

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

+ **O.M.P. 292/2003**

DELHI EARTHMOVERS

Through

..... Petitioner

Mr. Dushyant Sisodiya,
Advocate

versus

M/S. GIRDHAR BHAGAT & CO.

Through:

..... Respondent

Mr. Ashish Bhagat with
Mr. Abdesb Chaudhary and
Ms. Manisha Suri, Advocates

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Date of Decision : May 20, 2010

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | No. |
| 2. To be referred to the Reporter or not? | No. |
| 3. Whether the judgment should be reported in the Digest? | No. |

J U D G M E N T

MANMOHAN, J (ORAL)

I.A. No. 6189/2010

For the reasons stated in the application, same is allowed and the petition is restored to its original position.

Application stands disposed of.

O.M.P. 292/2003

1. Present petition has been filed under Section 34 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act, 1996")

challenging the arbitral Award dated 4th May, 2003 passed by Mr. H.L. Ahuja, Sole Arbitrator.

2. Briefly stated the facts relevant to the present case are that earthwork of approximately 2,20,000 CUM in Embankment between ROB I and Km 16.000 at Moradabad By-pass Project, Moradabad, Uttar Pradesh was allotted to respondent by the UP State Bridge Corporation Ltd. In turn, respondent awarded part of the aforesaid work to petitioner-objector by way of an Agreement letter dated 20th June, 2000. In this Agreement, work awarded to petitioner-objector was described as under :-

<i>"S. No.</i>	<i>Description of Work</i>	<i>Unit</i>	<i>Rate (Rs.)</i>	<i>Qty.</i>	<i>Amount (Rs.)</i>
<i>1.</i>	<i>Earthwork in Embankment between ROB I and Km 16.000 at Moradabad By-pass Project. (without compaction, without water, excluding cost of Earth i.e. only loading and dumping without spreading)</i>	<i>Cum</i>	<i>25.65</i>	<i>220000</i>	<i>56,43,000</i>

The above quantities are approximate and liable to vary."

3. Mr. Dushyant Sisodiya, learned counsel for petitioner-objector states that Arbitrator has passed the impugned Award erroneously relying upon the debit notes alleged to have been signed by the petitioner-objector's Project Manager. He states that petitioner-

objector's Project Manager had no authority to execute the said debit notes.

4. Mr. Sisodiya further submits that the impugned Award is beyond the jurisdiction of the Arbitrator. In this connection, Mr. Sisodiya refers to Clauses 5, 6 and 9 of the Agreement executed between the parties. The said Clauses are reproduced hereinbelow :-

"5) We shall submit our bills for this work to the U.P. State Bridge Corporation Ltd. every month and your monthly bills shall be paid on receipt of payment of our monthly bills for the particular month.

6) The Diesel, Lubricants & Spares for Machinery will be provided by us and the cost for the same will be deducted from your monthly bills.

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9) All disputes under this contract shall be decided by an Arbitrator to be appointed by the Managing Partner, Girdhar Bhagat & Co., subject to the provisions of Indian Arbitration Act 1940 and Arbitration and Conciliation Act 1996. The matter shall lie in the jurisdiction of Delhi Courts only."

5. Mr. Sisodiya submits that in view of the aforesaid Clauses, Agreement executed between the parties did not provide for hiring of machinery by respondent and consequently, the Arbitrator could not have decided the said dispute. In this connection, Mr. Sisodiya relies upon a judgment of Bombay High Court in ***General Insurance Corporation of India Ltd., Mumbai Vs. Nandlal Engineering Company Pvt. Ltd., Mumbai*** reported in ***2002(1) Arb. L.R. 466 (Bombay)*** wherein it has been held as under :-

"40. At the outset, I may mention that it is a settled law that Arbitrator is the creature of the contract between the parties

and, hence, if he ignores specific term of the contract, it is a question of jurisdictional error which can be corrected by Court and for that limited purpose agreement is required to be considered. In New India Civil Erectors (P) Ltd. vs. Oil and Natural Gas Corporation (1997) 11 SCC 75, the Apex Court considered the contention wherein the Arbitrator had passed an award contrary to the specific stipulation/conditions contained in the agreement in question. The Apex Court thus observe: (SCC p.79, para 9)

“It is axiomatic that the Arbitrator being a creature of the agreement, must operate within the four corners of the agreement and cannot travel beyond it. More particularly, he cannot award any amount which is ruled out or prohibited by the terms of the agreement. In this case, the agreement between the parties clearly says that in measuring the built-up area, the balcony areas should be excluded. The Arbitrators could not have acted contrary to the said stipulation and awarded any amount to the appellant on that account.”

The aforesaid judgment was considered in H.P.SEB vs. R.J. Shah & Co. (supra) and in paragraph 26, the Court held as under:

“(26) In order to determine whether the Arbitrator has acted in excess of jurisdiction what has to be seen is whether the claimant could raise a particular dispute or claim before an Arbitrator. If the answer is in the affirmative then it is clear that the Arbitrator would have the jurisdiction to deal with such a claim. On the other hand if the arbitration clause or a specific term in the contract or the law does not permit or give the Arbitrator the power to decide or to adjudicate on a dispute raised by the claimant or there is specific bar to the raising of a particular dispute or claim then any decision given by the Arbitrator in respect thereof would clearly be in excess of jurisdiction.”

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45. However, in the cases where there is no question of interpretation of any terms of the contract, but of solely reading the same as it is and still the Arbitrator ignores it and awards the amount despite the prohibition in the agreement, the award would be arbitrary, capricious and without jurisdiction.”

6. On the other hand, Mr. Ashish Bhagat, learned counsel for respondent submits that this Court in Section 34 jurisdiction cannot interfere with a finding of fact arrived at by the Arbitrator. Mr. Bhagat relies upon the reasoning given by the Arbitrator in the impugned Award. The relevant portion of the Award reads as under :-

16. It may be seen that there is a glaring difference between the two versions of money paid by the Respondent and received by the Claimant. This gap is largely due to the fact that the Respondent had raised five debit notes on account of hiring of machinery etc. and had paid directly to the suppliers on behalf of the Claimant. These debit notes are as under:

- a) Debit Note dated 16.8.2000 for Rs.12,870/-*
- b) Debit Note dated 9.11.2000 for Rs.2,29,076/-*
- c) Debit Note dated 9.12.2000 for Rs.4,62,853/-*
- d) Debit Note dated 7.1.2001 for Rs.3,36,602/-*
- e) Debit note dated 6.2.2001 for Rs.3,63,493/-*

17. The above debit notes were duly confirmed by making an endorsement which is purportedly have been hand written and signed by Shri Ram Singh Dahiya on behalf of the Claimant. The Claimant had filed an affidavit of Shri Ram Singh Dahiya (CW-3) and he was cross examined by the Respondent. He admitted that he had written the endorsement at the bottom of all the five debit notes on blank papers but came out with the plea that the same were got written by the Respondent under pressure.

18. For better appreciation I am reproducing the language used by Shri Ram Singh Dahiya under the debit notes.

- a) Debit Note dated 16.8.2000 for Rs.12,870/-
Received copy confirmed as rates settled by Babu Ram. For Delhi Earthmovers Sd/- Ram Singh Dahiya P.M.16.8.2000. (PM Stands for Project Manager).*
- b) Debit Note dated 9.11.2000 for Rs.2,29,076/-
Confirmed and checked from record and found correct. For Delhi Earthmovers Sd/- Ram Singh Dahiya P.M. 9.11.2000*
- c) Debit Note dated 9.12.2000 for Rs.4,62,853/-.
Confirmed and verified. For Delhi Earthmovers Sd/- Ram Singh Dahiya, Project Manager 9.12.2000.*

- d) *Debit Note dated 7.1.2001 for Rs.3,36,602/-
Received copy. Confirmed and verified rates and
number of trips. For Delhi Earthmovers Sd/-
Ram Singh Dahiya, Project Manager 7.1.2001.*
- e) *Debit note dated 6.2.2001 for Rs.3,63,493/-
Received copy. Rates and trips verified. Signed
Ram Singh. 6.2.2001.
No work done after 31.1.2001. We have removed
our belongings from site as per inspection of our
Head Office.
Sd/- Ram Singh Dahiya for Delhi Earthmovers.*

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21. *The Claimant argued that Ram Singh Dahiya (CW-3) was not authorized to confirm and sign the debit notes of large amounts while the Respondent had always been taking receipts of much smaller amounts from the partners. It was further contended that they had not asked the Respondent to make direct payment to the various suppliers of machinery, that the Respondent got confirmation and signatures by Ram Singh Dahiya on blank papers under pressure when he was working with them after he had left the service of the Claimant and that they were never informed about these debit notes about which they came to know only when the Respondent filed documentary evidence in the Arbitration proceedings. They further argued that the Respondent had fabricated all these debit notes and also TDS Certificate etc.*

22. *The Respondent, in reply, argued that Shri Ram Singh Dahiya (CW-3) was working as Project Manager of the Claimant during the relevant time, that he has admitted that he had written and signed the endorsement, that he is a matriculate and understands as to what he was writing, that his endorsements do not indicate that the same were written hesitantly or shaken indicating any fear or pressure, that different language has been used on the debit notes that the position of the endorsement and signatures on the typed debit notes does not fit in the scheme that he would have signed on blank debit notes because such endorsements are not exactly at the bottom, that this documentary evidence cannot be rebutted unless under very special circumstances, that Shri Ram Singh had never worked with them, that the Claimant, even in their earlier notice did not indicate anything about such a pressure having been put on Ram Singh nor he himself took any action by writing letter or police complaint, etc., that no suggestion was put to Pradeep Kumar (RW-2) that the endorsement of Ram Singh was obtained on blank papers and therefore the testimony of Shri Pradeep Kumar remained unchallenged on this point.*

23. *On careful consideration of the facts and circumstances in their totality, I am of the view that Shri Ram Singh Dahiya (CW-3) had written the endorsement at the bottom of the*

aforesaid debit notes without any pressure or coercion. The story of pressure or coercion appears to be afterthought.

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25. *It may be stated here that the Claimant in spite of the directions given to them did not produce their books of account and the statement of bank account. Therefore, an adverse inference has to be drawn against them that is to say that if they would have produce these documents, the same would have gone against them.*

7. Mr. Bhagat further states that machines were actually hired by petitioner-objector and only at the petitioner-objector's request respondent had made payment to the hirer. Consequently, according to him, the aforesaid dispute was clearly arbitrable in accordance to the arbitration clause executed between the parties.

8. Having heard the parties, I am of the view that the scope of interference by this Court with an arbitral award under Section 34(2) of Act, 1996 is extremely limited. Supreme Court in ***Delhi Development Authority Vs. R.S. Sharma and Company, New Delhi*** reported in (2008) 13 SCC 80, after referring to a catena of judgments including ***Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.*** reported in (2003) 5 SCC 705 has held that an arbitral award is open to interference by a court under Section 34(2) of the Act, 1996 if it is contrary to either the substantive provisions of law or the contractual provisions and/or is opposed to public policy.

9. In fact, the Supreme Court in ***McDermott International Inc. Vs. Burn Standard Co. Ltd. & Ors.*** reported in (2006) 11 SCC 181 has succinctly summed up the scope of interference by this Court by stating

“the 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc.....”

10. I am of the opinion that this Court in Section 34 jurisdiction under Act 1996, cannot sit in appeal over the views of the arbitrator by re-examining and re-assessing the material on record. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisal of evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for this Court to take upon itself the task of being an appellate judge on the evidence before the arbitrator.

11. In the present case, I find that the Arbitrator after examining the evidence on record has come to a factual finding that Mr. Ram Singh Dahiya was authorised and in fact, had executed the debit notes. I further find that the debit notes are corroborated by detailed receipts executed by Mr. Khushwaha on behalf of the petitioner-objector. In the said receipts, details of machinery hired as well as the number of trips made and the amount due to the hirer are specifically mentioned and the said figures tally with the debit notes. Even this corroboratory evidence is attested by Mr. Ram Singh Dahiya as Project Manager. It is pertinent to mention that petitioner-objector has been changing its stance with regard to debit notes. Though initially it took the stand that its Project

Manager was not authorised to execute the debit notes, it later on took the stand that he was made to sign blank papers under pressure and it finally took defence that Project Manager did not know the language. On perusal of the arbitral record I also find that petitioner-objector's partner, Mr. Babu Ram has admitted on oath that machinery of third parties were hired by petitioner-objector for executing the work under the Agreement.

12. In view of the aforesaid, I am of the view that finding of fact arrived at by the Arbitrator that debit notes are genuine, requires no interference in Section 34 jurisdiction.

13. I am further of the opinion that the arbitration clause executed between the parties is of wide amplitude and the Arbitrator has jurisdiction to decide all disputes under the contract executed between the parties. In my view, there was neither any express nor implied restriction, prohibiting respondent from paying those parties who had supplied machinery at the instance of petitioner-objector. This is more so when the partner of the petitioner-firm has admitted in its evidence that petitioner-objector had hired machinery from third parties to execute work of loading and unloading of earth.

14. I am further of the opinion that the arbitration clause incorporated in Clause 9 of the agreement executed between the parties provides for an alternative disputes resolution mechanism. To read it in a narrow and restricted manner would defeat the intent of incorporating such a

Clause. In view of aforesaid, the judgment relied upon by the learned counsel for petitioner-objector has no application to the facts of the present case.

15. Consequently, objection petition being devoid of merits is dismissed but with no order as to costs.

MANMOHAN,J

MAY 20, 2010
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