

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

Reserved on: 26th April, 2022
Pronounced on: 19th July, 2022

+ **O.M.P. (COMM) 124/2019 & I.A. 11506/2021.**

ORCHID INFRASTRUCTURE DEVELOPERS (P). LTD.

..... Petitioner

Through: Mr. Manish Sharma, Advocate. Ms.
Jigyasa Sharma and Mr. Ninad Dogra,
Advocates.

versus

FIVE STAR CONSTRUCTIONS PVT. LTD.

..... Respondent

Through: Ms. Kawaljit Kochar, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J.:

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 [*hereinafter*, "***the Act***"] impugns the arbitral award dated 10th September, 2018, whereby the Sole Arbitrator has dismissed Petitioner's counter-claim and allowed Respondent's claim in part – to the extent of Rs. 4,33,877/-.

BRIEF FACTS

2. Petitioner – Orchid Infrastructure Developers Pvt. Ltd. [*hereinafter*, "***ORCHID***"] awarded a contract *vide* letter dated 28th December, 2012, for

‘Construction of 21 Dwelling Units, ORCHID ISLAND at Gurugram on 7 plots bearing numbers 257 to 262 and 261-A’ [hereinafter, “Contract”] to Respondent – Five Star Constructions Pvt. Ltd. [hereinafter, “FIVE STAR”] for a consideration of Rs. 2,21,01,162/-. The construction was tentatively to be completed within a period of twelve months *i.e.*, on or before 31st December, 2011.

3. Dispute arose between the parties with regard to delays in completion of work under the Contract. ORCHID contends that it released a mobilisation advance of Rs. 11,05,058/- to FIVE STAR and routinely made payments in terms of the Contract. FIVE STAR repeatedly sought extensions, which were granted by ORCHID, without prejudice to its rights to raise claims. Thereafter, ORCHID issued a show-cause notice dated 1st November, 2012, to which, there was no satisfactory response from FIVE STAR. Ultimately, on 23rd May, 2013, FIVE STAR terminated the Contract. ORCHID then issued a final bill dated 20th November, 2013, which was responded by FIVE STAR asking ORCHID to depute a suitable person for joint verification of the work done. ORCHID contended that a substantial portion of work was still left to be completed, and the same was awarded to other contractors at the cost and risk of FIVE STAR. Further, ORCHID was also forced to pay a “delay penalty” to its customers, on account of the delay in handing over possession of the dwelling units.

AT ARBITRATION

4. In the circumstances noted above, FIVE STAR invoked arbitration under Section 11 of the Act, which led to appointment of the Arbitral Tribunal by

this Court *vide* order dated 27th May, 2016. FIVE STAR raised claims towards: (i) Rs. 29,60,466/- (towards expenditure incurred on work done till 14th January, 2013); (ii) interest; and (iii) costs. ORCHID filed its counter-claim *qua* mobilization advance, liquidated damages due to FIVE STAR'S failure to complete work, cost for pending work commissioned by ORCHID from other contractors and costs.

5. The Arbitrator, *vide* impugned award dated 10th September, 2018, allowed FIVE STAR'S claim in part and directed ORCHID to pay a sum of Rs. 4,33,877/- along with post-award interest payable at 12% per annum. The remaining claims, as well as ORCHID'S counter-claims, were dismissed.

CONTENTIONS OF THE PARTIES

ON BEHALF OF ORCHID

6. Although, ORCHID seeks setting-aside of the impugned award with respect to award of claim and dismissal of counter-claims; however, Mr. Manish Sharma, counsel for ORCHID, has addressed arguments only *qua* the award of claim of Rs. 4,33,877/-, and no serious challenge was raised *qua* dismissal of counter-claims. His submissions summarised as follows:

6.1. The impugned award is arbitrary, erroneous and against the public policy of India – as it gives no reasoning for award of the claim in favour of FIVE STAR.

6.2. The impugned award is based on conjecture and surmises and fails to fulfil the statutory mandate of Section 31(3) of the Act. The Arbitrator has erroneously and mistakenly held in paragraph no. 11.28 of the impugned

award that ORCHID (in its Statement of Defence), has admitted to the pleadings *qua* interim relief, and on the basis of such “deemed admission”, ruled in favour of FIVE STAR. On the contrary, ORCHID had categorically refuted FIVE STAR’s claim and had rather raised counter-claims of recovery of mobilisation advance, liquidated damages, etc.

6.3. Since the Arbitrator has rejected the main claim for Rs. 29,60,466/-, which included Rs. 4,33,877/- claimed as interim relief, axiomatically the interim relief also had to be rejected; nonetheless it could certainly not be granted in isolation, devoid of reasoning. The impugned award is thus, contrary to Section 31(3) of the Act. Reliance is placed on the judgments in *Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.*,¹ and *Jai Singh v. Delhi Development Authority and Ors.*²

6.4. The Arbitrator had come to a categorical finding that the final bill raised by FIVE STAR dated 7th May, 2013 was not proved as per law. Having come to this conclusion, he could not have awarded the claim of Rs. 4,33,877/- which is based on unproved documents. Further, upon a perusal of the final bill dated 7th May, 2013, it is apparent that no work was done after raising the Bill of Quantities [*hereinafter*, “**BoQ**”] for the period from 9th December, 2012 to 7th May, 2013.

ON BEHALF OF FIVE STAR

7. On the other hand, Ms. Kawaljit Kochar, counsel for FIVE STAR, advanced the following contentions:

¹ (2019) 20 SCC 1.

² In O.M.P. No. 152/2002 decided on 4th September, 2008.
2008 (3) Arb LR 667 Del.

7.1. The Contract could not be executed within the prescribed time as ORCHID failed to fulfil its reciprocal obligations of supply of material(s) and drawing(s) on time, etc. There is ample proof filed along with the Statement of Claims to prove the same. Contractual period was extended up to 31st December, 2012; thereafter, in a meeting held on 16th January, 2013, followed by a letter dated 21st January, 2013, it was mutually decided by the parties that balance work would be completed by ORCHID, without prejudice to rights of FIVE STAR.

7.2. Admittedly, FIVE STAR's labour force worked on the site till 7th May, 2013. Thereafter, the final bill was submitted by FIVE STAR; however, ORCHID refused to make the payment of final bill, despite terms settled in the joint meeting on 16th January, 2013. In these circumstances, ORCHID sent a letter dated 15th July, 2013, reiterating the understanding reached between the parties during the joint meeting and demanding a payment of a sum of Rs. 4,10,247/-.

7.3. ORCHID refused to make the said payment, and accordingly, FIVE STAR invoked the arbitration clause and the Arbitral Tribunal stood constituted *vide* order dated 27th May, 2016.³ FIVE STAR filed its statement of claims before the Arbitrator for Rs. 29,60,446/- towards expenditure income incurred on execution of works till 14th January, 2013 and interest thereon till the actual date of payment. In response, ORCHID also filed its counter-claim.

7.4. Reliance is placed upon paragraph 12.4 of the arbitral award, which discloses the reason given by the Arbitrator for awarding the claim. In view of ORCHID's deemed admission, evasive denial and admitted document *viz.*

³ In Arb. P. 51/2016 *vide* order dated 27th May, 2016.

Ex. R-3, it becomes evident that ORCHID had resorted to falsehood in stating that FIVE STAR did not work after 14th January, 2013. The afore-said admitted document shows that FIVE STAR's workers had worked on site till 7th May, 2013, and therefore, it was entitled to the money in respect of the work done, despite its blameworthy conduct.

7.5. Reliance is placed upon the judgment of the Supreme Court in *Associate Builders v. Delhi Development Authority*⁴ to argue that the Court cannot venture into deciding questions of fact to set-aside an arbitral award under Section 34 of the Act. Reliance was also placed on the judgment in *Indian Oil Corporation Ltd. v. Shri Ganesh Petroleum*⁵ to say that the Court does not sit in appeal over an award made by the Arbitral Tribunal.

ANALYSIS

8. The Court has considered the afore-noted contentions of the counsel. Indeed, ORCHID had one main relief viz. Claim No. 1 for Rs. 29,60,466/- towards expenditure incurred on execution of work till 14th January, 2013 as per final bill. Claim No. 2 was *qua* interest on the said amount and Claim No. 3 was *qua* costs. Both the parties led documentary as well as oral evidence. FIVE STAR has not impugned the award in so far as the rejection of its claim is concerned, and rather, is only defending the impugned award to the extent it partly allows their claims. Claim No. 1 was rejected by the Arbitrator for the reasons disclosed in the following extracted portion of the impugned award:

“11.25. *It is extremely important to note that the factum of ‘tools and*

⁴ 2015 (3) SCC 49.

⁵ (2022) 4 SCC 463.

plants and other materials' (as per the list attached) of the value of Rs.20 lacs' mentioned in the said reply dated 19.09.2013 Ex.C12, is completely missing from the Statement of Claim as also the evidence of CWI Sh. Praveen Madhok. So, such a conduct of the Claimant cannot be appreciated and it persuades me to believe that at least a portion its Claim No.1 is based on falsehood and as such must be rejected.

11.26. In the Statement of Claim no specific amount has been claimed by the Claimant under Claim No. 1 in relation to 'VARIATION IN BOQ QUANTITY' although a mention thereof has been made. However CWI Sh. Praveen Madhok in para 6 of his affidavit Ex.CW1/A makes a mention of 'Detail in r/o Claim No.2, 'VARIATION IN BOQ QUANTITY' and is claiming a sum of Rs.25,26,569/-. So, this portion of evidence is not in accordance with the pleadings and is contrary to Claimant's own admission as contained in Ex.C12 mentioned above. Also page 48 which is part of Mark 6, the final bill as per the claimant, in respect of the "BOQ work done' the amount mentioned is '0'. So, it clear that this amounts to resorting to falsehood and is an effort to mislead even this Tribunal.

11.27. The question is, in such a situation when both parties have resorted to falsehood and have not been truthful, what is the way out?"

9. After having concluded that Claim No. 1 was based on falsehood, the Arbitrator nonetheless proceeded to allow the said claim in part – which is the subject-matter of the present petition. The reasons disclosed in the impugned award are as under:

*"11.28. In its Statement of Claim, the Claimant has specifically mentioned in para 5 that after adjustment of Rs. 5,91,963 / -the balance mobilization advance, towards final bill a sum of Rs.4,33,877/-towards the work done, was payable. **This has not been denied by the Respondent specifically and therefore is deemed to have been admitted as correct.** In the face of this situation, in respect of Claim No.1 it is held that the Claimant is entitled to receive from the Respondent a sum of Rs.4,33,877/-towards the work done by it and the claim for balance amount is rejected being false and has remained unproved."*

[Emphasis Supplied]

10. From the above, it becomes apparent that the Arbitrator has partly-allowed the claim in favour of FIVE STAR on the basis of a presumed

admission on the part of ORCHID. Apart from that, no other reasoning is discernible. On this aspect, a perusal of the pleadings would be apposite to ascertain if there is indeed an admission on the part of ORCHID. For the sake of clarity, Paragraph No. 5 of the Statement of Defence filed by ORCHID, which deals with the corresponding Paragraph No. 5 of the Statement of Claim, are juxtaposed against each other as follows:

Statement of Claim [FIVE STAR]	Statement of Defence [ORCHID]
<p>“5. INTERIM RELIEF: 5.1 Having explained "Brief History of Case" here in-before, the claimant now submits the application in terms of Section 17 of ARBITRATION AND CONCILLATION ACT 1906 <u>for interim relief</u> as follow</p> <p>A. The payment of <u>undisputed portion amounting to Rs.4,33,877/-</u> (Four Lakh. Thirty-Three Thousand and Eight Hundred and Seventy-Seven only) <u>works executed viz works executed</u> as per contract provisions after adjustment of recovery. of last installment of mobilization advance amounting to Rs. 5,91,963/- (Five Lakh Ninety-One Thousand Nine Hundred and Sixty Three only) which will facilitate the finalization of disputed claims of payment.</p> <p>B. Any other relief as deemed fit by the ARBITRAL TRIBUNAL”</p>	<p>“5. INTERIM RELIEF 5.1. As identified above, the brief history of the case presented by Claimant is replete with concealment of material documents, non-disclosure of material facts and misinterpretation. Even further the nature of relief prayed for does not fall within the purview of section 17 of the arbitration and conciliation act which envisages and provides only for grant of protective measures and not for payment/release of sums to a contesting party. Moreover, no justification has been provided (either in equity or in fact or towards balance of convenience/necessity of protection) by Claimant justifying an entitlement towards the interim relief prayed.</p> <p>A. <u>It is denied that there is any "undisputed portion of works executed" as asserted. It is further pointed out that in the said paragraph Claimant itself refers to "finalisation of dispute of payment" thus itself evidencing/acknowledging disputed liability that requires adjudication and determination.</u> It is the admitted position of the parties that the contract was entered into, contains a risk and purchase clause and that the contract was not duly performed within the time period provided</p>

	<p><i>and that the contract was "rescinded" prior to completion of works by Claimant and that on no occasion has Respondent waived its entitlements to loss and damages arising out of the delay and breaches by Claimant. Pertinently claimant admits that proceedings are pending against the claimant for recovery of sums against the negotiable instruments issued by claimant and it is thus evident that in addition to the amounts claimed under the counter claim, these amounts are also disputed and claimed by respondent. B. Claimant is not entitled to "any other relief" as claimed."</i></p>
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11. The above comparison reveals no admission as held by the Arbitrator, and rather, there is a clear denial. The Court also finds merit in Mr. Sharma's contention that once the Arbitrator came to the conclusion that FIVE STAR was disentitled to the Claim No. 1 for Rs. 29,60,466/-, he could not have proceeded to award an interim/ ancillary amount of Rs. 4,33,877/- since the same was included under Claim No. 1. To give further clarity, it must be noted that the amount of Rs. 4,33,877/-, in fact, was put forth by way of an interim relief. This also becomes apparent from the above-extracted paragraph no. 5.

12. From the above pleadings, it manifests that the amount of Rs. 4,33,877/- awarded in favour of FIVE STAR was included in the main relief – which stood rejected. On rejection of the main relief, axiomatically, the interim relief ought to have been rejected. The Arbitrator has evidently not taken note of this aspect and proceeded as if there was an admission on the part of ORCHID for the said claim. Since no other reason for awarding this claim is discernible, except for the alleged admission on the part of ORCHID,

the impugned award is liable to be set-aside being *ex-facie* contrary to the record.

13. The impugned award fails to give any basis for accepting the said figure. The final bill (also referred to as “Mark Six”) dated 7th May, 2013 was required to be proved by the FIVE STAR; however, the same could not be done. The Arbitrator has specifically held that the said document was not proved as per law and there were no pleadings in support of the same. The relevant observations of the Arbitrator on this aspect read as follows:

“11.12. CWI Sh. Praveen Madhok in para 22 has also deposed that as per final bill Mark 6 (10 Sheets) till 14.01.2013, a sum of Rs.29,60,446/- had been incurred towards the expenditure. How this figure has been arrived at is also not clear.”

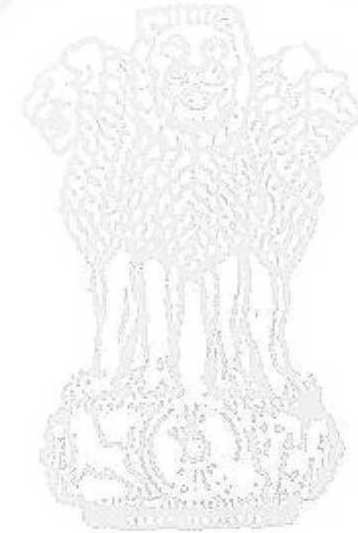
14. The Arbitrator came to a conclusion that no work was done for the period from 9th December, 2013 to 7th May, 2013, and consequently, rejected the final bill. In light of this finding, he could not have proceeded to award Rs. 4,33,877/- under the impression that this was for work done by FIVE STAR after closure of the Contract. To this extent, the impugned award makes no reference to any evidence to support the findings, and is thus, entirely assumptive.

15. While there can be no quarrel as regards the general propositions of law advanced by FIVE STAR; however, the judgments relied upon by FIVE STAR are not applicable to the facts of the present case discussed above. In view of the above, the impugned award is patently unreasonable in so far as it awards Rs. 4,33,877/- in favour of FIVE STAR.

16. In view of the above, the present petition is allowed and the impugned award is set-aside to the extent it awards Rs. 4,33,877/- and interest thereon. All pending applications, if any, also stand disposed of.

SANJEEV NARULA, J

JULY 19, 2022
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