section 37 of the Act is even more restricted as the Court is only to ascertain that in the exercise of powers by the Court under Section 34 of the Act, it has not exceeded the scope of the provision of the Act. Where the Award has been confirmed by the Court under Section 34 of the Act, the Court in the exercise of its power under Section 37 of the Act should be even more restrained. [*MMTC Limited v. Vedanta Limited*, (2019) 4 SCC 163]

13. Insofar as the plea of the rate of interest being unreasonable or that the learned Sole Arbitrator should not have awarded *pendente lite* interest where the arbitral proceedings have been delayed is concerned, it may only be noted that Section 31(7) of the Act confers a discretion on the Arbitrator to award interest at such a rate and for such a period as he may determine. The interest, in the present case, is on account of damages for wrongful retention of money by the appellant. It is also to be noted that though the appellant has addressed a few communications to the learned Sole Arbitrator complaining of delay of arbitral proceedings by the respondent, no action was taken by it in terms of the Act to seek redressal against its grievance. It is also admitted that the record of the Award had also been misplaced and had to be re-constructed. We, therefore, do not find the award of Interest in the present case to be unreasonable so as to warrant any

interference from the Court in the exercise of its power under Section 37 of the Act.

14. In view of the above, we find no merit in the present appeal. The same is dismissed.

NAVIN CHAWLA, J

MANMOHAN, J

OCTOBER 29, 2021/rv/P

