IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Commercial Division
Appellate Side

Present :- **Hon'ble Mr. Justice I. P. Mukerji**
Hon'ble Mr. Justice Biswaroop Chowdhury

FMA 212 of 2023
CAN 1 of 2022

State of West Bengal
Vs.
M/s. Chowdhury Construction

For the appellant	**:-**	**Mr. Anirban Ray, GP,** **Mr. Arindam Mondal,** **Mr. Anirban Mondal,** **Mr. Paritosh Sinha,** **Mr. Shourye Saman, Advs.**
For the respondent	**:-**	**Mr. Priyankar Saha,** **Mr. Arijit Bhowmick,** **Mr. Hemant Tiwari,** **Ms. Pooja Agarwal, Advs.**
Judgment on	**:-**	**19.10.2023**

I. P. MUKERJI, J.:-

This is an appeal under Section 37 of the Arbitration and Conciliation Act, 1996. It is from a judgment and order dated 24th February, 2020 made by the learned Judge, Commercial Court at Asansol in an application under Section 34 of the said Act challenging an arbitral award dated 29th July, 2015.

The claim in arbitration arose out of a works contract between the respondent contractor and the Government of West Bengal dating back to 2007. It involved the widening and strengthening of the Memari-chakdighi and Tarakeswar Road in the then district of Burdwan, West Bengal spanning 30.16 km. It was executed on 8th August, 2007 costing the government Rs.11,63,76,445/-. The time stipulated for completion of the work was 18 months from the date of commencement on 8th February, 2008 i.e. on 7th August, 2009.

Eventually, as it happens in most of these works contracts, there was delay in progress of the work. The respondent contractor attributed this delay to the government whereas the government accused the contractor of breach of contract by delayed and poor performance of the work. Eventually the contract was rescinded by the government on 18th October, 2012. At the time of rescission of the contract by the government the security deposit of Rs.33,70,452/- which the respondent contractor had made in terms of the contract with the government at the time of its execution, as a kind of performance guarantee was forfeited.

As is usual in these matters, the matter went to arbitration. The respondent contractor made no less than 25 heads of claims of the following description:-

Sl. No.	**Particulars**	**Amount**
1.	Amount payable on account of works executed but not paid despite repeated requests and/or reminders made for the same.	Rs.49,66,996/-
2.	Amount payable on account of extra and/or additional items of works executed on instruction and direction from the department despite repeated requests made for the said payment.	Rs.27,94,000/-
3.	Compensation on account of prolongation of the job beyond the agreed period of 18 months for reasons attributable to the department:- (i) Towards on-site expenses incurred in the enlarged/overrun period. (ii) Towards off-site expenses incurred in the	 Rs.48,00,000/- Rs.7,85,000/-

	enlarged/overrun period.	
4.	Compensation on account of depreciation of tools and plants, machinery owned by the Claimant/Contractor and deployed at the instant site of work for reasons attributable to the department.	Rs.92,19,000/-
5.	Compensation towards business loss for being retained longer in the contract in question for an additional period of 39 months without any corresponding monetary benefit and without being free to move elsewhere with the blocked resources during the extended stay to earn the profit which the Claimant could have otherwise made.	Rs.1,37,88,000/-
6.	Compensation on account of additional cost of execution and/or added expenses in respect of works executed till unlawful termination of the contract due to rise in price of materials, labour, fuel etc. (Except towards increment in the price of bitumen, which has been preferred separately in Sl. No. 7).	Rs.2,25,55,122/-
7.	Compensation on account of unusual increment in the price of bitumen and fuel consumed in the work.	Rs.1,38,57,500/-
8.	Compensation on account of hire charges of machinery (Hot Mix Plant, Paver Finisher etc.) installed/deployed at the site of work for the period during which the said machinery had	Rs.1,88,00,000/-

	remained idle for reasons attributable to the department.	
9.	Amount payable to the Claimant/Contractor on account of release of the amount lying in deposit towards security in respect of the instant job.	Rs.33,70,452/-
10.	Compensation on account of loss of expected profit on the unexecuted portion of the contract.	Rs.8,12,990/-
11.	Compensation on account of mobilization and demobilization for reasons attributable to the department.	Rs.3,25,000/-
12.	Compensation on account of materials lying at site at the time of unlawful rescission of the contract.	Rs.49,50,000/-
13.	Compensation on account of idle/barren labour, detained at the site of works due to suspension of the job from time to time for various reasons attributable to the department.	Rs.17,62,000/-
14.	Compensation on account of advances made to the suppliers and/or manufacturers of various kinds of materials which could not be realized due to abrupt and unlawful rescission of the contract.	Rs.2,30,000/-
15.	Compensation on account of delayed release of payment against various on account bills.	Rs.12,17,285/-
16.	Compensation on account of redoing works	Rs.46,46,000/-

	executed on instruction and direction from the department.	
17.	Compensation towards infructuous expenditure incurred for conducting survey work on 30 KM of the road in question for making assessment of the quantity of earth required for protective works proposed to be taken by the department.	Rs.1,46,000/-
18.	Compensation on account of execution of work during night hours by deployment of additional machinery, engagement of additional labour, making arrangement for sufficient light etc.	Rs.6,13,000/-
19.	Compensation on account of development of stackyard and service road at Chakdighi.	Rs.7,08,000/-
20.	Amount payable on account of rectification of the damages caused during execution of the road as well as after completion of the road due to plying of heavy vehicles as well as plying of overloaded trucks on the road in question (7th KM to 17th KM in particular).	Rs.16,77,407/-
21.	Compensation on account of loss and/or wastage of fuel (diesel in particular), idling of labourers as well as machinery due to execution of work during monsoon on being instructed by the department.	Rs.17,32,000/-
22.	Compensation on account of interest on blocked capital borrowed from bank at an exorbitantly high rate of interest.	Rs.94,50,000/-

23.	Compensation on account of loss of goodwill and/or reputation due to unlawful rescission of the contract by the department.	Rs.18,50,000/-
24.	Interest @ 18% per annum on due amount on claim Nos. (1) to (23) as above from 01.12.2012 till payment.	As already accrued and to be accrued further.
25.	Cost of Arbitration Proceedings.	As to be found due

The principal amount claimed was Rs.12,50,55,752/- with interest and cost.

By the said arbitral award dated 29th July, 2015, Claims 1 and 2 together amounting to Rs.26,91,029/- together with Claim 9 for refund of security deposit of Rs.33,70,452/-, 10% profit on the remaining work for Claim 10 amounting to Rs.5,42,000/- and Rs.2,25,000/- against Claim 15 for delayed release of payment was allowed. The principal sum of the award was Rs.68,28,481/- together with pre-reference, pendent lite and post award interest. The government had also preferred a counter claim which was not allowed.

The government was not satisfied with this award. It challenged it under Section 34 of the said Act. They were partially successful in the challenge before the court below. Only three claims were allowed i.e. Claims 1, 2, 9 and 15.

This part of the award which was upheld by the learned court below is challenged in appeal before us by the government.

Learned counsel for the appellant government submits that his client is not challenging the award in respect of Claim No. 1 aggregating to Rs.26,91,029/- but was only challenging the award with respect to Claim

No. 9 relating to forfeiture of security deposit and Claim No. 15 relating to delayed release of payment.

Learned counsel for the appellant government, principally made three submissions.

He argued that the respondent contractor had not challenged termination of the contract by the government. There was absence of reasons in the award. The learned arbitrator had merely quoted the submissions of learned counsel for the respondent contractor and added that he agreed with those submissions. He was required to give detailed reasons. For the absence of reasons, the award fell afoul of the requirement of Section 31(3) of the said Act and was liable to be set aside. He also contended that the findings arrived at by the learned arbitrator were contrary to his observations. He said that in the award the learned arbitrator had held that the contractor was responsible for the delay. Yet, in his findings, he held the imposition of liquidated damages and termination of the contract to be unlawful.

We are unable to accept these submissions of learned counsel for the government.

The contractor need not have challenged the rescission/termination of the contract. If he would have done so, he may have been obliged to claim specific performance of the contract by the government. An injured party in this type of a case is not entitled to the relief of specific performance, but is confined to damages only which the contractor claimed. The government invoked Clause 2 of the agreement giving a notice dated 27th August, 2012 to the contractor to showcause why liquidated damages should not be imposed. This notice was received by the contractor on 30th August, 2012. Time to file the reply to the showcause was till 5th September, 2012. The contractor replied to it on 3rd September, 2012. On 5th September, 2012, the contractor's defence

was rejected and liquidated damages in terms of Clause 2 of the contract was imposed. On 14th September, 2012 the government seemed to have backtracked from its stand and allowed the contractor time upto 30th September, 2012 to complete the work.

However, on 18th October, 2012 the appellant terminated the agreement.

The learned arbitrator at internal Page 79 of the award came to the conclusion that the contractor had failed to complete proportionate work in proportionate time. Nevertheless, he added that the government extended the time to do the work. By such extension, the government according to the learned arbitrator seemed to have waived its rights accruing on account of delay in performance of the work by the contractor. The learned arbitrator also added that the monsoon rain according to the arbitral tribunal also played its part in the delay. The tribunal went on to hold that although there was delay on the part of the contractor they had performed "the three milestones indicated in Clause 2 of the Conditions of Contract". On the arbitrator's interpretation of Clause 2, having completed three milestones, the government ought not to have imposed liquidated damages. The imposition of liquidated damages was wrongful. The learned arbitrator interpreted the application of Clause 3 of the Conditions by expressing the view that since it was not a case for imposition of liquidated damages, the termination of the contract by the appellant government was also wrongful.

Advancing these reasons, he held that the forfeiture of the security deposit was wrongful and that it should be released to the respondent.

It cannot be said that this part of the award is without reasons. In fact, the learned arbitrator has given cogent reasons to support his findings. It is true that some findings are at variance with the previous observations. Nevertheless, in the body of the award the learned arbitrator has justified the findings based on those apparently contradictory observations. For

example, although the learned arbitrator stated that the contractor was responsible for not performing proportionate work in proportionate time, nevertheless, he has gone on to say that by extending time, the government had ignored the delay, furthermore, the delay was substantially caused by monsoon and that three milestones had been crossed by the contractor, as a result of which neither liquidated damages ought to have been imposed nor the contract terminated.

The learned arbitrator held that the respondent contractor had completed 54.7% of the work within 18 months. Thereafter, he took extension of time eight times which spanned 38 months. According to the respondent claimant, in the contract period there were 10 months in the monsoon season. Even if these 10 months were left out in the remaining 28 working months of the extended period 93.6% - 54.7% = 38.9% of the work was done by the respondent contractor. Nevertheless, the respondent contractor had completed "three milestones indicated in Clause 2 of the Conditions of Contract". Therefore, Clause 2 of the Conditions of Contract was not rightly imposed. The summary of the arbitrator's findings is at internal Pg. 89 of the award is as follows:-

> *"The respondent had forfeited the remaining security deposit of the claimant, amounting to Rs.33,70,0452/- (C/68) on imposition of Clause 3(a). But according to me terminating of the contract by the respondent under clause 3(a) of the General Conditions of the contract was wrongful as I concluded in para 15.20 hereinabove. In my view by wrongful termination of the contract the respondent committed breach of contract with the result that there could be no forfeiture of the Security Deposit and the Claimant is entitled to a refund of their entire security amount of Rs.33,70,452/-."*

An arbitrator is not a trained lawyer or a judge. It is not expected of him to write an award with the precision, clarity and legalistic style of these

trained professionals. However, the law enjoins him with a duty to furnish some reasons in support of the award. [See Section 31(3) of the Arbitration and Conciliation Act, 1996].

Now, these reasons may be on questions of fact or on questions of law. On questions of fact the arbitrator is permitted to take a plausible view of the matter. If two reasonable views are possible on a question of fact, he is entitled to take either of them. Just because the view of the court is different is no ground to set aside a finding of fact. The arbitrator is the best judge of the quality and quantity of evidence before him. Only when he has acted on absolutely insufficient or irrelevant evidence to come to a finding that the same could be assailed in an application to set aside the award. The test is very rigorous. The error in the finding must be patent and apparent on the face of the records. Even on a question of law if the premise on which the arbitrator proceeds is so erroneous so as to come to the route of the matter which is a case of patent illegality on the face of the award and on that ground it is liable to be set aside.

The award has to satisfy the Wednesbury test of reasonableness. If an award is in conflict with the substantive law of India or in violation of statutory provisions or in disregard of a judgment of a superior court, it is vitiated by patent illegality. So is the case if the terms of the contract are ignored which the arbitrator is required to follow under Section 28(3) of the said Act.

If the award is so shocking, erroneous or unjust that it shocks the conscience of the court it is liable to be set aside. (See **Associated Builders Vs. Delhi Development Authority** reported in **(2015) 3 SCC 49, MMTC Vs. Vedanta Ltd.** reported in **(2019) 4 SCC 163** and **Sutlej Construction Ltd. Vs. Union Territory of Chandigarh** reported in **(2018) 1 SCC 178.**)

On the scrutiny of the award by the arbitrator in respect of the Claim Nos. 9 and 15, we are of the view that certainly the award cannot be called illegal, far less patently illegal. It is not violative of any provision of the said Act. The finding of the arbitrator that upon completion of three milestones the respondent contractor ought not to have faced imposition of liquidated damages and for those reasons, the contract could not be terminated is a reasonable view of the matter although it may not be a view which is shared by all. So, if the contract was not liable to be terminated, the security deposit was also not liable to be forfeited, according to the arbitrator. Such view can also support the findings of the learned arbitrator in respect of Claim No. 15.

In that view of the matter, we did not find any reason to interfere with the said part of the award as upheld by the learned court below.

This appeal is accordingly dismissed. No order as to costs.

Certified photocopy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

I agree.

(BISWAROOP CHOWDHURY, J.) **(I. P. MUKERJI, J.)**