

* **HIGH COURT OF DELHI : NEW DELHI**

+ **OMP No.469/2006**

Gas Authority India Ltd. ...Petitioner
Through : Mr. Prag P. Tripathi, ASG with
Mr. Atul Sharma and Ms.
Arti Gupta, Advs.

Versus

M/s. Himachal Futuristic
Communications Ltd. ...Respondent
Through : Mr. Biswajit Bhattacharya, Sr. Adv.
with Mr. Debashis Mukherjee and
Mr. Ajay Singh, Advs.

Decided on: February 18, 2010

Coram:

HON'BLE MR. JUSTICE MANMOHAN SINGH

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

MANMOHAN SINGH, J.

1. The present petition has been filed by the Petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside of the arbitral awards dated 16th November, 2005 and 2nd June, 2006 whereby the learned Arbitrator awarded to the claimant a sum of Rs. 1,10,96,933/- (as value of work completed) and Rs. 40,77,290/- (encashment of bank guarantee along with interest) and allowed the counter claim of only Rs. 6,00,000/- out of the total amount of the counter claim i.e. Rs. 6,14,19,981/-.

2. The brief facts of the matter necessary for considering the present petition are thus. The Petitioner issued a tender for the laying of HDPE Duct, blowing and splicing of Optical Fiber Cable ('OFC' for brevity). The offer of the respondent was accepted and a letter of intent dated 15th March, 2002 was issued by the Petitioner to the respondent for laying of permanently lubricated HDPE Duct and splicing of OFC for the stretch of Thane-Lonavale (85 Km.) and Lonavale-Pune (80 Km.) The parties entered into a contract on 20th May, 2002. As per the contract, the period for completion of the work was six months from the date of issuance of the letter of intent, i.e. on or before 15th September, 2002. As per the contract, various permissions were to be obtained by the respondent for furtherance of the work, including permissions from Government departments and corporations.

3. The Petitioner sent a letter dated 3rd April, 2002 to the Government of Maharashtra asking its permission to lay the OFC, at the same time sending a copy of the letter to the respondent and asking it to follow up with the same. The Petitioner also requested the respondent to submit the details of the length of the stretch to be built based on the route survey to the Government of Maharashtra in the permitted format. The Government of Maharashtra vide letter dated 29th April, 2002 asked the Petitioner to submit the route details etc, i.e. the details that the Petitioner had asked the respondent to submit. Due to such permission related and other problems, the contracted work was not completed till the designated time, i.e. 15th September, 2002. Thereafter, the Petitioner

extended the time for completion of the project till 2nd December, 2002. Since the work was incomplete even after that, the date of completion was provisionally extended up till 31st December, 2002. The work being incomplete, the parties continued to exchange correspondence and the respondent sought another extension up to 30th April, 2003. Vide its letter dated 7th February, 2003, the Petitioner warned the respondent that non-progress of the work and stagnation in the same might constrain the Petitioner to get its work done through another agency. The respondent reiterated that it would complete the work in its letter dated 12th February, 2003.

4. However, the Petitioner did not grant any further extension and by its letter dated 25th February, 2003 terminated the contract between the parties in accordance with Clause 29 of the General Conditions of Contract as in 11 months, the respondent had been able to complete only 82 of the 157 kilometers of the stretch to be constructed, i.e. less than 35% of the total work had been done.

5. The Petitioner thereafter followed the due process of tendering and awarded the balance work to a new contractor. Further, the performance guarantee was encashed by the Petitioner as provided for in the contract. The Petitioner suffered heavy losses due to the inaction and incompetence of the respondent on account of which the respondent was asked to pay damages worth Rs. 2 Crore, which the respondent has failed to pay.

6. Thereafter the respondent herein filed a claim before the learned Arbitrator praying for an award of Rs. 490,17,404/- in its favour as opposed to which the Petitioner herein filed its counter claim for Rs. 620,19,981/-. At the end of the arbitral proceedings, the Learned Arbitrator passed an award of Rs. 1,10,96,933/- in favour of the respondent on account of value of work done and Rs. 40,77,290/- on account of encashment of bank guarantee along with interest and rejected the counter claims of the Petitioner.

7. The Petitioner moved an application under Section 33 of the Arbitration and Conciliation Act, 1996 for correction of the arbitral award on 15th December, 2005. Thereafter, the respondent also moved an application under Section 33 of the Arbitration and Conciliation Act, 1996 for correction of the arbitral award on 21st December, 2005. These applications were decided by the learned Arbitrator vide award dated 2nd June, 2006.

8. By this award, the Learned Arbitrator reconsidered and allowed the Petitioner's counter claim no. 2 to the extent of Rs. 6,00,000/- which was directed to be adjusted from the amount payable by the Petitioner out of the total counter claim of the sum of Rs. 6,20,19,981/-. The respondent had, in its application, pointed out an arithmetic error and the same was corrected. After deducting the amount allowed for counter claim no. 2, the learned Arbitrator held that the amount payable to the respondent would be Rs. 1,04,96,933/-.

9. It is submitted by the Petitioner that the arbitral awards dated 16th November, 2005 and 2nd June, 2006 must be set aside as the learned Arbitrator has failed to appreciate the material fact that the Petitioner suffered heavy losses due to the inaction of the respondent. The respondent raised the issue of agreement with the Government of Maharashtra in August 2002, i.e. one month before the completion of time of the project stating that the requisite permissions from the latter were pending supply of a copy of the agreement to it. It is stated that the said excuse is sham and is bogus. The learned Arbitrator has further failed to appreciate that the delay caused in the working of the project could not have been due to the Petitioner as it was the obligation of the respondent to obtain all the necessary permissions, in which obligation the respondent failed and therefore, the learned Arbitrator erred in holding that the Petitioner was partly to be blamed.

10. It is alleged that there are certain contradictions in the arbitral award dated 16th November, 2005 in so far as the learned Arbitrator has given a finding at page 17 of the award that the work schedule has not been followed by the respondent but has then given the ultimate finding that the Petitioner contributed to the delay. It is argued by the Petitioner that if a party is responsible for the delay, it cannot avail the benefit of delay as held by this Court in the case of ***Mecon Ltd. Vs. Pioneer Fabricators Pvt. Ltd., 2007(4) Arb.L.R. 323 (Delhi)*** at page 338 para 31. As per Petitioner, the learned Arbitrator completely overlooked the fact that the Petitioner had been reminding the

respondent from day one that it had to obtain the requisite permissions in spite of which the respondent did nothing to change its lackadaisical manner. Further, on the one hand the learned Arbitrator has held that the termination of contract by the Petitioner was legal and justified but on the other hand, damages have not been awarded to the Petitioner for the losses suffered by it and in fact, encashment of bank guarantee has been held to be bad.

11. The amount awarded to the respondent was not as per the agreed tender rates and the same was awarded at an increased rate.

12. It was further submitted that the learned Arbitrator went beyond the scope of reference in observing that the Petitioner, instead of giving 2-3 months extension to the respondent, cancelled the contract and awarded the new tender to some other contractor.

13. It is argued that the learned Arbitrator failed to appreciate that the respondent came to know/understand about the requirement of the agreement with the GoM only on 20th September, 2002 despite being reminded by the Petitioner repeatedly from day one, which proves that the respondent was not aware of the requirement for completion of project which caused the delay in the implementation of project. The Petitioner suffered due to the delay caused by the respondent in implementation of the project.

14. It is also contended by the Petitioner that the learned Arbitrator passed the award on the premises that the Petitioner was under an obligation to take permission and enter into an agreement

with the Government of Maharashtra. Whereas under the contract volume 2 of 2, chapter 3, 3.0 Scope of Work, Clause 3.1.1.1A, inter alia, it states that to seek ROW/permission was in the scope of the contractor/respondent herein. Not only this, even the parties to the contract acted and understood the contract as above. The Petitioner told the respondent repeatedly to take permission from the GoM and as per its own admission, the respondent had been pursuing the GoM/ROU authorities. As such the above finding is contrary to the terms of the contract and liable to be set aside.

15. The Arbitrator on one hand held the termination of the contract/tender by the Petitioner as legal and justified and on the other hand rejected the counter claim of damages and losses of the Petitioner suffered by it due to the delay and non completion of the work in terms of the tender.

16. It is argued that since the learned Arbitrator held the termination of contract valid, not upholding the invocation of contract performance bank guarantee of Rs.40,77,290/- is bad and contrary to the findings, therefore, the award is liable to be set aside.

17. It is further argued by learned counsel for the Petitioner that the arbitral awards dated 16th November, 2005 and 2nd June, 2006 ought to be set aside as only those bills were to be admitted which had been jointly signed by both the parties. In fact, the learned Arbitrator decided upon the sum of Rs. 1,45,55,204/- stating it to be on the basis of joint

admission/statement of the parties despite the fact that some of the bills were not signed by both parties and were even denied by the Petitioner.

18. In its reply, the respondent has submitted that the averments made in the present petition are bald averments, none of which can invoke the jurisdiction of this Court under Section 34 of the Arbitration and Conciliation Act as no ground raised by the Petitioner falls under the circumstances carved by the Apex Court for setting aside of an arbitral award under Section 34 of the Arbitration and Conciliation Act.

19. The respondent submitted that the learned Arbitrator has considered all aspects, contractual terms, principles enunciated in case laws propounded by the Supreme Court, and has then given an interpretation in favour of the claimant. The learned counsel for the respondent relied upon several case laws to contend that a Civil Court has very limited jurisdiction to interfere with an arbitral award.

20. It is submitted by the respondent that its claim has been allowed only in respect of item Nos. 1(i), 1(ii), 4 and 5. With regard to item numbers 1(i) and 1(ii), it is submitted that the work done by the claimant has been jointly valued and certified by the claimant and TCIL (the agency which was overlooking the work done for the Petitioners). Thus, this claim has been granted by the learned Arbitrator on the basis of admitted joint measurement done along with Project Manager, TCIL and the Petitioner. No exception can be taken to this finding of the learned Arbitrator.

21. The learned counsel for the respondent submitted that it was disabled by the Petitioner from performing the contract within the scheduled time. The learned Arbitrator held that delay had indeed been caused due to the fault of the Petitioner, and in fact, by the acts of both sides. It has been further submitted that the value of the work executed by the claimant amounts to Rs.1.75 crores but it has been paid only Rs.31.7 lac and thus the expenditure involved in execution of the balance job is expected to be partly covered through the payments due to the claimant by way of unpaid jobs and encashment of bank guarantee for security deposit available with GAIL.

22. The respondent objected to the present petition on the grounds, inter alia, that the petition is not maintainable as it questions interpretation of the contract which is in the exclusive domain of the Arbitrator. While disposing of the application under Section 33 of the Arbitration and Conciliation Act, 1996, filed by GAIL, it has been conceded/admitted by GAIL as follows :

“.....it is this figure [Rs.1,07,72,403/-] which should have been awarded rather than Rs.1,45,55,204/-“. At this page 116, it has been further conceded/admitted by GAIL as follows :

“.....measurement certified by both sides is Rs.1,07,72,403/-“

The learned Arbitrator further held as follows :

“.....during the arguments....certification was admitted by both sides.”

23. I have perused the contentions of both the parties. One of the disputes between the parties is that as per the Petitioner, two of the bills which have led to the amount awarded i.e. 1,45,55,204/- have not been signed by its representative/project manager and therefore, the same cannot be deemed to be 'admitted' or 'joint certification' of both the parties.

24. The Petitioner's main contention is that the two bills of the amounts Rs. 87,35,714/- and Rs. 58,19,489/- have not been signed by its Project Manager and therefore cannot be a 'joint' admission, it is very clearly observed with regard to these two bills in the arbitral award dated 2nd June, 2006 (page 2 thereof) as follows :

"I may, in this connection, clarify that during the arguments reference was made to these pages and the certification was admitted by both the sides. Along with the papers at pg. 698 Vol. II a figure of Rs. 87,35,714/- was mentioned as an amount due on account of Thane-Lonewale section. Similarly, at pg. 701 a figure of Rs. 58,19,489.91/- was given as Lonewale-Pune section. My recollection is that though the GAIL had certainly mentioned that the figure at pg. 698 and 701 bore the endorsement both of Project Manager, GAIL and TCIL but it was not signed, of course GAIL had denied any certification by TCIL. But no attempt was made to produce from the record or from any witness that these calculations which bear the Project Manager's endorsement was not signed by anyone on behalf of GAIL. I, therefore, took it that this figure of Rs. 14555204/-, represented the amounts due on account of work done as certified at pages 698, 699, 700, 702 and 703.

.....

As no objection was raised at that time and the claimant has not claimed beyond that amount and the four payments mentioned, thus making a total of Rs. 1,45,55,203/-, no discussion took place on these items. But if GAIL had sought to reduce this amount awarded by me and it would have open to the claimant to justify the said amount by invoking the items mentioned at pg. 698 and 701 as mentioned earlier. GAIL before me has not disputed the

figures and the details of the survey and ROU bills. Its only objection being that the amounts could only be paid if the claimant had completed the work satisfactorily. This argument has already been rejected by me.”

25. The learned Arbitrator considered the amount of Rs.1,45,55,204/- as reasonable because Tender Committee of GAIL admitted that :

“Value of job executed by M/s. HFCL is Rs.1.75 crore.”

Further, the question of the two bills being signed/unsigned has been brought up before the learned Arbitrator in the application under Section 33 of the Arbitration and Conciliation Act and the learned Arbitrator has given a speaking order as regards the same.

26. It appears that the amount awarded by the leaned Arbitrator has been awarded on the basis of admission and evidence and therefore cannot be interfered with under the law.

27. The next question involved in the matter is as to whether signing of agreement with GoM was a pre-requisite for entering into a contract with HFCL and also for obtaining ROU/ROW permission from various authorities. The case of the respondent before the Arbitrator was that the agreement with the GoM was mandatory before any work could be started and until that was done by the respondent, the work could not have been contracted. On the other hand the case of the petitioner is that the agreement with GoM was an independent agreement and had nothing to do with the responsibility of the HFCL for obtaining ROW/ROU and hence delay in signing the agreement with GoM, even if correct, has no relevance in determining the question of delay. The learned Arbitrator,

after hearing the learned Counsel for the parties, has relied upon GoM Resolution dated 22.11.2001 which inter alia reads as under:

“...Public Works Deptt. Zilla Parishads, Municipal Authorities, Revenue and Forest Departments, other Govt. and Semi Govt. bodies will give permission to lay cable/duct only after applicant entities have entered into agreement with the Govt. for obtaining such Right of way (emphasis supplied).”

28. It is also held that there was no way in law that the ROW permission could be granted prior to the signing of agreement with GoM. The learned Arbitrator has also given his findings in this regard, the relevant portion of which reads as under:

“....it cannot thus be denied that agreement with GoM in terms of GoM Resolution dated 22.11.2001 was essential before any authorities could give permission to lay cables...admittedly land belonging to NHAI fell within Thane to Pune in the State of Maharashtra. GoM Resolution of 22.11.2001 makes no distinction who was in the management or to whom the land belonged. The mere fact of land belonging to NHAI did not take it out of the purview of GoM Resolution of 22.11.2001.”

29. The learned Arbitrator has given his finding that signing of agreement with GoM in terms of resolution dated 22.11.2001 was necessary condition for obtaining ROW/ROU from various authorities including NHAI and in view of that, GoM agreement was signed in September/October which necessarily delayed the matter. It was also observed by the Arbitrator that no work could be done even though permission had been taken from the authorities concerned till the agreement was signed by GoM and GAIL and the same process was

completed in September/October, 2002. Therefore, the respondent could not have even commenced work before September/October, 2002 when the petitioner and GoM executed the contract in terms of GoM resolution dated 22.11.2002. Therefore, the Arbitrator has given the specific finding that blame has to be placed on both the sides. Not only that, the learned Arbitrator has commented upon the conduct of the petitioner while terminating the contract and assigned reason in various paragraphs of the Award as regards the said delay and then held that since both parties were to blame for the delay, no party could claim damages.

30. The finding of the learned Arbitrator appears to be legally sound and reasonable and cannot be interfered with as counter claims have been rejected since these arose out of the same issues and are based on no evidence. The next point for discussion in the matter is about Claim No.4 i.e. performance of Bank Guarantee encashment. The following is the finding of the Arbitrator on this aspect which reads as under:

“....the only reason for encashment of bank guarantee claimed by the respondent is that as the balance work had to be got completed which would have entailed excess expenditure the bank guarantee was encashed to partly reimburse the loss that it says it has suffered....I have also found that the rate at which the balance work was got done by GAIL not done in a businesslike manner and leaves great scope for the finding of arbitrariness in the allotment of work. On these basis, as I cannot find the fault lies only with the contractor, the question of encashing the bank guarantee by the GAIL in exercise of its rights to forfeit it for non-performance is not established.... It has been admitted by

GAIL that the work which had been performed by the contractor, the value of that comes to Rs.1.45 crores. Of this admittedly only Rs. 35,58,271/- had been paid... there was no justification to encash the bank guarantee.”

I do not find any fault in the said finding of the Arbitrator and it cannot be interfered with in the present petition.

31. The scope for setting aside an arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996 is very limited, as is obvious from the various judgments referred. The grounds given by the Petitioner are in the way of an appeal and it has been held in a catena of judicial pronouncements that a Civil Court will not sit in appeal over the decision of the Arbitrator as it is not to re-appraise evidence or facts and merely because the Court would come to a different conclusion on the available material is not enough ground to interfere with the award.

32. It is well settled that the jurisdiction of the court when called upon to decide the objection raised by a party against an arbitral award is limited as expressly indicated in the Arbitration and Conciliation Act, 1996. The court has no jurisdiction to sit in appeal and examine the correctness of the award on merits with reference to the materials produced before the Arbitrator. It cannot sit in appeal over views of the Arbitrator by re-examining and re-assessing the materials. (see ***Puri Construction (P) Ltd. Vs. Union of India (1989) 1 SCC 411***).

33. In my view, the scope of interference by this Court with an Arbitrator's award under Section 34 of the Arbitration and Conciliation Act, 1996 has been extensively dealt with by the Supreme Court in ***Oil***

705. The relevant observations of the Supreme Court in the said judgment are reproduced hereinbelow :

“31. Hence, in our view in addition to narrower meaning given to the term ‘public policy’ in Renusagar’s case 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.

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A. (1) The court can set aside the arbitral award under Section 34 (2) of the Act if the party making the application furnishes proof that :

- (i) a party was under some incapacity, or
- (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
- (iii) the party making the application was not given proper notice of the appointment of an Arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

(2) The court may set aside the award :

- (i) (a) if the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties,
- (b) failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part I of the Act.
- (ii) if the arbitral procedure was not in accordance with :
 - (a) the agreement of the parties, or
 - (b) failing such agreement, the arbitral procedure was not in accordance with Part I of the Act.

However, exception for setting aside the award on the ground of composition of arbitral tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part I of the Act from which parties cannot derogate.

(c) If the award passed by the Arbitral Tribunal is in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to :

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality; or

(d) if it is patently illegal.

(4) It could be challenged :

(a) as provided under Section 13(5); and

(b) Section 16(6) of the Act.”

34. In the case of ***Food Corp. of India Vs. Arosan Enterprises Ltd. ILR (1996) 1 Del. 185***, it has been laid down that the approach of the court must be to support the award if it is reasonably possible, rather than to declare it illegal. It is not permissible to reappraise the evidence or to go into the questions of quality and quantity of evidence. If two views are possible, the court even if inclined to take a view different from that taken by the Arbitrator is not entitled to substitute its view over that of the Arbitrator. But at the same time, assuming it to be an award which sets out reasons, though it is not permissible to go into the reasonableness of the reasons yet this court can set aside the award on finding errors apparent on the face of the award or if there is an error of law on the face of the award.

35. The Apex Court in the case of ***D.D. Sharma Vs. Union of India, 2004 (5) SCC 325*** held that the jurisdiction of the court to set aside an award is well settled. An Arbitrator being a Judge chosen by the parties, his decision would ordinarily be final unless one or the other conditions contained in Section 30 of the Arbitration Act, 1940 is

satisfied for the purpose of setting aside his award. Interpretation of a contract is a matter for the Arbitrator to determine, even if it gives rise to determination of a question of law. It is also trite that correspondences exchanges by the parties are required to be taken into consideration for the purpose of construction of a contract. Once it is held that the construction of an agreement fell for consideration of the Arbitrator, the determination thereupon shall not ordinarily be interfered with. The court's jurisdiction in this behalf is merely to see whether the Arbitrator has exceeded his jurisdiction or not.

36. In ***BOC India Ltd. Vs. Bhagwati Oxygen Ltd., 2007 (9) SCC 503***, the Court refused to set aside the award of the Arbitrator and held that when the Arbitrator had considered all the aspects of the matter including the terms of the contract and all the materials on record and the statement of claim and had come to a conclusion of fact, it cannot but be held that the award was not based upon a proposition of law which is unsound or an error of law must have appeared from the award itself or from any document or note incorporated in the award or appended to it. When the Arbitrator had taken a plausible view on interpretation of contract, it is not open to the court to set aside the award on the ground that the Arbitrator had misconducted himself in the proceedings.

37. Recently in the case of ***Sethi Engineering Corp. Vs. Delhi Development Authority, 158 (2009) DLT 19*** a similar question arose before this Court and damages on account of prolongation of work

beyond the stipulated date of completion were awarded by the Arbitrator and observations were also made in this regard. This Court refused to interfere with the findings given by the Arbitrator.

38. Admittedly the contract for the remaining work was given at almost the double price to M/s. M.Y. Omni and Sujata however, no justifiable reason has been given by the Petitioner for awarding the contract at such a higher price. Since no urgency was shown by GAIL to award the contract at this unjustified excess amount, the learned Arbitrator rejected the counter claim of the Petitioner. Claim of both the parties for damages on account of termination of the contract was rejected by the learned Arbitrator.

39. The learned Arbitrator took this view and no other possible view can be made by this Court on findings of the Arbitrator. There is no error apparent on the face of record in the award. It is not against public policy nor any other defect/error of law exists in the award.

40. In the light of this discussion and the case law on the matter, nothing more remains to be said. There is absolutely no ground on which the arbitral awards dated 16th November, 2005 and 2nd June, 2006 can be set aside. The Petitioner's petition under Section 34 of the Arbitration and Conciliation Act, 1996 is, therefore, dismissed.

MANMOHAN SINGH, J.

FEBRUARY 18, 2010
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