



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

% Reserved on : 06.02.2024

Pronounced on : 24.04.2024

+ **OMP (ENF.) (COMM.) 142/2018 & EX.APPL.(OS) 1185/2023**

MAHAMAYA INFRABUILD PVT. LTD Petitioner

Through: Mr. Satvik Varma, Senior Advocate
with Mr. Shikhar Kdiare, Mr.
Srinivasan Ramaswam, Ms. Gazal
Ghai and Ms. Rudrakshi Deo,
Advocates.

versus

EARTHCON CONSTRUCTIONS PVT. LTD Respondent

Through: Mr. Darpan Wadhwa, Sr. Advocate
with Mr. Mukesh Gupta, Mr. Amique
Khalid, Mr. Shahid Khan, Ms.
Neelakshi Bhadoria and Mr. Amer
Vaid, Advocates

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

1. By way of present petition filed under Section 36 of the Arbitration & Conciliation Act, 1996 (hereinafter, '*the A&C Act*'), the Decree Holder (hereafter, '*DH*') seeks enforcement of arbitral award dated 30.03.2015 (hereinafter, '*consent award*'), which according to the DH was a consent award, under which the Judgement Debtor (hereafter, '*JD*') is liable to pay a sum of Rs 20,14,06,953/- alongwith future interest @18% p.a. from 01.06.2018 to the DH.

2. The JD has disputed its liability to pay any sums under the consent award sought to be enforced by DH.



3. In very simplistic terms, this appears to be the issue that this court is called upon by the parties to resolve.
4. As stated above, what appears to a very benign issue on the surface, hiding beneath is the whimsical manner in which the arbitral proceedings went about.
5. Since this court is an executing court, the discussion on the facts is confined to such essential facts as may be necessary to decide the issue raised before this court. Following are such necessary facts.
 - i. DH and JD are the two contracting parties to a Memorandum of Understanding ('MoU') dated 10.08.2011. Under the MoU, the JD had agreed to construct a large residential project on a piece of land owned by the DH. The mutual rights and obligations of the parties were recorded in the MoU.
 - ii. Disputes arose between the parties, whereby the DH made allegations of non-performance against the JD. Since MoU covenanted resolution of disputes through arbitration, vide order dated 21.04.2014 passed in Arbitration Petition No. 149/2014, the disputes were referred to Hon'ble Justice Mukul Mudgal, for arbitral resolution (hereafter, 'AT').
 - iii. JD raised several claims before the AT. However, during the course of arbitral proceedings, parties reached a settlement and thereafter filed an application under Order XXIII rule 3 CPC read with Section 30 of the A&C Act for passing of a consent award. Consequently, the consent award came to be passed.
 - iv. The terms of the settlement, which also formed part of the consent award, are as under:-



“8.1 For sake of convenience, relevant terms of settlement and interim consent Award are extracted hereafter:

Settlement

“...I. That the Claimant shall pay a sum of Rs.15.2 crores (Rs. Fifteen crores twenty lakhs) to the Respondent and after having received the aforesaid amount, the Respondent shall be left with no right or interest in the Plot No.GH-B (GH-14 to GH-17) admeasuring 10742.00 sq. mts. in housing sector Industrial Area Talanagri, Ramghat Road, Aligarh.

II. That the Claimant also undertakes to pay the remaining dues and interest thereon to the UPSIDC, in respect of the said Plot in addition to the abovesaid Rs.15.2 crores payable to the Respondent.

III. (A.) That out of agreed total amount of Rs.15.2 Crores, the Claimant shall initially pay Rs.2 crores to the Respondent on or before 31st January, 2015. The date of payment of Rs.2 crores i.e. 31st January, 2015 is the essence of this agreement. If the Claimant does not pay the said amount of Rs.2 crores to the Respondent on or before 31st January, 2015; the present settlement shall become infructuous and the arbitration proceeding shall be resumed forthwith. After receiving the aforesaid initial amount of Rs.2 Crores, the Respondent shall clear and pay, out of the received amount of Rs.2 Crores, the remaining due amount/arrears, interest, if any, payable on the due amount to the UPSIDC on or before February 15, 2015. After clearance of the dues of UPSIDC as mentioned above, the remaining amount out of Rs 2 Crores received by the Respondent shall be adjusted towards the total amount of Rs.15.2 crores payable to the Respondent. If the Respondent fails to clear and pay the dues of UPSIDC as mentioned above after receiving Rs 2 Crores, the Respondent shall pay back and refund the so received entire amount of Rs.2 Crores with interests @ 18 p.a. to the Claimant on or before 28 February 2015. In case the Respondent fails to pay back the aforesaid amount with interest within the stipulated time till February 28, 2015 as mentioned above, the counter



claim and defense of Respondent shall stand struck off and the arbitration proceedings shall be resumed forthwith.

(B). The Claimant undertakes to pay the remaining/balance sum out of Rs.15.2 crores on or before 31st August, 2015.

(C) If the Claimant fails or neglects to pay the entire remaining amount that remains unpaid in terms of Para A above out of Rs.15.2 crores payable to the Respondent pursuant to this agreement by 31.8.2015,' the Claimant shall be liable to pay interest at the rate of 18% p.a. on the remaining dues payable latest by 30.11.2015. The said interest shall be computable w.e.f. 1.9.2015 till the date of payment.

(D) If the Claimant does not make the payment of entire sum of Rs.15.2 crores and that amount paid to UPSIDC pursuant to this agreement as stated above to the Respondent by 30.11.2015; all amount given by the Claimant shall stand forfeited by the Respondent and the present proceeding shall be reinitiated from the stage prior to filing of this application. It is clarified that the sum of Rs.15.2 Crores mentioned herein includes the amount that remains with the Respondent after making payments to the UPSIDC in terms of Para A above.

(E) Till the time, the Claimant does not make payment of Rs.15.2. crores to the Respondent and the amount paid to UPSIDC pursuant to this agreement as stated above to the Respondent, the Claimant shall have no right to carry out any construction on the plot. The Claimant shall maintain complete status quo and will not create any third party right or interest in the plot in any manner whatsoever.

(F) After having received the balance amount out of Rs.15.2 crores and the amount paid to the UPSIDC in terms of Para A above and the Interest for any delayed payment, if any, the Respondent will immediately transfer the lease and all other rights in respect of the aforesaid plot in favour of the Claimant without any demur. All the expenditure related with the transfer of ease shall be borne by the Claimant.



(G) The parties hereto agree that the Claimant shall hand over a demand draft of the balance amount by 31.08.2015 without Interest, or with interest as agreed in sub-clause (C) by 30.11.2015 to Hon'ble Arbitrator. The Respondent shall be entitled to receive the demand draft from Hon'ble Arbitrator after execution of lease/transfer of lease of the said plot in favour of the Claimant....”

- v. The Consent Award required JD to make the payments within the stipulated time. JD paid a sum of Rs. 2 crores on 09.03.2015. However, for the balance payment of Rs. 14,47,20,370/-, JD filed an application before the AT for extension of time to make the payment.
- vi. Vide order dated 30.11.2015, the AT extended the time till 30.12.2015. JD requests for extensions continued and time was extended vide orders dated 05.01.2016 and 24.02.2016. During the course of proceedings w.r.t the extensions sought, JD paid a further sum of Rs.1 crore.
- vii. Disputes arose w.r.t the settlement arrived at between the parties and they once again approached the AT. After rounds of talks, vide order dated 07.07.2017, the AT observed that while parties had expressed that efforts would be made to arrive at a settlement qua the fulfilment of terms of settlement arrived at between them, in case the same was not achieved, the parties would be at liberty to take consequential action.
- viii. Vide order dated 19.09.2017, the AT revived the arbitral proceedings in terms of the consent award. Upon the revival of the proceedings, the AT adjudicated upon two applications filed by the JD- one of them being for setting aside of the consent award and the other for amendment of its claim. Both the said application came to be



dismissed vide order dated 31.01.2018. Vide order dated 17.05.2018, the AT, while observing that:

“1. The Learned Counsel for the Claimant, Mr. Datta states that the Claimant had moved an application under Order 11 Rule 6 CPC before the Hon’ble Delhi High Court. As stated in the Para III, the mandate of this Tribunal stood terminated and consequently, the Claimant had sought the appointment of an Arbitrator to adjudicate the fresh disputes which had arisen post reference order dated 21.04.2014 in Arbitration Petition No.149 of 2014 passed by the Hon’ble Delhi High Court.

2. The order of the Learned Single Judge of the Hon’ble Delhi High Court dated 09.05.2018 reads as under:-

“Learned counsel for the petitioner seeks leave to withdraw the present petition without prejudice to the rights and contentions of the petitioner.

The petition is dismissed as withdrawn, however, the same shall not prejudice the petitioner in any other proceedings.”

3. Mr. Agarwal, Learned Counsel for the Respondent states that since the application of the Claimant before the Hon’ble Delhi High Court was founded on the premise that the mandate of this Tribunal was over, he will be moving an execution petition in respect of the Award dated 30.03.2015.

4. Since the Senior Counsel for both the parties have stated that nothing further survives before this Tribunal, these proceedings stand concluded.”

- ix. The JD also filed two petitions under Section 11(6) of the A&C Act as well as petition under Sections 14(2) and 15(2) of the A&C Act, however, even the said petitions came to be dismissed by this Court. The first Section 11 petition came to be dismissed as withdrawn vide order dated 09.05.2018 whereas the second Section 11 petition and the petition under Section 14(2) and 15(2) came to be dismissed vide



judgement/order dated 14.09.2018. In between, a review petition being Review Petition No.341/2018 also came to be filed against certain observations made by the Single Judge in its order dated 23.07.2018, however, the same came to be dismissed vide order dated 05.09.2018. The SLP preferred against the judgement/order dated 14.09.2018 also came to be dismissed by the Supreme Court on 10.12.2018.

- x. A petition under Section 34 of the A&C Act also came to be filed against the consent award dated 30.03.2015 and the order dated 17.05.2018, however, the same came to be dismissed vide judgement/order dated 01.02.2019. It was informed that even the appeal filed by the JD under Section 37 of the A&C Act came to be dismissed.

DISCUSSION

6. DH has contested JD's opposition to the enforcement of the consent award by emphasizing upon the limitations of executing court to "go behind" the legality of the decree passed by the trial court. However, the DH has nowhere suggested or conceded that there is any legal infirmity in the consent award.

7. To emphasize the finality of the consent award, the DH has relied upon the order dated 31.01.2018 passed by the AT, whereby JD's application for setting aside the arbitral award dated 30.03.2015 came to be dismissed. DH contends that the binding nature of consent award was established with the said dismissal, making JD liable to honor the same and pay the sums payable thereunder.



8. DH also sought to take benefit of dismissal of JD's objections taken by way of petition under Section 34 of the A&C Act to contend that JD's opposition to enforcement of the consent award is futile.

9. JD countered DH's contentions/arguments by contending that even if it did not succeed in its attempt to challenge the award under Section 34 of the A&C Act, the award itself does not cast any liability on the JD to pay the sums as claimed by DH. According to the JD, its opposition is not based on a challenge to the validity of the consent award.

10. JD has referred to clause III(D) of the settlement, whereby it was agreed that in case JD fails to pay the sum by 30.11.2015, the parties would be relegated to the stage immediately prior to the filing of the settlement application, meaning thereby that the arbitral proceedings would get revived, restoring the original claims of the parties and absolving the JD from paying the sums it had committed to pay under the consent award.

11. This seems to be how even the AT came to understand the consent award, which is evident from the order dated 07.07.2017, wherein the AT records that the settlement attempts between the parties had failed and that they were free to take "consequential action". Later, in the proceedings dated 19.09.2017, the AT directed the DH to file its affidavit of evidence.

12. The aforesaid orders dated 07.07.2017 and 19.09.2017 clearly indicate that the AT proceeded in terms of the consent award by reviving the arbitral proceedings, upon JD's failure to pay the sums committed by it in terms of the settlement, and which formed part of the consent award.



13. However, for some inexplicable reason, JD chose to file an application before the AT inviting an order for setting aside the consent award. JD filed two separate applications dated 05.12.2017 and 30.05.2016 for amendment of the statement of claim and for setting aside of the consent award respectively. In the amendment application, the JD sought to plead the facts that had played out subsequent to the passing of consent award, with the additional prayer of refund of Rs.3 Crores paid by it to DH, under the consent award.

14. AT rejected both the applications vide order dated 31.01.2018. The amendment application was turned down by holding that the amendments sought to be made were beyond the scope of reference made to the AT. The other application i.e. the application for setting aside the consent award was rejected on the ground that the consequences of non-payment by JD had already been provided for in the consent award, according to which, the said situation would lead to the revival of the original claim in the arbitral proceedings.

15. The JD has played down the consequences of the order dated 31.01.2018 by contending that the AT could not have entertained the application, having become *functus officio* after passing the consent award. DH, on the other hand, has relied upon the said rejection to argue that the binding nature of consent award and JD's liability to pay the sums due therein is reinforced by the said dismissal.

16. Be that as it may, the AT upheld the consent award. The issue whether an application for setting aside of the award before the AT itself was maintainable or not, or whether the AT could have decided the application in



the manner it did, declaring the binding nature of its own order, cannot be gone into in these proceedings, since the scope of these proceedings is confined to the enforcement of the consent award and not to undertake legal vetting of the arbitral proceedings.

17. The legal existence of consent award cannot be wished away by the JD, and thus, maintainability of these enforcement proceedings is beyond doubt. However, in what manner the consent award could be enforced is for this court to see.

18. In these proceedings the DH has claimed that JD is liable to pay a sum of Rs. 20,14,06,953/- with future interest @ 18% p.a. from 01.06.2018 to the DH and the assistance of the court is sought by invoking its coercive powers against the JD to recover the dues.

19. Relevant clauses of the consent award are already extracted above.

20. It was agreed by the parties in clause III(D) that in case the JD was unable to pay the sum by 30.11.2015, the arbitral proceedings would be revived. In fact, in clause III(A), it has been emphasized that timely payment is the essence of the settlement, based on which the consent award came to be passed.

21. JD failed to pay the sum of Rs. 14,47,20,370/- by 30.11.2015 and rather filed an application seeking extension of time. AT obliged the JD by granting extension till 31.12.2015. JD failed to pay even in the said extended period and thereafter, two more extension were granted by AT vide orders dated 05.01.2016 and 24.02.2016 thereby extending the time till 31.01.2016 and 31.03.2016 respectively. It would be worth noting that the DH did not object to the extension requests made by the JD, thereby consenting to the modification of the consent award.



22. Even thereafter, the AT indulged the JD, unchallenged by the DH, until 07.07.2017, when the AT passed an order recording the failure of the parties to settle, however, it is essential to note that this settlement was for fulfilling the settlement terms recorded in the consent award, and take consequential action.

23. It is worth noting that the consent award was modified or novated with the consent of the parties, by subsequent extensions of time granted by the AT, only to the extent of such extensions of time. The original understanding of the parties that failure to make payments by JD would lead to revival of the arbitral proceedings never came to be diluted by any subsequent modification.

24. There is no indication from the arbitral record that the extension of time sought by the JD, and granted by the AT, would now confer an irreversible liability on the JD to pay the balance sum, with no consequence of the parties being relegated to the stage prior to settlement by reviving the arbitral proceedings.

25. Following the consent award, arbitral proceedings were revived by AT vide order dated 19.09.2017 whereby it was noted that the JD had already filed its affidavit of evidence while the DH was directed to file its affidavit of evidence.

26. On 17.05.2018, the parties made a statement that all the issues between the parties stood resolved and requested the AT to close the proceedings. The DH made a statement that it would rather seek to execute the consent award. Perhaps, parties had their own interpretation of the consent award inasmuch as the JD had the belief that no monetary liability could be visited upon him under the consent award while DH was under the



belief that it could claim the sums from the JD in terms of the consent award.

27. In the opinion of this court, JD's reading of the consent award is correct. The only consequence of non-payment of the sums by JD as determined under the settlement and further incorporated in the impugned award, would be the revival of the arbitral proceedings. The consent award, as modified by subsequent extensions of time to pay granted to the JD does not cast any liability on the JD to pay the sums mentioned therein, even after repeated defaults.

28. Consequently, no assistance can be provided by this court to DH to recover the sums claimed by it in enforcement of consent award.

29. The only direction towards enforcement of the consent award that could have been passed would have been the direction for revival of arbitral proceedings. However, parties abandoned the said remedy and made a statement that all issues stood resolved and requested the AT to close the proceedings.

30. For the reasons stated above, the execution petition alongwith pending application is dismissed.

**MANOJ KUMAR OHRI
(JUDGE)**

APRIL 24, 2024/ga