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

% ***Reserved on: 6th May, 2024***
Pronounced on: 29th May, 2024

\+ **O.M.P. (COMM) 331/2020 & I.A. 10114/2024**

GOVT OF NCT OF DELHI
Through Executive Engineer
Flyover Project Division
F-131, PWD
Mukarba Chowk
G.T. Karnal Road,
New Delhi-110033 ..... Petitioner

Through: Mr. Anupam Srivastava, ASC with Ms. Simran Ahuja, Advocate.

versus

M/S DSC LIMITED
E-9, 3rd Floor,
South Extension, Part-II,
New Delhi-110049. ..... Respondent

Through: Mr. Deepak Khurana and Mr. Abhishek Bansal, Advocates.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

JUDGMENT

NEENA BANSAL KRISHNA, J.

1. The Petition under Section 34 of the Arbitration and Conciliation Act, 1996 *(hereinafter referred to as the „Act, 1996")* has been filed on behalf of the petitioner/Govt. of NCT of Delhi, challenging the Award dated 24.09.2014, wherein the Declaration sought by the respondent with regard to the date of completion of work to be 22.09.2010, has been upheld.

2. The petitioner has asserted that the respondent/claimant was awarded the Contract for *construction of Elevated Road over Barapulla Nalla starting from Sarai Kale Khan to Mathura Road, Delhi*, which was to be

completed within 18 months. The date of commencement of Project was 11.09.2008, while the date of completion was 10.03.2010, which was subsequently revised to 01.10.2010. The respondent/claimant *vide* Letter dated 10.02.2011 called upon the petitioner *herein* to examine the documents filed along with the communication and sought grant of extension while accepting the fact that only after completion of the balance work, they shall seek Completion Certificate for commencement of defect liability period. Taking this Letter into consideration and that the work was not completed prior to the date of said communication, the date of completion of the Project was taken as 25.11.2011 by the petitioner. Based on this date of completion, the petitioner exercised its rights under the Contract and levied liquidated damages @10% of the Contract amount as stipulated under the Contract. The petitioner thus, issued Notice for encashment of Bank Guarantee against which the respondent sought restraint by filing a Petition under Section 9 of the Act, 1996.

3. In the interim, the respondent invoked the Arbitration Clause and called upon the petitioner, to appoint an Arbitrator. However, the petitioner resisted the appointment of the Arbitrator on the ground that levy of liquidated damages, is an „excepted matter" and could not be referred to the Arbitration. Without prejudice, learned Sole Arbitrator got appointed, who held the date of completion to be 22.09.2010 and further held that there was no delay on the part of the respondents and thus, concluded that the petitioner was not entitled to levy the damages @10% as it had sought to do.

4. Aggrieved by the said Award, the petitioner has sought to challenge it on the grounds that the conclusions arrived at by the learned Arbitrator, are against the clear and explicit terms and conditions of the Contract as the

Arbitrator *has overlooked the records produced before him* for drawing such a conclusion. Moreover, the evidence produced on behalf of the petitioner, has not been considered.

5. Further, the learned Arbitrator has *not conducted the proceedings in a fair and transparent manner causing prejudice to the rights of the petitioner*. It is asserted that the Award is not in accordance with law and is liable to be set aside.

6. **No formal Reply has been filed on behalf of the respondent. The respondent in its Written Synopsis** has submitted that the Petition is *barred by time* as the petitioner filed this Petition on 23.12.2014, which was returned to the petitioner on various occasions. The objections had to be raised by the Registry time and again, and despite availing 3 opportunities to explain the delay, no plausible explanation has been given in this regard.

7. It is asserted that the claim filed by the respondent, before the learned Arbitrator, was for Declaration of the date of completion. It is argued that the claim of damages was *not an „excepted" matter*. It was only the *quantification of damages that was excepted* but not the levy of liquidated damages. Moreover, there was no delay on the part of the respondent in completing the Project, as has been rightly held by the learned Arbitrator.

8. It is further contended that there were various extensions granted by the Engineer In-charge, without any application by the Contractor to seek extension and no delay can thus, be imputed to the respondent. After the grant of extensions, the petitioner has retracted and is attributing the extensions to the respondent by asserting that while granting extensions, it had reserved its rights to claim damages.

9. The Clause 5 of the Contract dealt with time and extension for delay. Clause 5.2 provided that when delay

> "*If the work(s) be delayed by:-*
> *(i) Force majeure, or*
> *(ii) abnormally bad weather, or*
> *(iii) serious loss or damage by fire, or*
> *(iv) civil commotion, local commotion of workmen, strike or lockout, affecting any of the trades employed on the work, or*
> *(v) delay on the part of other contractors or tradesmen engaged by Engineer-in-Charge in executing work not forming part of the Contract, or*
> *(vi) non-availability of stores, which are the responsibility of Government to supply or*
> *(vii) non-availability or break down of tools and plant to be supplied or supplied by Government or*
> *(viii) any other cause which, in the absolute discretion of the Engineer-ln-Charge is beyond the Contractor's control.*
> *then upon the happening of any such event causing delay, the Contractor shall immediately give notice thereof in writing to the Engineer-in-Charge but shall nevertheless use constantly his best endeavors to prevent or make good the delay and shall do all that may be reasonably required to the satisfaction of the Engineer-in-Charge to proceed with the works."*

10. It is asserted that the contention raised on behalf of the petitioner that the suit for Declaration simplicitor without claiming consequential relief is not maintainable, is not tenable for the simple reason that it is not a Declaration of title sought for but is only a determination of date of completion and is thus, not a Suit for Declaration in the classical sense. Therefore, this objection is not maintainable especially because the maintainability of the claim for Declaration without any consequential relief

was never taken before the Arbitrator. This plea cannot be now permitted to be taken for the first time. Reliance has been placed on the case of *MST Rukhmabai vs. Lala Laxminarayan and Ors.* (1960) SCR 253; *Maganbhai Govindbhai Parmar vs. Ramanbhai Gambhirbhai Patel* MANU/GJ/0909/2018; *Vemareddi Ramaraghava Reddy and Others. Vs. Konduru Seshu Reddy and Others* AIR 1967 SC 436; *Karan Singh (since deceased) through his LRs and others vs. Bhagwani (since deceased) through her LRs* 2017 SCC OnLine P&H 5387 and M*/s Supreme General Films Exchange Ltd. vs. His Highness Maharja Sir Brijnath Singhji Deo of Maihar and Others* (1975) 2 SCC 530.

11. Furthermore, it is argued that the learned Tribunal has rightly observed that there are no losses proved by the petitioner. The road was opened within the extended time and minor discrepancies/repairs that were undertaken subsequently, cannot be deemed to be non-completion of the work. *No legal losses have been proved by the petitioner* and the learned Arbitrator has rightly decided the controversy. It is a well-reasoned order based on the evidence and the documents and does not call for any interference.

12. **The respondent in its Supplementary brief Synopsis** has stated that the findings in the Award, have been arrived at after an appreciation of the evidence and do not warrant interference under Section 34 of the Act, 1996 unless they are shown to be perverse. It is asserted that the petitioner has not stated grounds or reasons for setting aside the Award and hence, the Award cannot be set aside. Reliance is placed on the case of *UHL Power Company Ltd. v. State of Himachal Pradesh*, (2022) 4 SCC 116, and *Atlanta Limited v. UOI*, 2022 (3) SCC 739 in this regard.

13. It is further contended that the scope of interference under Section 34 of the Act, 1996 is very limited. Reference has been made to the case of *Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation Limited*, (2022) 1 SCC 131; *Dyna Technologies Private Limited v. Crompton Greaves Limited*, (2019) 20 SCC 1; *Patel Engineering Limited v. North Eastern Electric Power Corporation Limited*, (2020) 7 SCC 167; *Union of India v. Annavaram Concrete Private Limited*, 2021 SCC OnLine Del 4211, and *Central Government Employees Welfare Housing Organisation v. Labh Construction & Industries Ltd*., 2019 SCC OnLine Del 8236.

14. **Learned counsel appearing on behalf of the petitioner in its Written Submissions** has vociferously contended that the *question of liquidated damages, was an excepted matter* within the domain of the Superintendent Engineer exclusively and could not have been questioned in the Arbitration proceedings. Once the parties have decided that certain matters are to be decided by the Superintending Engineer, the same could not have been the subject matter of the Arbitration proceedings. For this Reliance has been placed on *Vishwanath Sood vs. Union of India*, (1989) 1 SCC 657 and on *Mitra Guha Builders (India) Company vs. Oil And Natural Gas Corporation Limited*, (2020) 3 SCC 222 and *J.G. Engineers Private Limited vs. Union of India and Another*, (2011) 5 SCC 758.

15. Learned counsel for the petitioner has submitted that the scope of the present Petition has to be governed under Section 34 as it existed before the Amendment Act, 2015. The impugned Award has been passed on 24.09.2014, while the objection has been filed on 22.12.2014. The Hon‟ble Supreme Court in the case of *Ssangyong Engineering and Construction vs.*

NHAI, AIR 2019 SC 5041, has held that the objections that were filed before 31.10.2015, shall be governed by unamended law. It, therefore, follows that the principles for challenging the Award under Section 34 of the Act, shall be governed by the principles laid down in *ONGC vs. SAW PIPES*, AIR 2003 SC 2629.

16. It is argued that the present *Award is against the Fundamental Policy of Indian Law* as it is violative of the statute and in disregard of the Orders of the Superior Court. The approach of the learned Arbitrator was not judicial and he *failed to follow the principles of natural justice* and did not consider the facts and the evidence, which was led by the parties. The conclusions arrived at by the learned Arbitrator, *are perverse* and against the Fundamental Policy of Indian Law. It is further argued that the Award suffers from *patent illegality*.

17. It is further argued on behalf of the petitioner that the relief claimed by the respondent in his Statement of Claim, was barred under Section 34 of the Specific Relief Act as a Suit simplicitor for Declaration, without any consequential relief, is not maintainable. For which reliance has been placed on *UOI vs. Ibrahim Uddin*, (2012) 8 SCC 148 and *Akkamma vs Vemavathi*, 2021 SCC Online SC 1146. Admittedly, the petitioner *vide* its Letter dated 31.10.2012, has withheld the amount of Rs.4,97,04,000/-, from the Running Bills. Instead of seeking the consequential relief in the form of recovery of this amount or any other claim arising out of the Contract, the respondent has sought bare Declaration, which is not maintainable under the law.

18. Learned counsel on behalf of the petitioner, has further argued that the *petitioner cannot be estopped from claiming liquidated damages for delay in completion of work merely because it granted extensions to the respondent*,

to complete the work. In terms of Clause 5.3 and 5.4 of GCC, time was the essence of the Contract, which could be extended if grounds mentioned in Clause 5 were met. All the extensions were granted to the respondent, subject to and without prejudice to the rights of the Government to recover liquidated damages. In terms of Clause 3 of Section 55 of the Indian Contract Act, 1872 the promisee is entitled to recover compensation or loss occasioned by the non-performance of contract by the promisor by giving Notice to the promisor of his intention to do so.

19. It is further argued that the work can be said to be completed only if it satisfies the conditions of Clause 8 of GCC, which contemplates that the Project is said to be completed only when the Final Certificate of completion, is issued to the Contractor. The Work shall not be treated as complete unless the Contractor has removed from the premises, all the scaffolding, surplus materials, rubbish and all huts and sanitary arrangement that have been erected at the site, at the time of execution of the Project. It is contended that the Final Certificate of completion has been issued only on 25.11.2011 and has to be considered as the date of completion of the Project.

20. It is further argued that the learned Arbitrator observed that the road was worthy of taking the traffic load in connection with the Common Wealth Games and thus, was complete for all practical purposes. However, during the hosting of Commonwealth Games, the pride of the Nation was at stake. Hence, the traffic movement was permitted only towards the Commonwealth Games venues, which cannot be treated as *„commercial traffic load"*, for which, reference may be made to Letter dated 22.09.2010.

21. In the end, it has been argued that the finding of the learned Arbitrator that because the petitioner did not suffer any loss or damages, it is not

entitled to claim any damages, is erroneous and contrary to the established law. In *ONGC* (Supra), the Apex Court has held that the liquidated damages need not be proved in all kinds of cases; if there is a delay in completing the construction of road or bridge within the stipulated time then it would be difficult to prove how much loss is suffered by the State.

22. It is, therefore, submitted that the option of getting the incomplete work done from a third party at the expense of the Contractor, is an option available to the Chief Engineer, but it is not necessary that it would be availed by him.

23. Therefore, it is submitted that the Award suffers from patent illegality and is against the Fundamental Policy of Indian Law and is liable to be set-aside.

24. Submissions heard and the record including the written submissions perused.

25. In the Case of *Ssangyong Engineering and Construction* (supra), the Apex Court has clarified that in case Objections under S.34 of the Act,1996 have been filed prior to 23.10.2015, but are pending for disposal then the unamended Act, prior to 2015 in effect applies.

26. The grounds of challenge under Section 34 of the Act, 1996, are well established which is Fundamental Policy and patent illegality.

27. The scope of a challenge under Section 34 of the Arbitration and Conciliation Act, 1996 is limited to the grounds stipulated in Section 34 as held in *MMTC Limited v. Vedanta Ltd*, (2019) 4 SCC 163. Comprehensive judicial literature on the scope of interference on the ground of Public Policy under Section 34 was postulated in *Associate Builders v. DDA*, (2015) 3 SCC 49. The Apex Court placed reliance on the judgment of *ONGC v. Saw*

Pipes, (2003) 5 SCC 705 to determine the contours of Public Policy wherein an award can be set aside if it is violative of „*The fundamental policy of Indian law"*, „*The interest of India"*, „*Justice or morality*" or leads to a „*Patent Illegality"*.

28. For an Award to be in line with the „*The fundamental policy of Indian law"*, the Tribunal should have adopted a judicial approach which implies that the Award must be fair reasonable and objective and in accordance with the law of the land. The ground of „*patent illegality*" is applied when there is a contravention of the substantive law of India, the Act, 1996 or the rules applicable to the substance of the dispute.

29. In *Hindustan Zinc Limited v. Friends Coal Carbonisation*, (2006) 4 SCC 445, the Apex Court referred to the principles laid down in *Saw Pipes* (supra) and clarified that it is open to the court to consider whether an Award is against the specific terms of contract, and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

30. The Apex Court in the case of *Ssangyong Engineering & Construction Co. Ltd.* (Supra), has exhaustively dealt with the expression *"patent illegality*" and which acts of the Arbitral Tribunal would come within the purview of patent illegality. The only correct interpretation of a contract would be if no reasonable person could have arrived at a different conclusion while interpreting the relevant clauses of the contract and that any other interpretation would be irrational and in defiance of all logic, however, the findings would suffer from the vice of irrationality and perversity if the Arbitrator arrived at his findings by taking irrelevant factors into account and by ignoring vital clauses of the contract. Hence, the Apex

Court held that the court could intervene and review the merits of an award if it is found to be on wrong interpretation of the Contract and thus, „patently illegal".

31. Against this background, the question which arises for the consideration of this court is: whether the Award of the learned Arbitrator warrants judicial interference on the grounds as narrated above.

32. **The first main objection** taken on behalf of the petitioner, is that levy of liquidated damages was ***an excepted matter*** *falling in the exclusive jurisdiction of the Superintendent Engineer, in terms of Clause 5 of the Contract*. It was not arbitrable and the learned Arbitrator lacked jurisdiction to arbitrate in the present matter. Thus, the Fundamental Issue before the learned Arbitrator was whether the levy of liquidated damages, in terms of Clause 5 of the Contract, were final and an excepted matter not falling within the jurisdiction of the Arbitrator.

33. The argument of the petitioner has been specifically addressed by the learned Arbitrator, who has observed that *„excepted matters", as the parties agreed, do not require any further adjudication since the Agreement itself provides for a named adjudicator -concurrence to the same obviously is presumed by reason of the unequivocal acceptance of the terms of the Contract by the parties and this is where the Courts have found our lacking in its jurisdiction to entertain an application for reference to the Arbitration in regard to such disputes.*

34. It was observed that this has been a consistent view taken in various Judgments. Therefore, the quantum as stipulated in the Contract, once calculated by the Superintendent Engineer, in terms of the Contract, is non-arbitrable as it comes within the category of excepted matter and the

quantum of liquidated damages, cannot be arbitrated afresh before the learned Arbitrator.

35. However, it was noted that the precursor to imposition of the liquidated damages, is the whether there was a delay, which entails imposition of the penalty of liquidated damages. Unless there is a finding that there was a delay and a circumstance making the respondent liable for liquidated damages, the same, even if calculated by the Superintendent Engineer, in accordance with the terms of the Contract, cannot be imposed. Therefore, the core issue was whether in fact there was any delay on the part of the respondent, which did not form part of the excepted category and was, therefore, arbitrable.

36. For this reliance may also be placed on *State of Karnataka vs. Shree Rameshwara Rice Mills*, 1987 (2) SCC 160, wherein the Apex Court made a clear distinction between adjudicating upon an issue relating to breach of condition of Contract and the right to access damages arising from such breach of condition. It has been held that while the right to quantify the damages may be excepted, but this was subsidiary to the adjudication whether indeed there was any breach of condition.

37. Likewise, in the case of *Vishwanath Sood* (supra), it was observed that once supremacy is given to the Superintendent Engineer to decide about the disputes between the two parties, the same was not arbitrable as the Contract itself provided a complete machinery for resolution of the disputes.

38. The Supreme Court in the case of *Bharat Sanchar Nigam Limited And Another vs. Motorola India Private Limited* (supra), dealt with a similar Clause, wherein one of the Clauses provided that the delay in the performance of the obligations by the Contractor, would result in the

sanctions namely forfeiture of performance security in addition to imposition of liquidated damages and/or termination of Contract on default. The other Clause of the Contract qualified the principles for calculation of the liquidated damages. While considering these two Clauses, it was held that for imposition of liquidated damages, there has to be a condition precedent and a finding that there has been a delay on the part of the supplier in discharging his obligation for delivery, under the Agreement. T*he Clause imposing liquidated damages would be attracted only if there is finding of delay on the part of the supplier while the determination/quantification of liquidated damages may be an excepted matter wherein the decision of the Superintendent Engineer, may be final and binding but before reaching to that Clause, there has to be a finding of there being a delay.* It was observed that there was no mechanism provided as to who would decide that there was a delay on the part of the supplier. Consequently, it was concluded that the question of determination of delay was not an excepted matter while quantification of liquidated amount, is an excepted matter. It was, therefore, held that the question of determination of delay, is not an excepted matter and has to be necessarily arbitrated and is an arbitrable dispute.

39. Along the similar lines, in the case of *J.G. Engineers Private Limited* (supra), while interpreting similar Clauses, it was held that while the quantification of the liquidated damages as stipulated in the Contract, was not arbitrable and was an excepted matter, but that Clause can be invoked only after it is determined that there was a delay on the part of the Contractor. In case it is found that the delay was indeed on the part of the Contractor, the question of getting the work completed from a third party and also the issue of imposition of liquidated damages, would arise. Once

the Arbitrator has recorded the finding after appreciation of evidence and material that the Contractor was not responsible for the delay and that the termination was wrongful, the question of imposition of liquidated damages would not become applicable.

40. From the above legal principles, it is evinced that *the question of determination of whether indeed, there was a delay is not an excepted matter* and it is only the quantum of damages which is non-arbitrable. Thus, the learned Arbitral Tribunal has rightly observed that the question of determination of delay on the part of the respondent, was not an excepted matter and has rightly entered into the arbitration on this aspect.

41. **The second aspect** which arises for consideration is whether the learned Arbitrator has rightly held that the Contract stood completed on 22.09.2010.

42. The respondent Contractor has sought a Declaration in respect of the date of completion. According to the claimant, the road got completed on 22.09.2010 and a Letter dated 27.09.2010 was written to the Special Commissioner, Delhi Police by the Project Manager-CW-II, wherein it was clearly mentioned that the main structural work of the Barapulla elevated road was complete and the road can be immediately opened for Commonwealth Games related traffic. However, few minor finishing and other works are yet to be carried out on the road. However, access to this road had been denied to PWD Officers and the Construction Agency since 25.09.2010. A letter dated 26.09.2010 had been written by the Executive Engineer CW-III to issue permission to the vehicles of PWD Officers and the Construction Agency, as per the given list but no permission was granted thus far. It is further stated that the elevated road is being used for regular

movement for such an important event, hence any deficiency that remains in the service or if any untoward accident happened, PWD or the Construction Agency should not be held responsible for the same.

43. Furthermore, there is a Letter dated 07.12.2010, whereby the road was inaugurated and the elevated road was officially opened by the Chief Ministers of Delhi, for the traffic.

44. The learned Arbitrator, therefore, has relied on the documents as placed on record by the parties, to conclude that the construction of the road having been completed on 22.09.2010.

45. The learned Arbitrator had given in detail the reasons for not accepting the date of completion to be 25.11.2011. It has been observed that *firstly*, the extensions given by the petitioner, from time to time for completion of the project were, unilateral. *Secondly*, once the road had been opened to traffic, there was no question of the Project not being completed. *Thirdly*, even if there were minor defects noted in the Project, the same were not of the nature which prevented the road from being used by the traffic and were of the kind which could have and were infact, rectified during this intervening period when eventually the petitioner chose to give the Completion Certificate on 25.11.2011. The formal Completion Certificate may have been given till this date, but from the documents of the petitioner itself, it was evident that the Project had been completed within the time.

46. It is also observed by the learned Arbitrator that there has been a supply of cement reflected in the records beyond 20.09.2010 but there is no explanation whatsoever forthcoming as to what purpose was this cement used.

47. In the end, it may be observed that the learned Arbitrator has rightly observed that the question of quantification of liquidated damages would have arisen if it was established by the petitioner that they had suffered some losses as is the requirement under Section 55 and Section 74 of the Contract Act. There is not a whisper about any losses having been suffered by the petitioner during the intervening period of September 2010 till November 2011, which is a condition precedent for imposition of any liquidated damages.

48. The learned Arbitrator has given a well-reasoned Order on the basis of the documents that were duly consideration, and has given an interpretation of the Project being completed on 20.09.2010, which is within the extended time as was awarded by the petitioner. The findings of the Ld. Arbitrator are neither against the fundamental policy of the land nor are they perverse or patently illegal. The challenge of the petitioner to the Award is purely on merits and there can be no reappreciation of findings of facts under Section 34 of the Act, 1996.

49. The learned Arbitrator after due consideration of the evidence on record, has given a well-reasoned Award which does not merit any interference.

50. At this stage, it is pertinent to note that the respondent has raised the objection of limitation wherein it is stated that the petitioner has not sufficiently explained the reasons for delay in re-filing. However, *vide* Order dated 03.11.2015, the IA. bearing No. 8561/2015 filed by the petitioner for Condonation of delay in refilling was allowed. Thus, this objection has already been dealt with by the Court.

51. The Petition is without merits and is hereby dismissed. The pending application also stands disposed of.

(NEENA BANSAL KRISHNA)
JUDGE

MAY 29, 2024/RS