

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 14.09.2021

+ **O.M.P. (COMM.) 184 of 2021**

M/S SIDDHARTH CONSTRUCTIONS CO.

.... Petitioner

versus

**INDIA TOURISM DEVELOPMENT
CORPORATION LTD**

.....Respondent

Advocates who appeared in this case:

For the Petitioner: Mr. Kaustubh Anshuraj, Advocate.

For the Respondent: Mr. Anish Chawla, Advocate.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter the 'A&C Act') impugning an arbitral award dated 09.05.2020 (hereinafter the 'impugned award') delivered by the Arbitral Tribunal constituted by a former judge of this Court as the Sole Arbitrator.

2. The impugned award has been rendered in the context of disputes that have arisen between the parties in relation to an agreement dated 02.07.2012 (hereafter 'the Agreement').

3. By the impugned award, the Arbitral Tribunal has partly denied the claims preferred by the petitioner. The Arbitral Tribunal has denied that petitioner's claim for damages and loss of profit on account of delay in completion of works.

Factual Context

4. India Tourism Development Corporation Ltd. (hereinafter referred to as "ITDC") invited tenders on 09.02.2011 for "*Construction of Memorial of Smt. Vidyavati Ji Mother of Great Martyr Shaheed Bhagat Singh Ji*" at Village Moranwali, District Hoshiarpur, Punjab (hereinafter referred to as the "Memorial").

5. The petitioner tendered its bid to execute the works on 11.04.2011, pursuant to the aforementioned notice inviting tenders. By a letter dated 23.11.2011, ITDC accepted the petitioner's bid to execute the works at a price of ₹3,67,73,933.74/-.

6. Thereafter, ITDC issued a detailed Work Order – Work Order no. ITDC Engg/DGM/Moranwali/2012 dated 20.12.2011 – in favour of the petitioner. On 02.07.2012, the parties entered into the Agreement. In terms of the Agreement, the petitioner was obliged to complete the works within a prescribed period of 12 (twelve) months to be reckoned from the seventh day of issue of the Letter of Intent or, the date of actual handing over the site, whichever was later. Therefore, the work was to be completed by 19.12.2012.

7. However, the works could not be completed within the stipulated time. The same were completed on 30.01.2018; that is, after a delay of five years, one month and eleven days. The petitioner claims that the delay in completion of works is for reasons attributable to ITDC.

8. Whilst the petitioner claimed that the delays were justified, ITDC asserted that the petitioner was liable for a delay of thirty-nine days.

9. The RA Bills (Running Account Bills) were cleared by ITDC. However, there was a considerable delay in clearance of the Final Bill. The same was cleared in two tranches. The first tranche of ₹28 Lacs was paid on 20.11.2018, that is, after a delay of ten months. The second tranche of ₹10,82,249/- was paid on 02.02.2019, that is, more than one year after completion of the work. In addition to this, ITDC had also deducted certain amounts from the payments due to the petitioner including compensation of ₹4 lacs on account of delay of thirty-nine days in completion of the works.

10. On 14.03.2019, the petitioner sent a notice and requested for appointment of an arbitrator with mutual consent. It asserted that the appointment procedure mentioned in Clause no. 48 of the Agreement was contrary to Section 12(5) of the A&C Act and, proposed the name of Sh. Amarjit Singh, (Retd.) Chief Engineer, Mohali for being appointed as the Arbitrator with mutual consent.

11. However, ITDC unilaterally appointed Justice (Retired) S.P. Garg, a former judge of this Court as the Sole Arbitrator.

12. The petitioner filed its Statement of Claims raising several claims. A tabular statement summarizing the claims made, is set out below:-

Claim No. 1(a)	Compensation for delay which was deducted by ITDC- ₹4,00,000/-
Claim No. 1(b)	Refund of security deposit-₹ 5,00,000/-
Claim No. 1(c)	Compensation for the deduction towards water and electricity charges- ₹1,48,957/-
Claim No. 1(d)	Compensation for the deduction from the final bill on account of M/S Aditya Associates- ₹1,05,891/-
Claim No. 1(e)	Compensation for the deduction on account of Goods and Service Tax (GST)- ₹3,74,448/-
Claim No. 1(f)	On account of granite stone flooring work, paid as 'Kota Stone Work'- ₹4,80,000/-
Claim No. 1(g)	On account of non-insurance-₹96,020/-
Claim No.1(h)	On account of Non-Insurance Workmen Compensation Policy (WCP)- ₹15,404/-
Claim No. 1(i)	On account of crafting of bronze statutes- ₹10,00,000/-
Claim No. 2	On account of losses and damage- ₹93,27,876/-
Claim No. 3	On account of loss of profit- ₹2,80,35,000/-
Claim No.4	On account of 10% of the reduced work- ₹6,60,801/-
Claim No.5	On account of balance security with interest- ₹5,00,000/-

13. ITDC raised counter-claims. The same are summarized as under:-

Counter Claim No. 1	Expenses incurred on security guards- ₹8,29,595/-
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Counter Claim No. 2	On account of salary amount paid to the engineers posted in Punjab-₹54,08,954/-
Counter Claim No. 3	On account of extra salaries paid by ITDC to their other staff at Head Quarters-₹14,85,000/-
Counter Claim No. 4	On account of miscellaneous charges incurred during the delayed period-₹10,53,201/-
Counter Claim No.5	On account of business loss- ₹1,73,93,099/-

14. On 11.11.2019, the Arbitral Tribunal made an interim award in favour of the petitioner for refunding the sum of ₹5 lacs paid by the petitioner to ITDC as Security Deposit.

15. The Arbitral Tribunal rendered the impugned award on 09.05.2020. The interim award passed on 11.11.2019 for return of ₹5 lacs towards Security Deposit forms a part of the impugned award.

16. The Arbitral Tribunal also awarded an aggregate sum of ₹11,40,720 under Claim nos. 1 (a), (c), (d), (e), (g), (h) with interest at the rate of 9% per annum with effect from 09.05.2019 till the date of the award. Further, the petitioner was also awarded future interest at the rate of 9% per annum from the date of the award till the date of payment, in the event, the same was not paid within a period of sixty days.

17. Aggrieved by the impugned award to the extent that it disallowed its claims, the petitioner has filed the present petition.

Submissions

18. Mr. Kaustubh Anshuraj learned counsel appearing for the petitioner, assailed the impugned award primarily on the grounds that the findings of the Arbitral Tribunal were inconsistent. He submitted that by a letter dated 24.08.2018, which was an admitted document, ITDC had accepted that at least 389 days delay was attributable to ITDC. He pointed out that the Arbitral Tribunal had relied on the said document and allowed the petitioner's Claim no. 1(a). But it had disregarded the same and disallowed the petitioner's claim for damages and loss of profit on account delay in completion of the contract (Claim nos. 2 and 3).

19. Mr Anshuraj submitted that the Arbitral Tribunal had returned contradicting findings. Whilst it found that only three days delay was attributable to the petitioner; it subsequently proceeded to also hold that 50-50 delay is attributable to both the parties. Further, the Arbitral Tribunal noted that the petitioner had, by its letter dated 08.11.2013, put ITDC to notice that it would claim compensation for delay in completion of the works. However, in contradiction with this finding, the Arbitral Tribunal held that the petitioner had not put ITDC to notice regarding the quantum of compensation or the period for which such compensation shall be claimed. He referred to the decision of this Court in ***Union of India v Sanghu Chakra Hotels Private Limited (Delhi): 2008 SCC Online Del 912***, in support of his contention that mutually

inconsistent and self-contradictory findings by the arbitrator is contrary to the public policy of India and suffers from patent illegality.

20. Next, he submitted that the Arbitral Tribunal had erred in rejecting the petitioner's claim for "overheads cost escalation" as computed on the basis of the Hudson Formula. He submitted that the work was to be completed within twelve months but was completed after a delay of five years, one month and eleven days and thus, the petitioner was entitled to overhead charges of 5% of the total contract value (as agreed), multiplied by sixty-one months.

21. He submitted that the Arbitral Tribunal had refused to grant loss of profit by holding that the petitioner did not produce any evidence that it had the financial capacity to earn ₹2,80,35,000 as profit by undertaking the project beyond the extended period. This was patently erroneous as only Class-I contractors were eligible to bid for the project. The pre-qualification cum tender notice showed the work to be estimated at ₹3,08,64,031.79/- and, the criteria for being eligible to apply for the tender included the average annual turnover of the firm during the last three years to be at least 30% of the estimated work. The tenderers were also required to submit proof of completing similar work in the last seven years successfully as well as the latest solvency certificate.

Reasons and Conclusion

22. The petitioner's claim for refund of the deductions made by ITDC on various grounds (Claim No.1) was substantially accepted by

the Arbitral Tribunal; the Arbitral Tribunal has entered an award of an aggregate amount of ₹11,40,720/-, in favour of the petitioner. The additional amount claimed by the petitioner for using Sadar Ali Stone instead of Kota Stone [Claim No.1(f)] and its claim on account of crafting a bronze statue [Claim No.1(i)] was rejected by the Arbitral Tribunal.

23. The specifications under the Agreement required the petitioner to provide Kota floor stoning in front of the cafeteria. The petitioner had paid for the same. It was petitioner's case that it was directed to affix Sadar Ali Granite as flooring instead of Kota Stone. However, the Arbitral Tribunal found that there was no document to establish that the petitioner had been directed to substitute Kota Stone with Sadar Ali Granite as flooring in front of the cafeteria. As opposed to the same, ITDC had placed several communications on record reminding the petitioner to lay only Kota stone flooring. The decision of the Arbitral Tribunal to reject the petitioner's claim is thus, based on material and evidence on record and therefore, warrants no interference in these proceedings.

24. The petitioner's claim for a sum of ₹10,00,000/- on account of crafting a bronze statue was rejected by the Arbitral Tribunal. The Arbitral Tribunal found that Item no. 123 of the Bill of Quantities, required the petitioner to fix a bronze statue weighing 2200 Kgs at a cost of ₹28,00,000/-. It was not disputed that the petitioner had fixed a statue weighing only 1060 Kgs, instead of 2200 Kgs, against the said BoQ item. The Arbitral Tribunal found that by a letter dated 01.07.2014,

the petitioner had requested that statute of a reduced weight be permitted to be fixed. The same was approved. The pro-rata payment of ₹13,49,088/- was also released to the petitioner. The Arbitral Tribunal found, after evaluating the material on record, that the petitioner had also accepted the reduced payment. Therefore, the Arbitral Tribunal held that the petitioner was not entitled to the said claim. The said decision cannot be faulted and, in any event, cannot be assailed on the grounds as available under Section 34 of the A&C Act.

25. The petitioner's grievance against the impugned award is mainly on account of the decision of the Arbitral Tribunal to deny its claim for damages/loss of overheads (Claim No.2) and loss of profits (Claim no.3) on account of delay in completion of the works. The petitioner had claimed that the delay in completion of the works were attributable to ITDC, which constituted a breach of the Agreement and the petitioner was entitled to damages on account of the same. The Arbitral Tribunal had examined the material on record and found that whilst the petitioner was entitled to extension of time for completion of the contract, it was not entitled to damages on account of overheads/damages (Claim No.2) and loss of profits (Claim No.3) on account of delay in completion of the works.

26. The Arbitral Tribunal had accepted the petitioner's claim for refund of deduction of ₹4,00,000/- on account of delay in completion of the contract [Claim No.1(a)] as the Arbitral Tribunal found that the completion of the contract was delayed for various reasons for which "*the claimant [the petitioner] was not at fault alone*". The Tribunal also

found that ITDC had not given any prior notice to the petitioner for deducting the sum of ₹4,00,000/- on account of delay of thirty-nine days in completion of the contract.

27. In addition, the Arbitral Tribunal found that there was no material on record to establish that ITDC had suffered any loss on account of alleged delay of thirty-nine days in completion of the contract in question. In view of its aforesaid findings, the Arbitral Tribunal found that the deduction of ₹4,00,000/- made by ITDC from the amounts payable to the petitioner, on account of “non-allowable delay” of thirty-nine days was unjustified.

28. It was contended on behalf of the petitioner that in view of the findings of the Arbitral Tribunal in respect of Claim no.1(a), the petitioner was also entitled for claim of damages/compensation for overheads during the extended period of the contract as well as loss of profits for the said period. It was also contended that the findings of the Arbitral Tribunal that both the parties were in part responsible for the delay and there was slow progress of the work, is inconsistent with the Arbitral Tribunal’s findings in respect of Claim No.1(a).

29. The aforesaid contention is unmerited. The finding that the petitioner was entitled to extension of time for completion of delay on account of reasons not attributable to it does not mean that the Arbitral Tribunal had found ITDC to be responsible for delay in completion of the works and in breach of the Agreement. The Arbitral Tribunal had examined the hindrance register and had found that the hindrances that

resulted in delay justified grant of extension of time for completion of the contract. But that did not mean that ITDC was solely responsible for such delays. ITDC had never accepted or admitted that the entire delay was attributable to it.

30. It is also petitioner's claim that the delay caused due to various reasons which included delay on account of elections, obstruction by villagers, water logging etc. could not be by any stretch be attributed to ITDC.

31. The Arbitral Tribunal found that the petitioner had not produced evidence of suffering or incurring any loss on account of cost of tools, plants etc. It had also produced no material to establish that it had paid any additional cost for electricity or water.

32. It is the petitioner's contention that its claim for damages and overhead charges (Claim no. 2) was liable to be allowed on normative basis as 5% of the contract value was attributable to overhead charges under the Agreement. The petitioner contends that the impugned award is vitiated by patent illegality as the Arbitral Tribunal has not accepted the same. This contention is, plainly, unmerited. The Arbitral Tribunal's decision to not accept the petitioner's claim as the petitioner had failed to produce proof of actual damages, cannot be faulted. There is no principle of law that mandates that damages must be allowed on normative basis in all cases. The question as to whether the petitioner has sufficiently established that it had incurred any loss or damage is a question of fact and the Arbitral Tribunal's decision in this regard is

final. The petitioner's claim for loss of profit was also disallowed on similar grounds. The Arbitral Tribunal had referred to the decisions of this Court in ***Union of India v. M/s Om Construction Company: 2019 SCC OnLine Del 9037*** and ***GTM Builders and Promoters Pvt. Ltd. v. Sneh Developers Pvt. Ltd.: 2018 SCC OnLine Del 9653*** and, the decision of the Supreme Court in ***Kailash Nath Associates v. DDA: (2015) 4 SCC 136*** and had held that the petitioner was required to prove actual proof of loss of damages. The said view cannot by any stretch be stated to be patently erroneous or one that vitiates the impugned award on the ground of patent illegality.

33. The following observations made by the Supreme Court in its recent decision in ***Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd.: 2021 SCC OnLine SC 695*** are relevant and set out below:

“24. This Court has in several other judgments interpreted Section 34 of the 1996 Act to stress on the restraint to be shown by courts while examining the validity of the arbitral awards. The limited grounds available to courts for annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the courts. There is a disturbing tendency of courts setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award. This approach would lead to corrosion of the object of the 1996 Act and the endeavours made to preserve this object,

which is minimal judicial interference with arbitral awards. That apart, several judicial pronouncements of this Court would become a dead letter if arbitral awards are set aside by categorising them as perverse or patently illegal without appreciating the contours of the said expressions.

25. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression 'patent illegality'. Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression 'patent illegality'. What is prohibited is for courts to re-appreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression 'patent illegality'.

26. Section 34 (2) (b) refers to the other grounds on which a court can set aside an arbitral award. If a dispute which is not capable of settlement by arbitration is the subject-matter of the award or if the award is in conflict with

public policy of India, the award is liable to be set aside. Explanation (1), amended by the 2015 Amendment Act, clarified the expression ‘public policy of India’ and its connotations for the purposes of reviewing arbitral awards. It has been made clear that an award would be in conflict with public policy of India only when it is induced or affected by fraud or corruption or is in violation of Section 75 or Section 81 of the 1996 Act, if it is in contravention with the fundamental policy of Indian law or if it is in conflict with the most basic notions of morality or justice. In *Ssangyong* (supra), this Court held that the meaning of the expression ‘fundamental policy of Indian law’ would be in accordance with the understanding of this Court in *Renusagar Power Co. Ltd. v. General Electric Co.* In *Renusagar* (supra), this Court observed that violation of the Foreign Exchange Regulation Act, 1973, a statute enacted for the ‘national economic interest’, and disregarding the superior courts in India would be antithetical to the fundamental policy of Indian law. Contravention of a statute not linked to public policy or public interest cannot be a ground to set at naught an arbitral award as being discordant with the fundamental policy of Indian law and neither can it be brought within the confines of ‘patent illegality’ as discussed above. In other words, contravention of a statute only if it is linked to public policy or public interest is cause for setting aside the award as being at odds with the fundamental policy of Indian law. If an arbitral award shocks the conscience of the court, it can be set aside as being in conflict with the most basic notions of justice. The ground of morality in this context has been interpreted by this Court to encompass awards involving elements of sexual morality, such as prostitution, or awards seeking to validate agreements which are not illegal but would not be enforced given the prevailing mores of the day.

27. In light of the principles elucidated herein for interference with an arbitral award by a court in exercise

of its jurisdiction under Section 34 of the 1996 Act, we proceed to consider the questions that arise in these Appeals as to whether the Division Bench of the High Court was right in setting aside the award of the Arbitral Tribunal dated 11.05.2017.”

34. The challenge laid by the petitioner to the impugned award is, thus, outside the scope of the grounds on which challenge to an arbitral award is permissible under Section 34(2) or 34(2A) of the A&C Act.

35. The petition is unmerited and is, accordingly, dismissed.

SEPTEMBER 14, 2021
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VIBHU BAKHRU, J