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IN THE HIGH COURT OF DELHI AT NEW DELHI

OMP NO. 417/ 2004

Reserved on : January 7th, 2008

Pronounced on: March 3rd, 2008

NATIONAL BUILDINGS CORPORATION. LTD

... Petitioner

Through : Mr. Sanjiv Mahajan, Advocate

Vs.

M/s SATISH KUMAR CONTRACTOR

... Respondent

Through : Mr. D. Moitra, Advocate, Mr. Ravinder
Kumar, 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 present petition is under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter, "the Act"). It challenges an award made against the petitioner.

2. The material facts required for the disposal of this case are that the petitioner entered into a contract with the respondent for the construction of a

school building at Kularan Kalan, Agra. The contract was awarded by the petitioner to the respondent after a due tendering process; the contract cost was agreed upon at Rs. 1,69,46,996. The work was to be completed within 18 months (reckonable 15 days from the date of the letter of allotment). The stipulated dates for the commencement and completion of work were 25.1.1991 and the 24.6.1993 respectively.

3. It is admitted that the premises while in an incomplete state were taken over by the school authorities in January, 1993 and restored to the respondent contractor in March 1994. Work in the entire campus- including the external development work- was finally completed in March 1996 and handed over to the school authorities. The respondent-contractor, aggrieved by alleged non-payment of its final dues by the petitioner invoked the arbitration clause and sent notice to the Chairman of the petitioner. As no action was taken by the petitioner, the respondent approached this Court for the appointment of an arbitrator. Consequently, the arbitral tribunal was constituted and the petitioner filed its claims before the tribunal. After considering the materials and contentions, the arbitrator awarded a sum of Rs. 23,73,763/- in favour of the respondent contractor.

4. The petitioner alleges that in granting the relief to the respondent, the arbitrator transgressed the terms of reference and has in effect re-written the terms

of the contract. The petitioner challenges the decision of the arbitrator to award an amount of Rs. 29,556 in favour of the respondent, towards shuttering in excess of 3.5 meters, when admittedly the parties had jointly conducted the measurements at the site and recorded the same in the measurement book.

5. The finding of the tribunal regarding the claim for payment for fans is attacked as perverse and contrary to record. It is averred that the arbitrator did not consider that the amount was not payable by the petitioners on two grounds, viz. that the fans supplied were duplicate and that the respondent had failed to supply guarantee cards. Instead, it is submitted, the tribunal basing its findings on the fact that no affidavit had been filed in rebuttal, awarded the amounts to the respondent. It is also submitted that the finding of the tribunal that no affidavit was submitted in the reply is contrary to the record as the petitioner had stated in its affidavit that the fans supplied were duplicate and it is also contended that after the filing of respective evidence and cross examination, there was no question of filing further affidavits.

6. The petitioner also alleges that the arbitrator has, instead of finding whether there was any delay in the completion of the work, proceeded to examine the petitioners' accounts and passed the award on the basis of its appreciation of

such records. It is averred that this was unnecessary in the face of the admitted position that the security amount was retained against the liquidated damages. It is also submitted that the process of calling for accounts of the petitioner, while ignoring the affidavits of the respondent, is contrary to settled law. In this respect, it is alleged that findings of the arbitrator that there was no evidence to show imposition of levy was contrary to the admitted position of the respondent, the contractual clauses and the law applicable. It is submitted that under the contractual clauses the petitioner was required to retain the security amount as lien which would be subject to arbitration and therefore there is no question of the appropriation of the said amount being shown in the account.

7. The petitioner complains that the arbitrator, while allowing the mentioned claim of the respondent for refund of the cash security failed to take note that the respondent justified the delay only for a period of 25.12.1995. It is contended that the arbitrator held that the work was completed only on 31.3.1996, therefore the petitioner is entitled to liquidated damages for the period 25.12.1995 to 31.3.1996; the period for which delay was unexplained. It is also alleged that the finding regarding time not being of the essence is inconsistent with the respondent's position in the arbitral proceedings; neither in the claim petition or in the affidavit did it ever allege that time was not of essence to the contract. Due to this

unequivocal admission of the respondent that time was of essence to the contract there cannot be a finding to the contrary. The petitioner also relies on clause 12, clause 22, clause 2, 29 and 29A of the contract, to justify its claim for liquidated damages, on the ground of delay and alleges that the arbitral tribunal erred in the appreciation of law with regard to the award of damages; the petitioner was not required to prove damages in the face of contractual stipulations which clearly prescribed the amount which was payable by the respondents.

8. The award of the learned sole arbitrator in respect of the counterclaim for payment for the preparation of bills is alleged to be perverse and contrary to terms of the contract. By virtue of Clause 9, it was the responsibility of the respondent to prepare the bills and since this work had been completed by the petitioner, he was entitled to the claimed amount of Rs. 1,00,000.00. It is alleged that as regards interest awarded to the respondent, under Section 8(3) of the Arbitration and Conciliation Act, the arbitral tribunal had to decide the dispute in terms of the contract between the parties. In view of such an express contract, the Respondent was disentitled to interest on any amount retained or withheld by the petitioner, by reason of clause 29A.

9. The respondent submits that the present petition is not maintainable

before the court under section 34 as the petitioners objections are factual and there are no legal objections as such, also there are no grounds of public policy on which the award is sought to be said aside.

10. The respondents submit that the petitioner cannot claim liquidated damages because they were never levied during the subsistence of the agreement. It was only during the arbitral proceedings, after completion of the work was the plea for liquidated damages raised. It is alleged that no amount was deducted from the bills of the respondent. It is also averred that as extension was granted, time was not of essence to the contract. The counterclaim for liquidated damages was wholly unwarranted. The also respondent alleges that only one extension was granted during the pendency of the work and other extensions were all *post facto*, after completion of the work. It is submitted that *post facto* extensions are not extensions in the eye of the law and that they were not granted "subject" to the levy of liquidated damages, rather only the right to levy liquidated damages was reserved. The claim did not come up during the pendency of the contract, and was only raised as a counter claim during the arbitral proceedings.

11. With regard to the award of Rs.29,556 towards shuttering of dining room hall being in excess of 3.5 meters and the award of Rs. 3,00,000.00 to the

respondents, it is submitted that the objections raised by the petitioner are entirely factual and have been decided by the learned arbitral tribunal; it is not open for this court to go into questions of fact under section 34 of the Act.

12. With respect to the claim regarding the levy of liquidated damages, the respondent allege out that the petitioner admitted that security had been released and kept in cash deposit on account of paucity of funds; to verify the factual situation the arbitrator had called for the records of the accounts of the petitioner, through which it was established that the guarantee had been released and kept as cash security. Therefore, the arbitrator cannot be faulted in releasing the said amounts to the respondents. In relation to the claim of Rs. 1 lakh for the preparation of the bills, the respondent submits that according to the custom and usage of the trade in all government departments, including the present one, the department itself prepares the final bill and therefore the petitioner is not justified in asking for further sums for the same and rejection of the counterclaim is valid and should be upheld. As regards the objection that the learned arbitrator did not decide the dispute in accordance with the provisions of the contract [as mandated under section 28(3) of the Act], it is specifically denied that no interest can be awarded.

13. Learned counsel for the petitioner reiterated the position taken in the

pleadings. He submitted that the award in respect of the ceiling fans was unsupported in law. It was urged that the arbitrator did not act in accordance with law, and erred in ignoring the report of inspection which had mentioned the defects in the ceiling fans. Counsel submitted that this was sufficient material in the circumstances, justifying the withholding of amounts.

14. The claimant contractor, in terms of the agreement, had to supply 307 ceiling fans to various buildings of the school. The petitioners contended before the arbitrator that although the fans had been supplied, they were found to be duplicate; an amount of Rs. 3 Lakh was deducted from the amount payable to the contractor for the replacement of these fans. The arbitrator considered that the fans supplied were accepted by the RE (as confirmed in his affidavit) and concluded that the contract had not required any particular brand of fans. He found that there was no breach by the contractor and thus it was not open to the present petitioner to challenge or pick holes in the supplies made or ask for replacement after 6 months. Therefore, in the opinion of the learned arbitrator, the retention of the 3 lakh rupees was extra contractual and illegal. Though the petitioner has challenged this finding, the attack is not based on any convincing argument. The reliance on an inspection report was held unfounded since the petitioner did not give any notice of such inspection. The persons inspecting the premises were not produced. No attempt to get the evidence of the manufacturer too was made. In this background, the findings

of the arbitrator are neither unreasonable nor capricious as to be violative of the fundamental policies or laws.

15. The petitioner had alleged that time was of essence to the contract and the respondent had to pay 5 % of the contract value as liquidated damages for the delay in the completion of the work. The case of the respondent-contractor before the learned arbitrator was that despite completion of the contracted works, the petitioner had not returned the cash guarantee which was due to it. It was the contention by the petitioner that the extension had been granted without prejudice to the contractual right of the petitioner to claim liquidated damages and accordingly the same had been adjusted in the security amount.

16. The arbitrator examined the accounts of the petitioner and found that although the amount had been released as cash deposit and credited to the personal account of the contractor, no payment had been made and accordingly awarded this claim. The arbitrator was of the opinion that even otherwise a claim for liquidated damages by the petitioner was not justified because, in his opinion, after the first extension of time, given till 25.11.1993, time was not mentioned to be of essence to the contract and the second ex post facto extension granted on 3.7.1996 till 25.11.1996, was meaningless as work had been admittedly completed by

31.3.1996. Therefore, in the judgment of the arbitrator, damages could not be levied in view of section 55(3) of the Indian Contract Act. He therefore held that there was no question of the adjustment of any Liquidated Damages against the security deposit which had to be returned in full to the respondent-contractor. Apart from this he also ruled that the claim was barred by time because it had only been raised only in the counterclaims dated 9.7.2003 and the alleged cause of action had arisen on 31.3 .1996, the date of completion and acceptance of the work. He therefore, allowed the claim for Rs. 9,91,106 as refund of cash security.

17. The question whether there was delay in the performance of a contract is essentially one of fact. Undoubtedly, the first extension in this case was granted on 25-11-1993. Yet, the work was eventually completed in 1996. Undeniably, *post facto* extensions were granted, after expiry of the agreed periods. Section 55 (3) gives several choices to a promisee; if the performance of a contract is beyond the agreed period, the aggrieved party can accept the performance reserving liberty to recover damages. In this case, the performance was admittedly after the period agreed; yet post facto approval was granted. This was used as the sole excuse to retain the cash security amounts. The findings of the arbitrator are based on lack of notice by the petitioner about levying damages, during subsistence of the contract, or immediately upon performance, and raising of the claim only in arbitral

proceedings, in a belated fashion. These findings are perfectly plausible. The recital of Section 55 alone is not a magic formula entitling an aggrieved party to claim damages for breach of contract, of which time is deemed the essence. There must exist attendant circumstances, and a justifiable claim maintainable in law. Here, the petitioner chose to raise such claim almost seven years after the alleged cause of action. The findings, therefore, can hardly be faulted.

18. The claim for extra amount on account of shuttering of the dining hall at a height of 5 meters at extra cost, not included in the bill was based on the allegation that the respondent incurred extra cost and thus the sum was due to him in addition to the dues of the claim. The petitioner contested this claim and asserted that the Measurement Book, which had been signed by the respondent showed the height of the roof as 3.5 meters and accordingly it should be taken as so. In the absence of specific denial of this fact, the arbitrator opined that the entry in the MB should not be considered as sacrosanct and the height of the ceiling would be taken to be as sworn by the claimant by affidavit, i.e. 5 meters. Accordingly this amount was granted to the claimant-respondent.

19. Here, the grievance of the petitioner appears to be justified. The contractor did not deny that the agreed work, i.e 3.5 metres' height shuttering, had been

performed and so recorded. This was jointly reflected in the measurement book. Yet, it claimed that the shuttering height was 5 metres, and claimed extra cost for the balance work. The arbitrator here has acted *ex-facie* contrary to the contract. If the agreed height was 3.5 metres, and was so recorded, the onus was on the respondent to prove that the height was agreed to be increased and the amount not paid. The arbitrator could not have rejected objective materials and gone on the basis of a bald assertion, in an affidavit sworn on behalf of the petitioner. Therefore, award of the sum of Rs. 29,556 towards shuttering in excess of 3.5 meters, when admittedly the parties had jointly conducted the measurements at the site and recorded the same in the measurement book is unsustainable.

19. Intervention of courts with awards of arbitral tribunals is confined to grounds enacted under Section 34. The Supreme Court, in *Oil & Natural Gas Vs, Saw Pipes Ltd.* 2003 (5) SCC 705 scrutinized this provision, and held that interference was permissible on grounds of public policy, which in turn was explained as the award being contrary to:

- (a) Fundamental policy of Indian Law;
- (b) the interest of India; or
- (c) Justice or morality;
- (d) in addition, if it is patently illegal.

The above decision was affirmed in *Hindustan Zinc Ltd. Vs. Friends Coal Carbonization* 2006 (4) SCC 445; *Mc Dermott International Inc Vs. Burn Standard Co. Ltd.* 2006 (11) SCC 181. Thus, it is not every error, factual or even legal, which can form the basis of judicial interdiction with the award of an arbitrator. The threshold for a challenge is very high; most certainly, it is higher than what was contemplated in the previous *regime* of the old Arbitration Act, 1940. Each of the four indicators mentioned in *Saw Pipes* is a pointer to something striking, prominent, which should impel the court to use its jurisdiction. Otherwise, the challenge mechanism would mock the Act, and add a layer of substantive litigation in the judicial system – result unintended by Parliament, and the Supreme Court.

20. An application of the above standards with the facts of this case would show that the grounds of challenge to the award, except to the extent it attacks the findings on the shuttering height, are unfounded. The award of interest, at the rate of 12% per annum was on the basis that the contract was a commercial one, from the date of claim, i.e 29-9-1998. The amount quantified was Rs.23,73,763.00; in case the award was paid within 60 days, the entire award was deemed satisfied. In case the award was not so satisfied, future interest @ 18 % p.a till realization was awarded. The petitioner has been pursuing its remedies. Yet, it took a chance, and

did not deposit the amount, or seek any directions of this court. In the circumstances, the award of a higher rate of interest is not wholly unjustified, though it may require modification.

21. In the light of the above discussion, the award to the extent it directed payment of Rs. Rs. 29,556 towards shuttering in excess of 3.5 meters, cannot be sustained; it is set aside. The rest of the award, along with direction to pay 12% p.a interest till date of the award is upheld. The respondent is also entitled to post award, *pendente lite* interest at 15% p.a. till realization. The award, with the above modification, is upheld. The respondent is also entitled to costs quantified at Rs. 35,000/-. Let decree be drawn in the above terms.

DATED: 3rd March, 2008

S. RAVINDRA BHAT, J