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

**Date of decision: 4th July, 2014.**

\+ **FAO(OS) 286/2014 & Caveat No. 538/2014 & CMs No. 10368/2014 (for condonation of 18 days delay in filing) & 10369/2014 (for condonation of 29 days delay in re-filing)**

**DELHI STATE INDUSTRIAL & INFRASTRUCTURE DEVELOPMENT CORPORATION LTD ..... Appellant**

Through: Ms. Anusuya Salwan with Mr. Kunal Kohli, Adv.

Versus

**M/S RAMA CONSTRUCTION COMPANY THR ITS PARTNER R.N. GUPTA ..... Respondent**

Through: None.

**CORAM:**
**HON'BLE THE CHIEF JUSTICE**
**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

**RAJIV SAHAI ENDLAW, J.**

1. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (Arbitration Act) impugns the order dated 12th February, 2014 of the learned Single Judge of this Court of dismissal of objections under Section 34 of the Arbitration Act being O.M.P. No.774/2013 preferred by the appellant for setting aside of the arbitral award dated 28th May, 2013.

2. Though the respondent has filed Caveat No.538/2014 but none appears. However, on perusal of the memorandum of appeal, *prima facie*

not finding any merit in the appeal, we have heard the counsel for the appellant *in extenso*. Further, though the appeal is accompanied with applications for condonation of 18 days delay in filing thereof and of 28 days delay in re-filing of the appeal but as aforesaid, we have chosen to hear the counsel for the appellant on merits of the appeal.

3. Disputes and differences arose between the parties with respect to the work of "Modernization of the Community Work Centre (composite work) complete including civil development works, internal electrification and allied works", for which order was placed by the appellant on the respondent. The said order and the contract signed by the parties in pursuance thereto, provided for resolution of the said disputes by arbitration. The respondent filed an application under Section 11 of the Arbitration Act and which was disposed of by appointing a retired Chief Justice of this Court as the sole Arbitrator. The respondent made a claim against the appellant for a total sum of Rs.1,45,85,047/- and which was contested by the appellant. No counterclaim was made by the appellant on the respondent. Though the Arbitral Tribunal, vide award dated 1st April, 2013, also allowed the claim of the respondent of Rs.3,77,861/- towards the value of the work done by the respondent as per the first running account bill and not paid for, as well as

the claim of the respondent for Rs.3,86,872/- towards the bank charges incurred for the performance bank guarantee furnished in favour of the appellant but the challenge by the appellant before the learned Single Judge as well as in this appeal, is confined to the award, insofar as allowing the claim of the respondent for Rs.1,22,00,000/- towards loss of profit @ 10% of the unexecuted amount of the contract. The other claims of the respondent were rejected by the Arbitral Tribunal.

4. The challenge by the counsel for the appellant to the award of Rs.1,22,00,000/- towards loss of profit is on the ground of the same being contrary to law. It is argued that no claim for loss of profit could have been allowed without the respondent proving any loss suffered and which had not been done and the award to the said extent is thus liable to be set aside.

5. It is not as if the Arbitral Tribunal has not dealt with the said contention of the appellant. The Arbitral Tribunal relying on ***A.T. Brij Paul Singh Vs. State of Gujarat*** (1984) 4 SCC 59, ***Mohd. Salmatullah Vs. Govt. of Andhra Pradesh*** AIR 1977 SC 1481 and ***Dwarka Das Vs. State of Madhya Pradesh*** AIR 1991 SC 1031 has held that where the breach of contract is held to have been proved, the erring party is legally bound to compensate the other party to the agreement and for estimating the amount

of damages, the Court should make a broad evaluation, rather than going into minute details. It was further held that the claim of the respondent contractor for future profits was justified as the respondent contractor expected some profits from the agreement and the same could not be disallowed merely on the ground that there was no proof that the respondent contractor had suffered actual loss to the extent of the amount claimed.

6. The learned Single Judge rejected the challenge made by the appellant to the arbitral award holding that the finding returned by the Arbitral Tribunal, to the effect that the works could not have been executed without the structural drawings and which were not provided by the appellant, is a finding of fact and the appellant had been unable to show the same to be perverse or contrary to the evidence brought on record or in ignorance of the evidence brought on record and thus required no interference. It was further held that the Court could not sit in appeal over the award and insofar as the quantification of compensation is concerned, the view taken by the learned Arbitrator being a plausible view, founded on several decisions of the Supreme Court, could not be a ground for setting aside of the award.

7. The counsel for the appellant before us also has argued that the respondent had failed to prove that it was in a state of readiness to execute its

part of contract or had suffered any loss owing to the said reason. Relying on ***Bharat Coking Coal Ltd. Vs. L.K. Ahuja*** (2004) 5 SCC 109 it is further sought to be argued that loss of profit computed @ 10% of the value of unexecuted work could not have been awarded.

8. We are unable to agree. We have recently in our judgment dated 2nd July, 2014 in FAO(OS) No.242/2014 titled ***State Trading Corporation of India Ltd. Vs. M/s Toepfer International Asia Pte Ltd.***, relying on ***Thyssen Krupp Werkstoffe Vs. Steel Authority of India*** MANU/DE/1853/2011 and ***Shree Vinayak Cement Clearing Agency Vs. Cement Corporation of India*** 147 (2007) DLT 385 held that the scope of appeal under Section 37 is even more restricted than the scope of interference under Section 34 of the Act with the award. With respect to the scope of interference with the arbitral award, under Section 34 of the Act, we *inter alia* held:

> *"6. ....A Section 34 proceeding, which in essence is the remedy of annulment, cannot be used by one party to convert the same into a remedy of appeal. In our view, mere erroneous/wrong finding of fact by the Arbitral Tribunal or even an erroneous interpretation of documents/evidence, is non-interferable under Section 34 and if such interference is done by the Court, the same will set at naught the whole purpose of amendment of the Arbitration Act.*
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> *7. Arbitration is intended to be a faster and less expensive alternative to the courts. If this is one's motivation and*

*expectation, then the finality of the arbitral award is very important. The remedy provided in Section 34 against an arbitral award is in no sense an appeal. The legislative intent in Section 34 was to make the result of the annulment procedure prescribed therein potentially different from that in an appeal. In appeal, the decision under review not only may be confirmed, but may also be modified. In annulment, on the other hand, the decision under review may either be invalidated in whole or in part or be left to stand if the plea for annulment is rejected. Annulment operates to negate a decision, in whole or in part, thereby depriving the portion negated of legal force and returning the parties, as to that portion, to their original litigating positions. Annulment can void, while appeal can modify. Section 34 is found to provide for annulment only on the grounds affecting legitimacy of the process of decision as distinct from substantive correctness of the contents of the decision. A remedy of appeal focuses upon both legitimacy of the process of decision and the substantive correctness of the decision. Annulment, in the case of arbitration focuses not on the correctness of decision but rather more narrowly considers whether, regardless of errors in application of law or determination of facts, the decision resulted from a legitimate process.*

*8. In the case of arbitration, the parties through their agreement create an entirely different situation because regardless of how complex or simple a dispute resolution mechanism they create, they almost always agree that the resultant award will be final and binding upon them. In other words, regardless of whether there are errors of application of law or ascertainment of fact, the parties agree that the award will be regarded as substantively correct. Yet, although the content of the award is thus final, parties may still challenge the legitimacy of the decision-making process leading to the award. In essence, parties are always free to argue that they are not bound by a given "award" because what was labeled an award is the result of an illegitimate process of decision.*

*9. This is the core of the notion of annulment in arbitration.*

*In a sense, annulment is all that doctrinally survives the parties' agreement to regard the award as final and binding. Given the agreement of the parties, annulment requires a challenge to the legitimacy of the process of decision, rather than the substantive correctness of the award.*

*11. .....A perusal of the various grounds enunciated in Section 34 will show that the same are procedural in nature i.e. concerning legitimacy of the process of decision....*

*17. The Supreme Court in* ***Rashtriya Ispat Nigam Ltd. Vs. Dewan Chand Ram Saran*** *(2012) 5 SCC 306 refused to set aside an arbitral award, under the 1996 Act on the ground that the view taken by the Arbitral Tribunal was against the terms of the contract and held that it could not be said that the Arbitral Tribunal had travelled outside its jurisdiction and the Court could not substitute its view in place of the interpretation accepted by the Arbitral Tribunal. It was reiterated that the Arbitral Tribunal is legitimately entitled to take the view which it holds to be correct one after considering the material before it and after interpreting the provisions of the Agreement and if the Arbitral Tribunal does so, its decision has to be accepted as final and binding. Reliance in this regard was placed on* ***Sumitomo Heavy Industries Ltd. Vs. ONGC Ltd.*** *(2010) 11 SCC 296 and on* ***Kwality MFG. Corporation Vs. Central Warehousing Corporation*** *(2009) 5 SCC 142. Similarly, in* ***P.R. Shah, Shares & Stock Broker (P) Ltd. V. B.H.H. Securities (P) Ltd.*** *(2012) 1 SCC 594 it was held that a Court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating evidence and an award can be challenged only under the grounds mentioned in Section 34(2) and in the absence of any such ground it is not possible to reexamine the facts to find out whether a different decision can be arrived at. A Division Bench of this Court also recently in* ***National Highways Authority of India Vs. M/s. Lanco Infratech Ltd.*** *MANU/DE/0609/2014 held that an interpretation placed on the contract is a matter within the jurisdiction of the Arbitral Tribunal and even if an error exists, this is an error of fact*

> *within jurisdiction, which cannot be reappreciated by the Court under Section 34 of the Act. The Supreme Court in* ***Steel Authority of India Ltd. Vs. Gupta Brother Steel Tubes Ltd.*** *(2009) 10 SCC 63 even while dealing with a challenge to an arbitral award under the 1940 Act reiterated that an error by the Arbitrator relatable to interpretation of contract is an error within his jurisdiction and is not an error on the face of the award and is not amenable to correction by the Courts. It was further held that the legal position is no more res integra that the Arbitrator having been made the final Arbiter of resolution of dispute between the parties, the award is not open to challenge on the ground that Arbitrator has reached at a wrong conclusion."*

9. We may further add that the parties, by agreeing to be bound by the arbitral award and by declaring it to be final, agree to be bound also by a wrong interpretation or an erroneous application of law by the Arbitral Tribunal and once the parties have so agreed, they cannot apply for setting aside of the arbitral award on the said ground. Even under the 1940 Act where the scope of interference with the award was much more, the Apex Court in ***Tarapore and Co. Vs. Cochin Shipyard Ltd., Cochin*** (1984) 2 SCC 680 and ***U.P. Hotels Vs. U.P. State Electricity Board*** (1989) 1 SCC 359 held that the arbitrator's decision on a question of law is also binding even if erroneous. Similarly, in ***N. Chellappan Vs. Secretary, Kerala State Electricity Board*** (1975) 1 SCC 289 it was held that even if the umpire committed an error of law in granting amount, it cannot be said to be a ground for challenging the validity of the award; the mistake may be a

mistake of fact or of law.

10. As far as the reliance placed by the counsel for the appellant on ***Bharat Coking Coal Ltd.*** supra is concerned, not only is the same of an era under the Arbitration Act, 1940 and the provisions whereof relating to interference with the arbitral award were materially different from the provisions under the 1996 Act but the Supreme Court in that case set aside the award for loss of profit in the measure of 15% of the value of the unexecuted work, on the ground of the claimant therein under the other heads having been awarded compensation for delay in payment of the amount payable under the contract or for other extra works and which is not the position in this instant case. Further, the Supreme Court in ***Bharat Coking Coal Ltd.*** supra was considering a claim for loss of profit arising out of diminution in turn over on account of delay in the completion of work and not on the account of the contractor having been prevented from executing balance work for reasons attributable to the other party, which distinction was carved out by the Supreme Court in ***McDermott International Inc. Vs. Burn Standard Co. Ltd.*** (2006) 11 SCC 181. Thus, the said judgment is not applicable.

11. Rather, finding the counsel for the appellant to be arguing this appeal

as an appeal against the judgment of a Civil Court, we enquired from the counsel for the appellant that if the appellant desired so, why did the appellant insist on the arbitration clause in the contracts entered into and work orders placed by it. No answer was forthcoming.

12. We do not find any ground for interference within the meaning of Section 34 of the Arbitration Act to have been made out.

13. There is no merit in this appeal, which is dismissed. However, no costs.

**RAJIV SAHAI ENDLAW, J.**

**CHIEF JUSTICE**

**JULY 04, 2014**
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