

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

+ **FAO 212/2010**

Reserved on : 20.02.2023

Pronounced on : 25.05.2023

IN THE MATTER OF:

M/S MAHESH CONSTRUCTION Appellant

Through: Mr. Prarthna Dogra, Advocate.

Versus

MUNICIPAL CORPORATION OF DELHI & ANR. Respondents

Through: Mr. Attin Shankar Rastogi and
Ms. Anjali Kumari, Advocates.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

MANOJ KUMAR OHRI, J.

1. By way of present appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act'), the appellant has assailed the judgment dated 04.07.2009 passed by learned Additional District Judge – XIII, District, Central, Tis Hazari Courts, Delhi in Suit No. 118/2007 vide which objections filed by respondent No. 1/MCD under Section 34 of the Act were upheld and the Arbitral Award dated 21.07.2007 was set aside.

2. Briefly, the facts as emanate from the records and necessary to address the controversy are that in the year 2000, MCD floated tenders for de-silting of certain *Nallas* i.e., drains in the West Zone, Delhi. The appellant, a Contractor, participated in the said tender and was awarded the work vide work order Nos. 71, 61, 63, 24 and 28 dated 12.05.2000 and work order no. 115 dated 24.05.2000. The time period for completion of work was one month and two months respectively.

The Contractor alleged that despite the work being completed to the satisfaction of MCD, and the work having been recorded in the Measurement Book (hereinafter referred to as 'MB') maintained by the MCD, and the bills having been approved by the Engineer and Divisional Accountant, the payments were not released.

The Contractor submitted the following statement of claim:

Amount on A/c of work done (gross amount)	Rs.6,38,703
Earnest Money	Rs.16,800
Interest @ 12% per annum	Rs. 3,27,750
Cost of Arbitration proceeding and legal expenses and appointment of arbitrator	Rs. 50,000
Total	Rs. 10,33,253

MCD resisted the aforesaid claim. It was alleged that the Claim was time barred. On merits, it is alleged by the MCD that the Contractor did not supply the dumping receipts, photographs, videography to prove that the silt was dumped at the designated dumping site after its removal from the drain. It was alleged by MCD that aforesaid proof was required

to be submitted by the Contractor and in the absence of the same, it cannot be claimed by the Contractor that the work was satisfactorily completed by it. It was further submitted that vigilance department of the MCD had issued instructions not to release the payments in view of complaints received by it against the Contractor.

3. The Arbitral Tribunal rejected the objection on limitation in favor of the Contractor. The Tribunal held that no notice for final bill was ever given by the MCD to the Contractor and even from the date of finalization, the notice given by the Contractor on 04.03.2004 for appointment of arbitrator, was within limitation.

4. On merits too, the Arbitral Tribunal allowed the Claim and awarded interest on the sums claimed for pre-reference, pendente-lite, and future.

5. Arbitral Tribunal has returned a finding that the Contractor had dumped the silt at the sites other than the sites designated in the work order, on the instructions of the field staff of MCD. Arbitral Tribunal took note of the instructions and held that there was no breach of contract by the Contractor. It is noted by the Arbitral Tribunal that the Contractor is entitled to be paid as per the actual lead and not the pre-fixed lead of 10-20 kms for the designated dumping sites. It has accordingly rejected the MCD's argument that the Contractor shall unjustly gain since he gets paid at the actual lead and not for the pre-fixed lead cost of 10-20 kms already built into the rates payable to the Contractor for the work done.

6. MCD filed objections under Section 34 of the Act. It re-agitated the plea of limitation and also contended that the Contractor had failed to prove compliance of the contract whereby it was obliged to dump the silt at the sites designated in the contract. In absence of the same the

contractual obligation remained unfulfilled and hence bills were not cleared. MCD also challenged the interest awarded by the arbitrator.

7. The Trial Court vide impugned order while rejecting the plea of limitation, set aside the award by observing that in absence of SLF receipts, which would have proved dumping of silt at the designated sites, Contractor has failed to show completion of work as per the Contract. MB relied upon by the Contractor only showed the quantities of desilting carried out and does not reflect the dumping at the designated sites. The Court below, did not concur with the finding of the Arbitral Tribunal that in view of the instructions issued by the field staff, the contractual condition of dumping at the designated site was waived and he was directed to dump at new sites that were closer to the location. The Court found the Contractor wanting compliance with the contract for the said reason.

8. The law on scope of interference in Section 37 of the Act is well settled. Reference in this regard be made to the decisions of Co-ordinate benches of this Court in NHAI v. M/s. BSC-RBM-Pati Joint Venture reported as **2018 SCC OnLine Del 6780** and Union of India v. Sikka Engineering Company reported as **2019 SCC OnLine Del 8788**. The scope of judicial interference is very minimal and confined to the grounds countenanced in Section 34 of the Act. The settled position of law, through judicial decisions, is that the Court hearing objections under Section 34 of the Act is not required to judge the arbitral award as if it were sitting in appeal. However, out of judicial habit the Courts tend to act like appellate courts and blur the distinction between the two very distinct jurisdictions.

9. Applying the settled legal principles, it is felt that the Court below exceeded its jurisdiction by supplanting its own view on the view formed by the Arbitral Tribunal, which is not permissible. The view formed by Arbitral Tribunal is a plausible view and does not appear to be manifestly perverse to call for interference.

10. The Arbitral Tribunal was of the view that dumping of silt in the sites other than designated sites was not a breach of contract in view of specific instructions received from the field staff. MB was filed as evidence of silting work executed by the Contractor. Arbitral Tribunal relied upon this piece of evidence and was satisfied about its sufficiency. In Associate Builders v. Delhi Development Authority reported as **(2015) 3 SCC 49**, it has been laid down that Arbitral Tribunal is the master of both quality and quantity of evidence to reach a finding of fact. In view of this legal position, it was not proper for the Court below to discount evidentiary value of the MBs by calling it secondary evidence.

Indisputably, an arbitral award, which is based on no material or evidence at all can be held to be vitiated by patent illegality but insufficiency of evidence or material cannot be a ground for setting aside an arbitral award. Pertinently, MCD's own witnesses namely Manoj Kumar, Executive Engineer admitted that the bills for payments were finalized after making proper enquiries and test checks by the concerned staff and then were passed for payment by the Ex. Engineer and the Divisional Accountant. The bills were exhibited as well. Thus, there was evidence and material available on the record which substantiated the Contractor's claim. Apparently, the Court had embarked upon an exercise to re-evaluate the sufficiency of evidence in material produced and faulted the Arbitral Tribunal in incorrectly appreciating the

sufficiency of the said material which is clearly outside the ambit of Section 34 of the Act.

11. The power of Arbitral Tribunal to award interest for all the three periods namely, pre-reference, pendentelite and post award, is settled, after all. It has been held by Supreme Court, in Reliance Cellulose Products Ltd v. ONGC reported as **(2018) 9 SCC 266**, that interest is compensatory in nature and is parasitic on the principal amount. Following the “*Reliance*” ratio, it is seen that arbitrator is empowered under Section 31(7) of the Act to grant interest for all the three periods, unless the contract in so many words prohibits the “arbitrator” from granting interest under Section 31(7) of the Act. A clause in a contract that prohibits payment of interest on delayed payments, does not restrict the “arbitrator” to grant interest since it does not prohibit the “arbitrator” from granting interest under Section 31(7) of the Act and is a restriction on the contracting party to claim interest on delayed payments. As stated above, since interest is compensatory in nature, the arbitrator’s powers are not curtailed by such narrow clauses in the contract.

In view thereof, the award of interest by the Arbitral Tribunal for pre-reference, pendentelite and post award periods, is neither contrary to the terms of contract nor is it in breach of Section 31(7) of the Act.

12. This Court also takes note of the submission that insofar as subject work orders are concerned, the same were not part of any vigilance inquiry. The submission remained undisputed. In view of the above, the general instructions issued by the vigilance department vide letter dated 09.10.2002 could not have been made the ground to deny payments to the Contractor.

13. Consequently, the impugned order is set aside and the award passed by the Arbitral Tribunal is upheld.

(MANOJ KUMAR OHRI)
JUDGE

MAY 25, 2023

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