

* IN THE HIGH COURT OF DELHI AT NEW DELHI
 + FAO(OS)36/2009 & CM 1604/2009
 # S.R.P. INDUSTRIES LTD. Appellant through
 ! Mr.Ranjit Singh, Adv.
 versus
 \$ GEA PROCESS ENGG. LTD. Respondent through
 ^ None
 % Date of Hearing : February 13, 2009
 Date of Decision : March 02, 2009

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
 HON'BLE MR. JUSTICE RAJIV SHAKDHER
 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

VIKRAMAJIT SEN, J.

1. This Appeal assails the Order dated 31.10.2008 passed by the learned Single Judge in which the Objections filed by the Appellant have been partially allowed. The said Objections were filed against the Award pronounced by the Sole Arbitrator, Justice Awadh Behari Rohatgi(Retd.) for a sum of Rupees 1,10,04,974/- on account of price of goods sold and delivered to the Appellant, together with interest thereon at the rate of thirteen per cent per annum which was calculated in the Award to be Rupees 85,79,938/-.

Costs of Rupees 7,00,000/- as well as interest at the rate of thirteen per cent per annum from the date of the Award till the date of payment of Rupees 1,10,04,974/- were also granted.

2. The learned Single Judge had modified the Award to the extent of Rupees 24,90,000/-, being the value of two Invoices in respect of which goods were not to have been supplied to the Appellant by the Respondent.

3. The manner in which the Appellant has conducted itself both prior to the decision in the application filed by the Respondent under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('A&C Act' for short) for the appointment of the Sole Arbitrator, and thereafter in the arbitral proceedings leads us to an inescapable conclusion that its primary purpose was to protract proceedings. The Appellant has placed on record a copy of the Letter of Intent dated 19.5.1994 on the Respondent for supply of a Spray Dryer for the Appellant's Silica Plant at Varanasi, Uttar Pradesh, the consolidated price of which was Rupees 2,35,00,000/-. Consequent upon disputes having arisen between the parties, the Arbitration Clause had been invoked by the Respondent by its letter dated 21.4.1999. As the Appellant failed altogether to nominate its arbitrator, the Respondent had no alternative but to file Arbitration Petition No.124/2000 under Section 11(6) of the A&C Act. After

repeated and futile efforts to effect service on the Appellant, the Court eventually ordered the Appellant to be served through publication. Thereafter, appearance was entered on its behalf at the very next hearing. By an oral order passed in the presence of the counsel for the parties the application under Section 11(6) of the Act was allowed whereby Justice Awadh Behari Rohatgi(Retd.) was appointed as the Sole Arbitrator. It is worthy of emphasis that the only issue articulated on behalf of the Appellant was with regard to the territorial jurisdiction of the High Court of Delhi; no other plea or contention was raised.

4. The principal argument raised before us by Mr. Ranjit Singh, learned counsel for the Appellant, is that the appointment of a Sole Arbitrator by the Court was legally impermissible since the Arbitration Clause contemplated the appointment of one Arbitrator each by the contesting parties, and for the appointment of a Presiding Arbitrator by the two arbitrators. Mr. Ranjit Singh has endeavoured to rely on a letter dated 3.7.2001 addressed by learned counsel for the Respondent to the Arbitrator in which the Respondent had adverted to the need to appoint an arbitrator on behalf of the Appellant. The contention on behalf of the Appellant is that the Court was not empowered to appoint an arbitrator at the behest

of the Respondent; and/or that a Sole Arbitrator could not have been appointed at all.

5. It would be useful to reiterate that no objection was taken by learned counsel for the Appellant [the Respondent in the Petition under Section 11(6) of the A&C Act] when Justice Awadh Behari Rohtagi(Retd.) was appointed as the Sole Arbitrator by this Court on 22.5.2001. This appointment had been made by the Court in the presence of learned counsel for the Appellant. Even though the first hearing before the Sole Arbitrator had been fixed by this Court in the presence of learned counsel for the parties, there was no appearance for the Appellant before the Sole Arbitrator on that date. On the next date of hearing, that is 30.7.2001, the proceedings were adjourned by the Sole Arbitrator consequent upon a telephonic request made by the learned counsel for the Appellant. The same position obtained on the next date of hearing. Eventually, on 4.9.2001 on the request of learned counsel for the Appellant, a period of four weeks was granted for filing a Written Statement to the Claim. No Objections to the effect that a Sole Arbitrator could not have been appointed had been voiced before the Sole Arbitrator, even though Section 16(2) of the A&C Act specifically envisages such a challenge. An attempt to raise this objection appears to have been made by moving an

application for amendment of the Written Statement which was rejected by the Arbitrator, apparently on the ground that it should have been taken in the first 'Statement of Defence' and, therefore, any subsequent effort could only have been seen merely as a dilatory tactic; and the plea for amendment should, therefore, be rejected. Once again, on subsequent hearing, no representation was made on behalf of the Appellant but the Sole Arbitrator nevertheless informed them of the subsequent date of hearing.

6. It appears that a Review Application, being IA 11469/2003 against the appointment of the Sole Arbitrator, was filed but eventually withdrawn on 14.5.2004. A writ petition filed by the Appellant, WP(C)4659/2003, questioning the appointment of Arbitrator, was dismissed in default on 7.7.2004. Despite all these facts, this very question was sought to be resurrected before the learned Single Judge as well as before us. The learned Single Judge has duly noted the rejection of this ground by the learned Arbitrator and has approved the invocation by the learned Arbitrator of the principles of waivers and estoppel.

7. In the nascent stages of arbitration, when it was still to be ubiquitously accepted as an alternative form for dispute resolution, Courts exercised supervision on these proceedings. Arbitration as an alternative dispute resolution mechanism has

now developed into a robust institution, capable of effectively deciding the disputes within its ken. With this metamorphosis, the superintendence of the Courts has exponentially waned. Initially, jural interference was allowed a wide amplitude by the Supreme Court, leading to a proliferation in the grounds on which awards could be assailed. Whilst, initially awards were susceptible to being set aside, if all questions raised were not discussed in the award, later on the fiction that all points had been duly considered and rejected came to be adopted to insulate awards from jural censure. Similarly, whilst it was earlier accepted that awards should contain reasons in clear terms, it was subsequently opined that if the trend/chain of thought was discernible, the award was impregnable. Most significantly, their Lordships have gone to the extent of enunciating that judicial interference is not called for even in those instances where the arbitrator may have committed an error of fact. The following passage from *Union of India -vs- Rallia Ram*, AIR 1963 SC 1685 is worthy of reproduction:-

An award being a decision of an arbitrator whether a lawyer or a layman chosen by the parties, and entrusted with power to decide a dispute submitted to him is ordinarily not liable to be challenge on the ground that it is erroneous. In order to make arbitration effective and the awards enforceable, machinery is devised for lending the assistance of the

ordinary Courts. The Court is also entrusted with power to modify or correct the award on the ground of imperfect form or clerical errors, or decision on questions not referred, which are severable from those referred. The Court has also power to remit the award when it has left some matters referred undetermined, or when the award is indefinite, or where the objection to the legality of the award is apparent on the face of the award. The Court may also set aside an award on the ground of corruption or misconduct of the arbitrator, or that a party has been guilty of fraudulent concealment or wilful deception. But the Court cannot interfere with the award if otherwise proper on the ground that the decision appears to it to be erroneous. The award of the arbitrator is ordinarily final and conclusive, unless a contrary intention is disclosed by the agreement. The award is the decision of a domestic tribunal chosen by the parties, and the Civil Courts which are entrusted with the power to facilitate arbitration and to effectuate the awards, cannot exercise appellate powers over the decision. Wrong or right the decision is binding if it be reached fairly after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement. But it is now firmly established that an award is bad on the ground of error of law on the face of it, when in the award itself or in a document actually incorporated in it, there is found some legal proposition which is the basis of the award and which is erroneous.

Acknowledging that the Arbitrator is the final judge of facts, the Apex Court in *State of Orissa -vs- Kalinga Construction Co. (P) Ltd.*, 1970 (2) SCC 861 held that the High Court erred in considering the matter as a court of appeal and in re-evaluating the evidence and that it further erred in recording a finding in reversal of the conclusions of the arbitrator.

8. In *Hindustan Iron Co. -vs- K. Shashikant & Co.*, AIR 1987 SC 81 the Court held that the award of the Arbitrator ought not to be set aside for the reason that, in the opinion of the Court, the Arbitrator reached wrong conclusions or failed to appreciate the facts. That this was a well settled proposition of law was reiterated in the decision of the Apex Court in *Coimbatore District Podu Thozillar Sangam -vs- Balasubramania Foundary*, AIR 1987 SC 2045. It was opined that it is only an error of law and not a mistake of fact, committed by the arbitrator, which is justiciable in the application/objection before the Court. If there is no legal proposition either in the award or in any document annexed with the award which is erroneous and the alleged mistakes or alleged errors, are only mistakes of fact and if the award is made fairly, after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration

agreement, the award is not amenable to corrections of the Court. Similar views were again expressed in *Indian Oil Corporation Ltd. -vs- Indian Carbon Ltd.*, (1988) 3 SCC 36; *Jawahar Lal Wadhwa -vs-Haripada Chakroberty*, (1989) 1 SCC 76; *Puri Construction Pvt. Ltd. -vs- Union of India*, (1989) 1 SCC 411; *M/s. Sudarsan Trading Co. -vs- Government of Kerala*, (1989) 2 SCC 30; *Food Corporation of India -vs- Joginderpal Mohinderpal* , AIR 1989 SC 1263 where even a plausible view taken by the Arbitrator was held not to be open to Court interference. In *Municipal Corporation of Delhi -vs- M/s. Jagan Nath Ashok Kumar*, AIR 1987 SC 2316 the Court held that if the reasons appear *per se* to be not unreasonable and irrational the Court ought not to reappreciate the evidence. In *Hind Builders -vs- Union of India*, AIR 1990 SC 1340 the Court cautioned that where two views were possible it could not be predicated that there was an error apparent on the face of the award. In *Bijendra Nath Srivastava -vs- Mayank Srivastava*, AIR 1994 SC 2562 the view was expressed that the reasonableness of reasons given by the arbitrator were not open to challenge and that the proper approach would be for the Court to support the award. Similarly, in *Hindustan Construction Co. Ltd. -vs- Governor of Orissa*, AIR 1995 SC 2189 it was repeated that the Court cannot reappreciate the

material on the record. In *Trustees of the Port of Madras -vs- Engineering Constructions Corporation Ltd.*, (1995) 5 SCC 531 the decision of a Division Bench of the High Court of Madras, which reversed the Award on a question of fact and not a question of law, was set aside by the Supreme Court. After considering its previous decisions, the Apex Court in *B.V. Radha Krishna -vs- Sponge Iron India Ltd.*, (1997) 4 SCC 693 again held that the Court could not substitute its own view in place of that of the Arbitrator. In *Army Welfare Housing Organisation -vs- Gautam Construction & Fisheries Ltd.*, (1998) 7 SCC 290 the Court declined to vary an award for the reason that without reappreciating evidence it would not be possible to fault the quantum awarded towards anticipated expenses. The Arbitration and Conciliation Act 1996, has given statutory expression to the judicial view that Courts' interference in arbitration matters is to be eschewed.

9. The Apex Court lamented two decades ago, on the procedural delays that had crept in even in the disposal of disputes by the channel of Arbitration, in the following passage in *Guru Nanak Foundation -vs- Rattan Singh and Sons*, AIR 1981 SC 2075:-

Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and

speedy for resolution of disputes, avoiding procedural claptrap and this led them to Arbitration Act, 1940 ("Act" for short). However, the way in which the proceedings under the Act are conducted and without exception challenged in courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the courts been clothed with 'legalese' of unforeseeable complexity.

10. In *Olympus Superstructures Pvt. Ltd. -vs- Meena Vijay Khetan*, (1999) 5 SCC 651 it has been observed that Section 34 of the A&C Act is based on Article 34 of the UNCITRAL MODEL LAW and that the scope of the provisions of setting aside the award is far less than what was envisaged and permissible under Section 30 or 33 of the Arbitration Act, 1940. In *Sundaram Finance Ltd. -vs- NEPC India Ltd.*, AIR 1999 SC 565 the Apex Court has enunciated the law in these words:-

The 1996 Act is very different from the Arbitration Act, 1940. The provisions of this Act have, therefore, to be interpreted and construed independently and in fact reference to 1940 Act may actually read to misconception. In other words, the Provisions of 1996 Act have to be interpreted being uncommenced by the

principles underlying the 1940 Act. In order to get help in construing these provisions it is very relevant to refer to the UNCITRAL MODEL LAW rather than 1940 Act.

11. The provisions of the A&C Act are intended to circumscribe to a narrow point, the objections that can be entertained where an Arbitral Award is assailed. To widen the scope of Section 34 would be ignoring and setting at nought the legislative intent, which perhaps was itself a response to the judicial lament extracted above.

12. The Seven-Judge Bench of the Supreme Court in *M/s. SBP & Co. -vs- Patel Engineering Ltd.*, AIR 2006 SC 450 observed that when an application under Section 11(6) of the A&C Act is decided, the Court discharges its judicial responsibility. It necessarily follows that the Court can depart from the strict terms of an Arbitration Clause, although its effort must be to give effect to it as far as is possible. In *Northern Railway Administration, Ministry of Railway, New Delhi -vs- Patel Engineering Company Limited*, (2008) 10 SCC 240 the Three-Judge Bench of the Supreme Court has explained, with a view to resolve what was perceived as divergent opinions of that Court expressed in *Union of India -vs- Bharat Battery Mfg. Co.*, (2007) 7 SCC 684 and *ACE Pipeline Contracts (P) Ltd. -vs- Bharat Petroleum Corporation Ltd.*, (2007) 5 SCC 304, in these words:-

14. In all these cases at hand the High Court does not appear to have focused on the requirement to have due regard to the qualifications required by the agreement or other considerations necessary to secure the appointment of an independent and impartial arbitrator. It needs no reiteration that appointment of the arbitrator or arbitrators named in the arbitration agreement is not a must, but while making the appointment the twin requirements of sub-section(8) of Section 11 have to be kept in view, considered and taken into account. If it is not done, the appointment becomes vulnerable. In the circumstances, we set aside the appointment made in each case, remit the matters to the High Court to make fresh appointments keeping in view the parameters indicated above.

13. Reverting to the facts of the present case, the only possible assumption that can be drawn from the Order dated 22.5.2001 of this Court appointing the Sole Arbitrator was that there was waiver on the part of the Appellant of its right for appointment of its own Arbitrator. A period of thirty days is laid down in Section 11(5) of the A&C Act and even if it does not specifically apply to the succeeding Section 11(6), the need of urgency cannot be glossed over. Indeed, the Order dated 22.5.2001 cannot but be seen as a consent order; the Appellant is accordingly precluded, estopped and barred from challenging it. At none of the hearings post the appointment of the Sole Arbitrator has it been submitted on behalf of the appellant that

this appointment was made without its consent. It seems to us to be an idle and wasteful suggestion that a recalcitrant and negligent party which has failed to abide by its obligation under the Arbitration Clause, which party has not objected to the appointment of a Sole Arbitrator, must nonetheless be foisted with the additional expense of an arbitrator, together with a Presiding Arbitrator. We think it wasteful since the costs of the arbitration will needlessly escalate manifold times. In any event, ***Patel Engineering Ltd.*** has not disturbed the decision in *Datar Switchgears Ltd. -vs- Tata Finance Ltd.*, (2000) 8 SCC 151, followed in *Punj Lloyd Ltd. -vs- Petronet MHB Ltd.*, (2006) 2 SCC 638 which is in these words:-

So far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within thirty days of the demand, the right to appointment does not get automatically forfeited after expiry of thirty days. If the opposite party makes an appointment even after thirty days of the demand, but before the first party has moved the Court under Section 11, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within thirty days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under section 11 seeking appointment of an

arbitrator. Only then the right of the opposite party ceases.

14. In this regard, it would be relevant to refer to a recent decision of the Division Bench of this Court in FAO(OS) No.420/2006 decided on 28.01.2009 titled *Gujarmal Modi Hospital and Research Centre for Medical Science -vs- Utility Engineers India Ltd.* with which we are in respectful agreement. As in the circumstances before us, the Arbitrator appointed by the Respondent was appointed as the Sole Arbitrator, keeping in perspective the failure of the second party to nominate its own Arbitrator.

15. Before proceeding to the other question raised before us, we may also advert to the decision in *M/s.Neelkantan and Bros. Construction -vs- Superintending Engineer, National Highways, Salem*, AIR 1988 SC 2045 *albeit* with reference to the Arbitration Act, 1940. Their Lordships observed that – “If the parties to the reference either agree beforehand to the method of appointment, or afterwards acquiesce in the appointment made, with full knowledge of all the circumstances, they will be precluded from objecting to such appointment as invalidating subsequent proceedings. Attending and taking part in the proceedings with full knowledge of the relevant fact will amount

to such acquiescence, explains Russell on Arbitration, 18th Edition at page 105.”

16. Learned counsel for the Appellant has sought to rely on the decision in *Iron & Steel Co. Ltd. -vs- Tiwari Road Lines*, (2007) 5 SCC 703. Having analysed this Judgment it seems to us that the attempted support is sterile. This is for the reason that the Arbitration Agreement between those parties contained a clause to the effect that a dispute between them shall be decided in accordance with the Rules of Indian Council of Arbitration. These Rules contemplate initiation of arbitral proceedings predicated on any of the parties approaching or applying to the Indian Council of Arbitration. This was not done and instead one of the parties had filed an application under Section 11(6) of the A&C Act before the City Civil Court at Hyderabad. Their Lordships considered the principal question before them as to whether such an application was maintainable. The answer was in the negative since recourse had not been taken to the extant procedure of the Indian Council of Arbitration. It was observed that “in the matter of settlement of dispute by arbitration, the agreement executed by the parties has to be given great importance and an agreed procedure for appointing the arbitrators has been placed on high pedestal and has to be given preference to any other mode

for securing appointment of an arbitrator". This is not the situation which presents itself before us since the Respondent's request for nominating its Arbitrator had remained unheeded. In those circumstances, it was left with no alternative but to approach the Court under Section 11(6). It was yet open to the Appellant, on its first appearance before the Court, to nominate its Arbitrator. Instead, since no demurrer had been made, it must be seemed to have acquiesced, if not consented, to Court's decision to appoint the Arbitrator nominated by the Respondent as the Sole Arbitrator. Therefore, even the order in *National Aluminium Company Ltd. -vs- Metalimpex Ltd.*, (2001) 6 SCC 372 is of no avail to the Appellant. The A&C Act under Section 10 speaks of the freedom of parties to determine the number of arbitrators, provided that such number shall not be an even number and thereafter clarifies that failing such determination the Arbitral Tribunal shall consist of a Sole Arbitrator. This is for the reason why we find that no error has been committed by the learned Single Judge while deciding the Respondent's application under Section 11(6) of the A&C Act by appointing a Sole Arbitrator.

17. In the impugned Judgment the learned Single Judge has also noted the dismissal of the Review Application as well as the Writ Petition, both of which have been mentioned above, in

which the Appellant made a futile effort to challenge the appointment of the Sole Arbitrator. We concur with the conclusion in the impugned Judgment that the appointment of Justice Awadh Behari Rohatgi (Retd.) as the Sole Arbitrator had become final and binding on the parties because of the lack of success of the Appellant in those proceedings.

18. Mr. Ranjit Singh, learned counsel for the Appellant, thereafter endeavoured to take us through the merits of the decision of the Arbitrator. We have already noted at the commencement of this Judgment that the Appellant succeeded to have the Award amount reduced by a sum of Rs.24,90,000/-. When the Court is confronted with a challenge on the merits of an Award, it must circumscribe the arguments to the mould set by the Supreme Court in *Oil and Natural Gas Corporation Ltd. -vs- SAW Pipes*, AIR 2003 SC 2629. So far as the merits of the case are concerned, it was noted that in the contract the parties had pre-estimated or liquidated the compensation that could be claimed in the event of delay in the delivery of casting pipes because of which delay took place in deployment of rigs and on that basis actual production of gas from a particular platform had to be changed. Their Lordships held that keeping in view Sections 73 and 74 of the Indian Contract Act, 1872 read with the terms of the contract, it was not open to the Arbitrator to

hold that the party committing breach was not liable to pay compensation. It is a complete misunderstanding of this path blazing precedent to predicate that merits of an Award can be trespassed into. It is not open to a Court called upon to rule upon Objections to an Award to enter into the mind of the Arbitrator and/or to sit as an Appellate Authority over the Award. In ***SAW Pipes*** their Lordships perspicuously held that – “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”. Apart from the reduction of sum of Rupees 24,90,000/-, the learned Single Judge found no such errors. This is also our opinion and conclusion.

19. In this analysis, we find the Appeal to be wholly devoid of merit. The Appeal is dismissed but we decline from imposing costs. CM No.1604/2009 also stands dismissed.

(VIKRAMAJIT SEN)
JUDGE

March 02, 2009
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(RAJIV SHAKDHER)
JUDGE