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M/S BHAGWATI CONTRACTORS

....Petitioner

Versus

UNION OF INDIA & ANR

... Respondents

Through: None.

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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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 |

RAJIV SAHAI ENDLAW, J.

1. The petition under Section 34 of the Arbitration Act, 1996 has been preferred with respect to the arbitral award dated 13th May, 2009 rejecting certain claims of the petitioner. The counsel for the petitioner for the purposes of issuance of notice has made submissions particularly with respect to the findings of the arbitrator under Claims No. 1, 2, 3, 4 & 7.
2. The claim No. 1 of the petitioner before the arbitrator was on account of work done to restore the work damaged due to heavy rains and flood. The counsel for the petitioner has contended that the arbitrator, in spite of finding (i) that there were heavy rains and flooding not anticipated by the respondent; (ii) that the same

did damage the work already carried out by the petitioner; (iii) that in fact the design earlier given by the respondent to the petitioner was faulty and had to be rectified pursuant to the said rains and (iv) while further rejecting the plea of the respondent of the said claim being not payable owing to condition No. 5 of the Agreement, has still rejected the said claim holding that the petitioner proceeded with the work in the damaged portion without assessing the actual damages themselves or getting the damage assessed by the respondents. It is contended that the said finding of the arbitrator is contrary to the finding recorded on internal page 5 of the award (second line) wherein it is recorded “Thereafter losses were assessed during joint inspection on 5th August, 2003 and sent to higher authorities by respondent E.E for taking final decision vide letter dated 20th October, 2003 (C-16)”. The learned counsel for the petitioner has contended that thus the reason given for rejecting the claim is inconsistent with the finding aforesaid of the arbitrator inasmuch as the arbitrator having held that the losses were assessed and sent to higher authorities, the claim could not have been rejected for the reason of the petitioner having proceeded with the work in the damaged portion without assessment of the actual damage.

3. I have put it to the counsel for the petitioner whether there was any document on record where the assessment of the said losses was recorded. The counsel for the petitioner has contended that the same would be contained in the measurement book and/or documents in the possession of the respondent only and as per the practice and procedure followed is always retained with the respondent and the question of the same being with the petitioner does not arise.

4. In my view, the interpretation in *O.N.G.C. Ltd Vs Saw Pipes Ltd.* AIR 2003 SC 2629 of the provisions in Section 34 of the Act, of interference with the award for the reason of the same being contrary to the public policy, would not admit interference in the aforesaid facts. In the absence of there being any document before the arbitrator, where the assessment of damages was recorded, it cannot be said that the finding of the arbitrator of the petitioner having not got the

losses assessed is contrary to law. It is the party making the claim which has to prove the claim and even if the document containing the assessment of damages was with the department, law provides for the procedure to be followed for production thereof and in the absence of there being any document before the arbitrator of assessment of damages, the ordinary principle of the party failing to prove its case doing so at its own peril has to be followed and no fault can be found with the approach of the arbitrator in this regard. It can also not be said that the two findings are inconsistent with each other or for that reason a ground for interference under Section 34 of the Act is made out. A Section 34 proceeding, which in essence is the remedy of annulment, cannot be used by one party to complete or develop an argument which it could have and should have made during the arbitral proceedings or help that party retrospectively to fill gaps in its arguments.

5. The counsel for the petitioner has pointed out that in fact the award records that the petitioner had given its own assessment of damages and has also pointed out to para 3 on internal page 7 of the award where it is recorded that the Executive Engineer of the respondent had replied to the Superintending Engineer of the respondent vide letter dated 17th October, 2003 that damages to the tune of Rs. 16,86,000/- had accrued at site and has contended that owing to this also, reasoning given by the arbitrator is inconsistent with the findings elsewhere in the award. The counsel for the petitioner has contended that the interference under Section 34 is permissible when the courts find injustice to have been committed and in the present case, it stands established that substantial work done by the petitioner was damaged owing to the unprecedented rains and the petitioner has suffered heavy losses on this account.

6. In my view the finding aforesaid at internal page 7 of the award cannot also be said to be inconsistent with the reasoning given. Moreover in my view, mere wrong finding of fact by the arbitrator or even a wrong interpretation of the various documents is non-interfereable under Section 34 of the Act and if such interference

is done by the court, the same will set at naught the whole purpose of amendment to the law.

7. Arbitration is intended to be a faster and less expensive alternative to the courts. If this is one's motivation and expectation, then the finality of the arbitral award is very important. The remedy provided in Section 34 against an award is in no sense an appeal. The legislative intent in Section 34 was to make the result of the annulment procedure prescribed therein potentially different from that in an appeal. In appeal, the decision under review not only may be confirmed, but may also be modified. In annulment, on the other hand the decision under review only may be invalidated in whole or in part or be left to stand if the plea for annulment is rejected. Annulment operates to negate a decision, in whole or in part, thereby depriving the portion negated of legal force and returning the parties, as to that portion, to their original litigating positions. Annulment can void, while appeal can modify. Section 34 is found to provide for annulment only on the grounds affecting legitimacy of the process of decision as distinct from substantive correctness of the contents of the decision. A remedy of appeal focuses upon both legitimacy of the process of decision and the substantive correctness of the decision. Annulment, in the case of arbitration focuses not on the correctness of decision but rather more narrowly considers whether, regardless of errors in application of law or determination of facts, the decision resulted from a legitimate process.

8. In the case of arbitration, the parties through their agreement create an entirely different situation because regardless of how complex or simple a dispute resolution mechanism they create, they almost always agree that the resultant award will be final and binding upon them. In other words, regardless of whether there are errors of application of law or ascertainment of fact, the parties agree that the award will be regarded as substantively correct. Yet, although the content of the award is thus final, parties may still challenge the legitimacy of the decision-making process leading to the award. In essence, parties are always free to argue

that they are not bound by a given “award” because what was labeled an award is the result of an illegitimate process of decision.

9. This is the core of the notion of annulment in arbitration. In a sense, annulment is all that doctrinally survives the parties’ agreement to regard the award as final and binding. Given the agreement of the parties, annulment requires a challenge to the legitimacy of the process of decision, rather than the substantive correctness of the award.

10. Joseph Raz in his paper “The Politics of the Rule of Law” has opined that the function of the rule of law is to facilitate the integration of a particular piece of legislation with the underlying doctrines of the legal system; the authority of the courts to harness legislation to legal doctrine arises neither from their superior wisdom nor from any superior law of which they are the custodians; it arises out of the need to bring legislation in line with doctrine. The courts ensure coherence of purpose of law, ensuring that its different parts do not fight each other. The learned author has further observed that a law which is incoherent in purpose serves none of its inconsistent purposes very well. Purposes conflict if due to contingencies of life serving one will in some cases retard the other. The second basis for the authority of the courts to integrate legislation with doctrine is the need to mix the fruits of long established traditions with the urgencies of short term exigencies. In ensuring the coherence of law, the courts are expected to ensure the effectiveness of the democratic rule. In giving weight to the preservation of long established doctrines i.e., the traditions, they protect the long term interest of the people from being swamped by the short term. I have taken the liberty to quote from the aforesaid paper since the courts are being repeatedly called upon to adjudicate on the various provisions of the re-enacted arbitration law. From the various pronouncements in the last about 12 years since re-enactment, it appears that the danger of interpreting the new Act in a manner doing away with the whole object/purpose of re-enactment is imminent. The courts continue to be inundated till date, in spite of repeal of the old Act 12 years ago, with cases thereunder also,

particularly of challenge to the arbitral award. Provisions of the old and the new Act relating to inference with the arbitral award are vastly different. However, when the courts in the same day are wrestling with a matter concerning arbitral award under the old Act and with that under the new Act, the chances of culling out the huge difference between the two are minimal. It is not to be forgotten that the courts deal with and rule on disputes where monies and properties of real persons are at stake. The courts do not decide in abstract. Thus, when in one case the courts interfere with the award for the reason of the same not rendering to the litigant what the courts would have granted to him, the courts find it difficult in the very next case, though under the new Act to apply different parameters.

11. Arbitration under the 1940 Act could not achieve the savings in time and money for which it is renowned and had merely become a first step in lengthy litigation. It was to get over the said malady that the law was sought to be overhauled. While under the old Act, the award was unenforceable till made rule of the court and for which it had to pass various tests as laid down therein and general power/authority was vested in the court to modify the award, all this was removed in the new Act. The new Act not only made the award executable as a decree after the time for preferring objection with respect thereto had expired and without requiring it to be necessarily made rule of the court but also did away with condonation of delay in filing the said objections. The reason/purpose being expediency. The grounds on which the objections could be filed are also such which if made out, the only consequence thereof could be setting aside of the award. It is for this reason that under new Act there is no power to the court to modify the award or to remit the award etc. as under the old Act. A perusal of the various grounds enunciated in Section 34 will show that the same are procedural in nature i.e., concerning legitimacy of the process of decision. While doing so, the ground of the award being in conflict with Public Policy of India was also incorporated. However the juxtaposition of Section 34(2)(ii) shows that the reference to Public Policy was also in relation to fraud or corruption in the making

of the award. The new Act was being understood so till the Supreme Court in *Saw Pipes Ltd* (supra) held that the phrase Public Policy of India is required to be given wider meaning and if the award on the face of it is patently in violation of statutory provisions, it cannot be said to be in public interest and such award/judgment/decision is likely to adversely affect the administration of justice. In para 37 of the judgment it was held that award could be set aside if it is contrary to fundamental policy of Indian Law or the interest of India or justice or morality or if it is patently illegal. A rider was however put that illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that the award is against the public policy. Yet another test laid down is of the award being so unfair and unreasonable that it shakes the conscience of the court.

12. The courts have thereafter been inundated with challenges to the award. The objections to the award are drafted like appeals to the courts; grounds are urged to show each and every finding of the arbitrator to be either contrary to the record or to the law and thus pleaded to be against the Public Policy of India. As aforesaid, the courts are vested with a difficult task of simultaneously dealing with such objections under two diverse provisions and which has led to the courts in some instances dealing with awards under the new Act on the parameters under the old Act.

13. The result is that the goal of re-enactment has been missed.

14. The re-enactment was not only to achieve savings in time and prevent arbitration from merely becoming the first step in lengthy litigation but also in consensus with the international treaties and commitments of this country thereto. Since the enactment of the 1940 Act, the international barriers had disappeared and the volume of international trade had grown phenomenally. The new Act was modeled on the model law of international commercial arbitration of the United Nations Commission on International Trade. It was enacted to make it more responsive to contemporary requirements. The process of economic liberalization

had brought huge foreign investment in India. Such foreign investment was hesitant, owing to there being no effective mode of settlement of domestic and international disputes. It was with such lofty ideals and with a view to attract foreign investment that the re-enactment was done. If the courts are to, notwithstanding such re-enactment, deal with the arbitration matters as under the old Act it would be a breach of the commitment made under the treaties on international trade.

15. As far as the submission of the counsel for the petitioner in the present case of injustice having been done, the same is a subjective perception and the courts on their own notion of justice and injustice cannot undo what was sought to be done by the legislature by amending the arbitration law. All that can be said is that no case of the judicial conscience of this court having been shocked exists.

16. The counsel for the petitioner with respect to Claim No. 2 on account of extra lead of 75 Km of GSB materials not provided in agreement has contended that the finding of the arbitrator with respect to non-service of letter dated 24th November, 2002 on the respondent is contrary to the record. It is stated that the said letter was delivered to the same person to whom other letters on record had been submitted and the logic given by the arbitrator of the letter having not been diarized is also erroneous. It is contended that the said letter has important bearing on the matter. It is further contended that other documents forming the basis of the said claim and on the record of the arbitral tribunal have also not been considered or discussed by the arbitrator.

17. The arbitrator has while rejecting the said claim reasoned that the petitioner had not submitted for approval the samples from any other quarry than the quarry situated 75 KM away from the site of work and also failed to establish if other authorized quarry was available at lesser distance and hence no compensation was payable to the petitioner for the sample approved of a quarry at a long distance of 75 KM.

18. It is not disputed by the counsel for the petitioner that the samples from no other quarry had been submitted. The counsel for the petitioner has however contended that it was the respondent who had approved the quarry and the petitioner had vide letter dated 24th November, 2002 and other documents ignored by the arbitrator notified the respondent that owing to the quarry being at a long distance claims would be preferred.

19. I have enquired from the counsel for the petitioner whether there was any provision/clause in the agreement that if the quarry is beyond a particular distance, extra payment will be made for the same. The answer is in the negative. In the absence of any such provision and further the petitioner having failed to submit the samples of any other nearby quarry (which are argued to be within a distance of about 1 or 2 KM), again, no ground for interference under Section 34 of the Act is made out.

20. The Claim No.3 for Rs. 4,80,000/- on account of unproductive expenses is related to Claim No. 1 aforesaid. The said claim has been rejected by the arbitrator for the reason of the petitioner having not given any notice to the respondent for claiming such damages and for the reason of, claimant having furnished, certificate to the respondent of having not suffered any revenue loss on account of late completion of work and an undertaking not to claim any damages for delay. The objection of the learned counsel for the petitioner is that the first finding of not giving any notice is contrary to the record. In the petition in ground F-1 particulars of the letter stated to have been given are stated. With respect to the second reasoning it is contended that if the said certificate had not been given by the petitioner as demanded by the respondent, the respondent would have levied other penalties on the petitioner as the work was continuing.

21. The appraisal of evidence is within the domain of the arbitrator and a wrong appraisal of evidence by the arbitrator would not amount to the award being contrary to law. As far as the reason for giving certificate and undertaking is

concerned, I have enquired whether any protest letter was given by the petitioner immediately after the certificate and/or undertaking had been obtained. It is stated that no such protest letter was given as the works were continuing. The arbitrator has also held that the plea of the petitioner of the certificates having been given under duress is not believable inasmuch as the petitioner had at no time withdrawn the said certificate, even after grant of extension of time.

22. Again no fault can be found with the said reasoning and the objection in this regard, is also not found tenable.

23. Claim No.4 was for extra item of work executed. The arbitrator rejected the claim holding that the petitioner was supposed to take written instructions for the same from the respondents and no such instructions were obtained and the claim was not raised during the currency of work. The challenge before this court is that the said finding is in ignorance of documents on record; the petitioner had raised the claim during currency of contract vide letter dated 18th April, 2005 proved as Exhibit-29. The question which arises is whether the award can be said to be against the public policy for this reason. It is significant that there is no challenge to the finding of arbitrator of no written instruction from respondents having been obtained or to notice of extra item being required to be given within seven days of execution of extra work. Merely because one of the several reasons given is shown to be contrary to the material on record, it will not make the award contrary to public policy or be a reason for annulment of the award.

24. Lastly, with respect to the Claim No. 7, the objection is that the same is again in ignorance of documents on record and/or contrary to documents. For the reasons given above, the same does not fall within the domain of Section 34 of the Act.

No grounds are found to set aside the award. No case for issuance of notice is made out. The petition is dismissed.

IA No. 8484/2009

Allowed subject to just exceptions.

RAJIV SAHAI ENDLAW, J

December 22, 2009
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