

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

+ **OMP No. 8/2008**

Reserved on : August 12, 2008
Decided on : August 25th, 2008

UNION OF INDIA Petitioner
Through Mr. Rajeev Saxena, Advocate

versus

M/S. HARCHARAN DASS GUPTA Respondent
Through Mr. V.K. Sharma, Advocate

CORAM:

Mr. Justice S. Ravindra Bhat

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| 1. | Whether reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

Mr. Justice S. Ravindra Bhat:

1. The petitioner, Union of India (hereafter referred to as "the Union")

challenges, under Section 34, Arbitration and Conciliation Act, (hereafter “the Act”), the validity of an award of the Sole Arbitrator, appointed to decide the *inter se* disputes with the respondent; the award was published on 28th August, 2007 (hereafter called “the impugned award”).

2. The facts essential for deciding this case are that the Union accepted the tender of the respondent-contractor (hereafter “the contractor”) for construction of a multistoried complex at S.P. Marg, New Delhi (SH, Auditorium Building). The contractor was awarded the work on 14-10-1995. In terms of the contract, the work had to commence on 24-10-1995; the time allowed for completion was 15 months. According to the agreement, the date of completion was 25-1-1997. The Estimated cost of the project was Rs. 1,97,05,973/-. The project was actually completed on 14-3-2001 and the final bill was passed on 23-7-2001. The contractor demanded reference of disputes; the Union acceded, and referred them to Shri A.K. Singhal. The arbitrator was however changed, by this court; Shri O.P. Gaddhyn was substituted as arbitrator; he vacated office and ultimately, the arbitrator, Shri P.S. Chadha, after considering the pleadings, materials and contentions, published the impugned

award.

3. The Union contends that the Arbitrator, while considering the Claim No.1 on account of alleged wrong derivation of rates of extra/substitute item of work and granting the sum of Rs.3,86,064/- (against a Claim of Rs.7,50,00/-) erred by finding that the sanctioned rates for extra items and substituted items were less than the rates paid during the execution of the work. Mr. Saxena, learned counsel submits that the one hand, the Arbitrator agreed that the rates for items under this claim could not be derived under Clause 12 (i) (ii) (iii) (v); therefore, the Union, in terms of Clause 12(v) of the contract on the basis of the market rates derived them correctly, along with the analysis, however, on the other hand, the award does not disclose any reasoning for discarding the sanctioned rates and in awarding the amount of Rs.3,86,064/-. Reliance is placed on the decision reported as *Surajmull Nagarmull vs. Jute Corporation of India* AIR 2001 Cal. 227 to say that the award is non-speaking.

4. The Union next contends that the arbitrator, while dealing the Claim No. 2 (where a claim of Rs. 4,30,746/- had been made by the contractor on account of wrongful deduction of rebate from running and final bill) erred in allowing the sum of Rs. 3,49,356/- by ignoring the terms and conditions of the Contract. It is

contended that the final bill was paid within six months which was also admitted by the arbitrator. However, he failed to appreciate that the final bill was paid on 23.07.2001 and observed that it was not the final bill as certain amounts were withheld and Clause 10 CC amounts were paid later. He ignored that under Clause 9 and 25 of the Agreement if for undisputed items bills had been paid the same were deemed final. It is also contended that the award is in error as it holds that the security deposit amount should have been released by 13.09.2001, thus failing to appreciate that the work was completed on 14.3.2001 and the final bills was passed on 23.7.2001 whereas the security deposit was released on 19.9.2001 i.e. within six months (of the completion of work or finalization of final bill, whichever is later, as stipulated under Clause 17 of the Agreement).

5. Mr. Saxena, learned counsel next submitted that while considering Claim No. 6 on account of items of work executed but not paid or short paid, the arbitrator granted an amount of Rs. 1,80,303/- against the claim of the Contractor of Rs. 6,00,000/-. It was submitted that the arbitrator erred in law by failing to appreciate that the Contractor has used, M.S. Pins in place of the Copper Pins as required under the contract which was a patent breach on the part of the Contractor

and found to be so during an inspection. He submits that the arbitrator further fell into error by ignoring an undertaking dated 26.03.2001 given by the Contractor, where the latter had agreed to the reduced rates for Items invoked on this account which were also not refuted by him. Such an undertaking, contended counsel, is an amicable settlement and forms part of the contract, which cannot be discarded, nor rejected. The parties could approbate or reprobate at their whims and fancies and on frivolous pleas. The arbitrator, says counsel, committed a patent illegality in ignoring the undertaking and not giving effect to it. Such an award is contrary to public policy; counsel relied on *Double DOT Finance Ltd. Vs. Goyal M.g. Gases Ltd.* 2005 (L) ALR 324, to say that non consideration of an undertaking by a party by an Arbitrator makes the finding erroneous particularly when there is no evidence before the arbitrator on whether the undertaking had been given of free will.

6. The Union next attacks the findings on Claim No.7 on account of alleged claims of damages for maintaining staff, machinery and infrastructure beyond stipulated time for completion. The arbitrator awarded Rs.8,00,000/- against a claim of Rs.19,90,000/-. The finding that the work was delayed due to the Union not giving decisions and site within time is challenged; it is contended that the

arbitrator failed to appreciate that the work scheduled to be completed within 15 months was delayed by 50 months. The Contractor despite repeated requests and demands of the Union was negligent; the Union relies on 22 letters by which the Contractor was asked to proceed with the work diligently to avoid delays. It is alleged that the Contractor failed to arrange sufficient labour and resources and to mobilize adequate resources for completion of the work in time. In these circumstances, the finding that that extension of time was given to the contractor, for completing work, without levy of compensation and thus attributing delays to the department, is challenged as untenable. It is contended that while accepting extensions of time no claim or objection had been made by the Contractor; moreover, extensions had to be granted to enable him to complete the work and payments in this regard during the continuation of the contract had been released on escalation basis thus leading to no damage or loss to the Contractor. Counsel contends that conversely the Union was been put to unwarranted cost escalations that could have been avoided and mitigated if the Contractor had been efficient and expeditious in accomplishment of the assignment.

7. It is alleged, and contended that the arbitrator, while considering the Claim

No. 10 on account of alleged claims of interest @ 18% per annum awarded simple interest @ 10% per annum and future interest @ 12% per annum and thus erred in law. Reliance is placed on the decisions reported as *State of Rajasthan Vs. Nav Bharat Construction*, 2002 (1) SCC 659 and *Tuazhpron Export vs. Mukund Ltd.*, 2005 (3) ALR 407 where interest had been reduced from 15% to 6% and 18% to 5%.

8. The contractor resists the Union's grounds of challenge, and denies that the arbitrator erred in observing that the sanctioned rates for extra items and substituted items were less than the rates paid during the execution of the work, in Claim No. 1. The arbitrator has upheld the rates, which were paid to the Claimant up to 29th RA Bill. It is argued that the *rationale* given was that

"There is no justified reason to reduce the rate of Rs. 8,00/- abruptly once it had been paid to the Claimant up to 29th RA Bill".

This reason for upholding the rate, which paid up to the 29th RA Bill by the Union, is cited as a reasonable one. The contractor therefore contends that the Award cannot be attacked as a non-speaking award. It is urged that reasonableness of the reasons is a matter, which cannot be gone into in these proceedings by this Court.

9. As regards findings on Claim No. 2, the contractor submits that they are findings of fact by the arbitrator. The rebate offered by the contractor was indicated towards the end of Page 3 of the Award. It is contended that the Arbitrator looked into Exhibit R-206 filed by the Union, during the proceedings on 12th January, 2007 and after considering the same concluded that the 3rd, 5th, 7th, 10th, 12th, 13th, 15th, 19th, 21st and 22nd running Bills were not paid in time. As regards the rest, it was held that the work done was less. Counsel submitted that amount of rebate for monthly payments of these bills mentioned worked out to Rs. 89,909.00. Accordingly, the sum of Rs. 89,909.00 was awarded against this part of the Claim. Counsel for the contractor urged that no fault can be found with the Award in so far as it relates to the rebate against the Running Account Bills.

10. It is next argued that so far as the Final Bill is concerned, the award concluded that:

"On the basis of the available documents on record, I am of the considered opinion that no finality was given to the so called Final bill paid on 23rd July, 1991, Rs. 25,000/- was withheld for finalisation of QC Paras and another Rs. 25,000/- was withheld for non-approval of rates for extra item and reduced rate items. The escalation due under Clause 10-CC amounting to nearly Rs. 1.80 lakhs on the work done and paid in Final Bill was also not paid to Claimants.

The Final Bill was passed only to perhaps just to make recovery of rebate. The total amount of rebate recovered for final bill is Rs. 1,72,299/- and accordingly a sum of Rs. 1,72,299/- is awarded to Claimant against this part of the claim."

The contractor submits that being a technically qualified person, the Arbitrator was well versed with such situations and applied his experience in professional life to give his findings, which cannot be found fault with. It is contended that the petitioner's reference to Clause 9 is misplaced. According to that Clause, payments of those items of the bills in respect of which there was no dispute and of items in dispute for quantities and rates as approved by the Engineer-in-Charge were to, as far as possible, be made within the period specified. The items of quality control, or non-approval of the rates for extra items and reduced items or the escalation under Clause 10-CC were not items in dispute. Payments on these accounts were simply withheld for reasons, which had nothing to do with the contractor; therefore, reliance upon Clause 9 by the Union are without any basis. Clause 25 is the Arbitration Clause in the Agreement between the parties, which has no bearing on Claim No. 2 in any manner whatsoever; therefore, reliance upon that clause, it is urged is also without any basis. The delayed release of Security deposit, according to learned counsel for the contractor were correctly found by the arbitrator. The

factual position was that the actual date of completion of the work was 14th March, 2001. The amount of Security Deposit had to be released accordingly by 13th September, 2001. The finding of the arbitrator, was that the Security Deposit was released on 19th September, 2001 i.e not as per the terms of the agreement. The amount of rebate, thus incorrectly deducted by the Union, was awarded in favour of the Contractor; it is submitted that reliance upon Clause 17 by the Union is misplaced.

11. The Objection by the Union against Claim No. 6 is characterized as an appeal. The findings given by the Arbitrator are findings of fact, which cannot be questioned in these proceedings. It is contended that the arbitrator showed awareness about the contentions raised. In Para 1 of the Award, at Page 9, the Ld. Arbitrator has referred to and discussed the Inspection Report Exhibit R-55 and the alleged undertaking dated 26th March, 2001 as also the contention of the petitioner that the Contractor herein having accepted the deficiency and reduced rates could not make a claim for the same. The Arbitrator applied his mind to the rival contentions at Page 2 at internal Page 9 of the Award and took a view, which is plausible and

possible view keeping in view the facts of the case. He concluded that the undertaking dated 26th March, 2001 was given after the date of completion, when no work was required to be done. The contractor relies on the following finding that

“in spite of Claimant's letter dated 26th March, 2001 (Exhibit R-64), no reduction of rate was carried out in spite of the instructions of the Contractor on the fact of Exhibit R-64 to put up reduced rate statement. It is presumed that no reduction of rates was carried out by the Contractor in view of the fact that all the deficiencies found were rectified by use of dash fastners by Claimants for which no additional payments was made. It is further observed that Clause 16 of the Agreement empowers the Contractor to accept the defective work at reduced rates but does not give any authority to reduce the quantity of item actually executed. In view of my finding as above, the reduction in quantity of Agreement Item 9.5 and 9.6 is not held to be justified.”

12. Counsel for the contractor contends that the arbitrator rejected the additional claim of the Contractor herein amounting to Rs. 5,72,253/- for providing dash fastners as not justified, as that item was not required to be provided as per Agreement and that was executed mainly to rectify the deficiencies in the work. The following findings are also relied upon:

“The Respondents were forcing the Claimant to dismantle the whole work of stone cladding without checking at other places or locations in absence of undertaking R-64 dated 26th March, 2001 forced to be submitted, therefore, the said undertaking can be said as an arm twisting policy adopted by the Respondent”.

It was therefore, submitted that the said undertaking was not given on his own free will by the contractor; it was meaningless also since it was given after the date of completion of work when no work was required to be done. Having come to this conclusion for the reasons indicated in the Award, it cannot be said that the Ld. Arbitrator did not look into the contentions raised by the Petitioner. It is denied that the Award is against public policy. The Contractor relies upon the decision of the Supreme Court in *Chairman And M. D., N. T. P. C. Ltd. V. Reshmi Construction* 2004 (2) SCC 663.

13. In answer to the argument about the award under Claim No. 7, the contractor contends that the claim for damages has been allowed for a sum less than 50% of the claimed amount. This was supported by the finding that the documents on record revealed that a number of decisions were given very late (by the Union) and in many cases the decisions were conveyed when the stipulated period was over. It is urged that the arbitrator considered materials, i.e Exhibits R-165 to R-198. Therefore, the finding that the work got delayed due to various delay and hindrances attributed to the Union, was borne out. It is also urged that while

considering the hindrances on their part, the Union granted Extension of Time (“EOT”) without levy of compensation (Exhibit R-189). The arbitrator, based on the records and particularly those produced by the Union, held that the delay was attributable to the Petitioner/ Union. No levy (of compensation) had been admittedly imposed by way of compensation under Clause 2 of the Agreement, which also indicated that delay was not attributable to the contractor. It is also urged that the arbitrator showed awareness about the concept of mitigation of loss when observing as follows:

“The Claimant have filed the details of Rs. 19,90,000/- at Annexure-I on Page 8 of SOF duly supported with vouchers. But I feel that mitigation factor has not been considered. Therefore, the damages can be calculated by suing sound engineering practice adopted for calculation of overheads and other contingencies which are considered as 5% of the cost of work. The tender cost of the work was Rs. 1,67,21,050/- to be completed in 15 months. The 5% of Rs. 1,67,21,050/- works to Rs. 8,36,052/- for 15 months. Therefore, the overhead per month shall be Rs. 55,736/- and for a delay of 50 months, the amount will work out to Rs. 27,86,841/-. Considering the Claimants was supposed to mitigate losses, the 50% of the amount works out to Rs. 13,93,420/-. However, to be more conservative and taking into consideration the magnitude of work, I restrict the award to a lump sum amount of Rs. 8,00,000/- in favour of Claimants.”

14. The decision of the Supreme Court, in *Oil and Natural Gas Commission –vs- Saw Pipes Ltd* 2003 (5) SCC 705 marks a paradigm shift in what are permissible

areas of judicial intervention, under Section 34 of the Act. The court held that awards can be interfered with in certain situations:

“the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term “public policy” in Renusagar case⁵, it is required to be held that the award could be set aside if it is patently illegal. The result would be—award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality; or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.”

This was later reiterated, and applied in *Hindustan Zinc Ltd. v. Friends Coal Carbonisation*, (2006) 4 SCC 445; and *Mc Dermott International Inc. -vs- Burn Standard Co Ltd.* 2006 (11) SCC 181. Patent illegality should, as the above extract shows, should be such as goes to “the root of the matter” if the illegality is of a trivial nature, the award cannot be interfered with.

15. In this case, the findings on Claim No. 1 by the arbitrator, in the opinion of the court are neither unreasonable nor irrational; they are not bereft of any reasons. The contractor had claimed rates for extra and substitute items of work, on the basis of market rates. The Union calculated the rates, which were disputed. The arbitrator

noticed that during the supplies, the Union had been consistently paying for those supplies, on the basis of certain rates, up to the payment for 29th Running account bill. However, it reduced the amount, when the contractor claimed higher amounts. The arbitrator held that the reduction was not justified; he accepted the rates paid by the Union previously, and awarded Rs. 3,86,084/-. This can hardly be faulted as contrary to public policy of India, or patently illegal. Similarly, as far as alleged unjustified deductions from payments were concerned, under Claim No. 2, the arbitrator held, on the basis of documentary evidence, that barring a few bills paid in time, specific bills remained unpaid. The contractor had agreed to a rebate of stipulated amounts in relation to certain category of payments, if made within time. All the rebates were claimed; the arbitrator gave reasons for awarding each of the claims that he did. These were after application of mind; he also disallowed several claims. The award does not reveal any infirmity on this score.

16. As far as the award of Rs. 1,80,303/- for Claim No. 6 on the ground of work performed, but not paid for, or paid partly was concerned, the arbitrator, here too, examined the running bills and payments made. He noticed that the method adopted by the Union in refuting the claim, on the ground that the work had been

done, and checking 0.14% of the total area, and applying it for the entire work, to justify the denial of this head of claim, was unfounded. Further, as regards the complaint by the Union about use of MS pins instead of copper pins, the award noted that the Supervisor in question had a dispute with the contractor and that the Union did not issue a single notice in support of its allegations, which impelled it to withhold payment. So far as the Union's reliance on an undertaking was concerned, the arbitrator held that it was taken under coercion; the timing, according to him, supported this finding, since the undertaking was executed when the contract was completed. The contractor relies on *Reshmi Constructions (supra)* in support of its argument that this finding is sound. In that decision, the Supreme Court held that:

"...we cannot shut our eyes to the ground reality that in the cases where a contractor has made huge investment, he cannot afford not to take from the employer the amount under the bills, for various reasons which may include discharge of his liability towards the banks, financial institutions and other persons. In such a situation, the public sector undertakings would have an upper hand. They would not ordinarily release the money unless a 'No Demand Certificate' is signed. Each case, therefore, is required to be considered on its own facts.

Further, necessitas non habet legem is an old age maxim which means necessity knows no law. A person may sometimes have to succumb to the pressure of other party to the bargain who is on a stronger position."

The finding about the contractor having been coerced into executing the

undertaking may appear, at the first instance, to be rendered presumptively. Yet, as the Supreme Court observed, one cannot be unmindful of realities. So long as the finding is plausible, though not strictly legal, and does not go to the root of the matter, the courts would not upset it as contrary to public policy. Therefore, this finding cannot be upset.

17. The claim for damages for maintaining staff, machinery and infrastructure beyond the stipulated period of completion was Rs. 19,90,000/-. The arbitrator records that the contractor sought to justify this with vouchers, etc. However, the award grants only Rs. 8,00,000/-. This figure was arrived at by the arbitrator, after considering the mitigation factor. He applied "*sound engineering practice*" for calculation of overheads and other contingencies which are considered as 5% of the cost of work, upon the tender cost of the work, Rs. 1,67,21,050/- to be completed in 15 months. He reasoned that 5% of Rs. 1,67,21,050/- works to Rs. 8,36,052/- for 15 months, and thus overhead per month shall be Rs. 55,736/-. For the delay of 50 months, the amount was determined at Rs. 27,86,841/-. The arbitrator then held that the Contractor was supposed to mitigate losses and deducted 50% of that amount, leaving Rs. 13,93,420/-. He, however, on a conservative estimate, taking

into consideration the magnitude of work, restricted the award to a lump sum amount of Rs. 8,00,000/-. When confronted with an almost identical situation, where the award granted 5% of the contract value as damages, the Supreme Court, upheld it, in *Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd.*, (2007) 8 SCC 466, held that:

"...This has been taken as the yardstick and the compensation has been worked out at 5% of the contract value and damages to the tune of Rs. 8.9 crores has been awarded to the claimant. We are of opinion that this issue is purely dependent on the factual controversy of the matter and the majority of the arbitrators have assessed the loss on account of the delays on the part of the owner and awarded 5% of the contract value as a measure to award compensation to the owner on account of the delay on the part of the owner in completing the work and no exception can be taken to this approach. The amount cannot be said to be a wrong assessment of the situation."

It is therefore, held that the findings on Claim No. 7 are not contrary to public policy, or patently illegal, warranting judicial interference, under Section 34.

18. The award of 10% interest p.a from the date of invocation of arbitration, except in respect of Claim No. 5(i), where the interest was directed to be from a future date, cannot be termed excessive. Here, the Union's reliance on the decisions of the Supreme Court is inapposite; in those cases, the award of interest was to the tune of 18% per annum. However, post award interest at 12%, in the opinion of the

court, is not warranted. That is modified to 10% per annum.

19. For the above reasons, the petition cannot succeed on merits. However, the grant of post award, future interest is reduced from 12% per annum to 10% per annum. The petition is dismissed, subject to the above modification. In the circumstances of the case, the costs of this proceeding shall be borne by the petitioner, which shall pay Rs. 35,000/- to the respondent, within four weeks.

DATED: 25th August, 2008

S. RAVINDRA BHAT, J