IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE
COMMERCIAL DIVISION

Present:

THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE PRASENJIT BISWAS

APO 97 of 2022
IA NO. GA 1 OF 2022
with
AP 1717 OF 2015

Union of India
Vs.
Neo Built Corporation

Appearance:

For the Appellant : **Mr. Ajoy Krishna Chatterjee, Sr. Adv.**

Ms. Sanchita Barman Roy, Adv.

For the Respondent : **Mr. Sakya Sen, Adv.**

Mr. Sabyasachi Sen, Adv.

Judgment On : **31.01.2023**

Harish Tandon, J.

By virtue of an award made and published by the arbitrators on 1.9.2015, the claims under the 5 heads out of 16 to the tune of 2,83,09,412/- was awarded in favour of the respondents herein. The said

award was challenged in AP 1717 of 2015 before this Court and by the impugned judgment the application under Section 34 of the Arbitration and Conciliation Act, 1996 filed by the appellant herein was dismissed. Logical inference from the above facts can be manifestly seen that the rejection of the other claims of the respondent herein was not the subject matter of challenge at the behest of the respondent herein as the challenge to an award was made by the appellant in relation to the claims under 5 heads awarded by the arbitrator.

The genesis of the dispute can be traced when the respondent pursuant to the tender floated by the appellant on 3.10.2008 inviting the application from the persons interested and have requisite resources and capability to execute the work mentioned therein, was adjudged as the successful tenderer and after the negotiation accepted the offer which was followed by the formal agreement having entered into between the appellant and the respondent on 29th July, 2009. The said agreement reserved the stipulated period of completion of work i.e. 4.2.2021 but the appellant cancelled the contract on 12.7.2010 i.e. prior to the stipulated date on the pretext that the respondent herein could only execute 29 per cent of the work and did not meet the deadline indicated in the said agreement.

Immediately after the alleged termination of a contract settlement/negotiation process was activated which ultimately resulted into the reference of dispute to the arbitrators to be appointed in terms of the agreement as well as the general condition of contract having binding force in this regard. The erstwhile presiding arbitrator entered into a reference

and invited the respondent to submit the settlement of claims which was eventually filed on 22nd November, 2011. The appellant filed the counter claim but in the mean time the said presiding arbitrator could not pursue the matter because of unavailability of some of the members of the arbitral tribunal and ultimately the fresh appointments were made and the reply to a counter claim was also filed. The arbitral tribunal invited the parties to lead an evidence on each of the 16 heads of claim and ultimately by making and publishing an award on 1st September, 2015 discarded the claim of the respondent in respect of the claims under 11 heads and awarded the sum under 5 such heads amounting to Rs. 2,83,09,412/-. Thus, the challenge is restricted to the claims awarded by the arbitral tribunal at the behest of the appellant which, according to them, could not have been awarded by the arbitral tribunal.

While allowing the aforesaid claims constituting the awarded sum, the tribunal directed the payment to be made within the stipulated time and further indicated that the failure to pay the sum would attract an interest at the rate of 10 per cent per annum compounded quarterly from the date of expiry of the above period of 60 days till the date of payment. It is pertinent to record that the tribunal noticed at the time of the proceeding that the performance bank guarantee was not encashed by the appellant herein and, therefore, did not include such amount within the award meaning thereby the said performance bank guarantee shall be returned to the respondent having not encashed as on the date of the award.

The appeal under Section 37 of the said Act was dismissed by the impugned order as the Court did not find the award susceptible to be challenged on the parameters of the conditions enshrined therein. The award was basically challenged on the ground that the arbitral award has not considered the various aspects and misconstrued the evidence and, therefore, the same is liable to be set aside on such score.

It is to be remembered that the scope under Section 34 of the said Act is limited to the conditions enshrined therein and cannot be confused with the power bestowed upon the appellate forum. The aforesaid provision cannot be construed to confer power upon the Court to act as a court of appeal nor the interference is contemplated on the basis of other possible views which ought to have been taken by the arbitral tribunal provided the view taken by the arbitral tribunal is possible. When the two views are pitted against each other and the view expressed by the arbitral tribunal cannot be tainted with unreasonability, irrationality or perverse, the arbitral tribunal being the last word on facts and on reasonable interpretation of the various clauses of the agreement, the Court should stay away from interfering with such arbitral award. The test of public policy to an arbitral award has to be understood in the perspective of the fact that the Court in exercise of power under Section 34 of the Act neither act as a court of appeal nor to correct the error of facts. The award passed by the arbitral tribunal has to necessarily pass the muster of quality and the quantity of the evidence relied upon by the parties and it based upon a little evidence or the evidence which cannot be impinged on the quality of a legal mind. The award cannot be said to be invalid on such score. The equality in treatment and

opportunity of leading evidence and hearing is the hallmark of the adversial legal system and the approach of the arbitral tribunal should not be such which comes within the ambit of arbitrary or capricious exercise of the power.

The moment the arbitral tribunal being the last word on facts I have considered the evidence and interpreted the same, there is a little scope of interfering with such award unless the award is contrary to the public policy or the fundamental policy of the country which imbibe within itself the applicability of the substantive law governing the field. The patent illegality principle is intertwined with the public policy and, therefore, it is an ardent duty of the Court to be slow and circumspect and cautious in interfering with the award under the aforesaid provision of the Act.

On the contour of the limited scope, the challenge was founded on the aforesaid claims awarded under the 5 heads that despite the receipt of the notice the respondent failed to achieve the progress in the work which lead the termination of an agreement upon invocation of Clause 62 of the General Condition of Contract, 2001 and the security deposit was forfeited. It was further argued that the finding of the tribunal that the termination of a contract was premature and wrongful as the time was never the essence of a contract or contrary to the basic tenet of law and misinterpretation of the various clauses of the agreement which appears otherwise. The arbitral tribunal considered the aforesaid point and held that Clause 2.12 of Special Condition of Contract contained the provision relating to an extension of time and held that the time was never intended to be an essence of contract.

The tribunal also interpreted and considered the various clauses of the agreement in relation to the premature and wrongful termination of a contract and held that it was terminated in haste and directed the refund of the security as well as an amount of performance guarantee encashed by the respondent.

It appears from the grounds of challenge to an award that those are basically founded on a facts discerning course of an arbitral proceeding and on the basis of the evidence in support thereof the finding of the tribunal is improper.

As indicated above, the perversity as well as the patent illegality can only be perceived when the findings of the arbitral tribunal is based on no evidence or contrary to the provisions of the Act and the law applicable in this regard which cannot be assumed when the tribunal after marshelling the facts and evidence gathered in course of the proceeding arrived at the findings on a legal parameters. We thus do not find that any such ground was made out in an application under Section 34 warranting the interference with the award.

All such points agitated in the instant appeal does not find support on the legal parameters and, therefore, we do not find any justification in interfering with the impugned judgment.

However, a legal point is also taken in the instant appeal that the arbitral tribunal was denuded of the power to award interest on the compound basis. The aforesaid argument is advanced taking a lead from the judgment in case of ***Hyder Consulting (UK) Limited vs. Governor, State of***

Orissa through Chief Engineer Reported in (2015) 2 SCC 189. At the first blush we decided to go into the aforesaid aspect but our attention is drawn to the subsequent clarificatory judgment rendered between the same party reported in (2016) 6 SCC 362 wherein the Apex Court discarded the aforesaid point in the following:

> ***"12. In the present appeal, the question that arises for consideration is whether the High Court, while dealing with an appeal arising from rejecting an objection under Section 34 of the Arbitration and Conciliation Act, 1996, could have modified the award especially the rate of interest determined by the learned arbitrator. As we find, the learned arbitrator, while dealing with the interest component, has directed as follows:***
>
> > ***"Now, therefore, in order to settle the dispute between the parties regarding the basic loss by the petitioner contractor, I allow Rs. 5 lakhs interest @ 16 % with quarterly rest from the date of cause of action i.e. the date of allotment, till date of award and further @ 18 % with quarterly rest from the date of award till its final payment by the respondents, instead of Rs. 1.00 lakh as suggested by the Desert Development Agencies Committee, and also dismiss the claim of the petitioner contractor beyond Rs. 1.5 lakhs."***
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> ***The aforesaid direction is in consonance with the recent pronouncement in Hyder Consulting (UK) Ltd.***

13. The High Court has modified the said rate of interest by stating, inter alia, thus:

> ***"After holding that the arbitrator has the power to award interest on both the contingencies, the same has to be reasonable. The arbitrator, as indicated above, has awarded interest @ 16 % with quarterly rest from the date of cause of action i.e. the date of allotment of work till the date of award and further @ 18 % with quarterly rest from the date of award till its final payment, which in my view, is excessive both pre-reference. I accordingly modify the award to the extent that the respondent claimant shall be entitled to simple interest @ 15 % from the date of cause of action till the date of award and simple interest @ 18 % from the date of award till its final payment. The said interest is awarded keeping in view the provisions of Section 31 of the 1997 Act."***

14. At this juncture, we may repeat at the cost of repetition that the rate of interest granted by the arbitrator is in consonance with Hyder Consulting (UK) Ltd. and hence, there was no justification on the part of the High Court hearing the appeal and it should not have modified the interest component applying equitable principle.

In view of the above quote excerpt from the said report, we do not find that the appellant is justified in raising such plea. On the overall consideration of the points involved in the instant appeal we do not find any

ground warranting interference with the impugned order. The appeal is thus dismissed.

Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

I agree. **(Harish Tandon, J.)**

(Prasenjit Biswas, J.)

Later:

After delivery of the judgment, learned Counsel appearing for the appellant prays for stay of operation of the judgment.

After hearing the respective Counsel, we do not think any justification in acceding to the prayer made before us. Hence, the prayer is rejected.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)