

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ FAO(OS) No. 344/2008

Sarvesh Chopra Appellant through
Mr.Kirti Uppal with
Mr. Sanjeet Singh, Advs.

versus

Ircon International Ltd. Respondent through
Mr. Sandeep Sharma, Adv.

% Date of Hearing: February 04, 2010

Date of Decision: February 26, 2010

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE MANMOHAN SINGH

- | | |
|--|-----|
| 1. Whether reporters of local papers may be allowed to see the Judgment? | No |
| 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 Judgment of the learned Single Judge dated 27.5.2008 by which the Objections of the Appellant under Section 34 of the Arbitration & Conciliation Act, 1996 (for short 'A&C Act') had been dismissed. The learned Single Judge opined that the Petitioner had "miserably failed to show that the award was in contravention of any law or was against the public policy of India or was contrary to the evidence on record or contrary to the contract". The Arbitrator had concluded that

accord and satisfaction had been arrived at between the parties which was not vitiated by coercion or undue influence and hence was binding on the parties. In this analysis, it is evident that the Appeal assails concurrent findings of law and fact.

2. We have perused the subject Award passed by the Arbitrator which takes note of the pronouncement of the Hon'ble Supreme Court in some of the Judgments contained in the following Table:-

<u>Case Name</u>	<u>Bench Strength</u>	<u>Citation</u>
<i>B.H.E.L. -vs- Amar Nath Bhan Prakash</i>	2	(1982) 1 SCC 625
<i>Union of India -vs- L.K. Ahuja</i>	2	(1988) 3 SCC 76
<i>State of Maharashtra -vs- Navbharat Builders</i>	2	1991 Supp (1) SCC 68
<i>P.K. Ramaiah -vs- NTPC</i>	2	1994 Supp (3) SCC 126
<i>Nathani Steels Ltd. -vs- Associated Constructions</i>	3	1995 Supp (3) SCC 324
<i>Jayesh Engineering Works -vs- New India Assurance Co. Ltd.</i>	2	(2000) 10 SCC 178
<i>Union of India - vs- Popular Builders, Calcutta</i>	3	(2000) 8 SCC 1
<i>NTPC -vs- Reshmi Constructions, Builders & Contractors</i>	2	(2004) 2 SCC 663
<i>Ambica Construction -vs- Union of India</i>	2	(2006) 13 SCC 475
<i>Associated Constructions -vs- Pawan Hans Helicopters</i>	2	AIR 2008 SC 2911

3. The learned Arbitrator thought it proper not to dilate on the legal regime since he preferred to consider the merits of the dispute, viz., as to whether the settlement between the parties in the present case was vitiated by coercion. Since this exercise had been completed by him, it is obvious that he thought it otiose to arrive at a conclusion whether the Supreme Court had enunciated the law to the effect that once a 'No Claim Certificate' or any other document purportedly evidencing accord and satisfaction had been executed, it was no longer open to the parties to invoke the Arbitration Clause and seek an adjudication on this question through the aegis of the arbitration. In order to decide this question, the Arbitrator had examined the background in which the settlement was made in detail.

4. The learned Single Judge has discussed ***Nathani Steels Ltd. -vs- Associated Constructions***, 1995 Supp (3) SCC 324 and ***NTPC -vs- Reshmi Constructions, Builders & Contractors***, (2004) 2 SCC 663 and arrived at the conclusion that the Arbitrator was competent to decide the dispute regarding coercion and duress. In ***Nathani Steels***, the parties had set together for arriving at an amicable settlement, alongwith an Architect who appears to have performed the role of a Mediator. Finding that once the parties have arrived at "a settlement in

respect of any dispute or difference arising under a contract and that dispute or the difference is amicably settled by way of a final settlement by and between the parties, unless that settlement is set aside in proper proceedings, it cannot lie in the mouth of one of the parties to the settlement to spurn it on the ground that it was a mistake and proceeded to invoke the Arbitration clause. If this is permitted the sanctity of contract, settlement also being a contract, would be wholly lost and it would be open to one party to take the benefit under the settlement and then to question the same on the ground of mistake without having the settlement set aside. In the circumstances, we think that in the instant case since the dispute or difference was finally settled and payments were made as per the settlement, it was not open to the respondent unilaterally to treat the settlement as non est and proceed to invoke the Arbitration clause.” ***Nathani Steels*** should not be misunderstood. The Court came to an unequivocal conclusion that there was no coercion, undue influence, duress or fraud. Having arrived at that conclusion, the proceedings under laws, other than arbitration, were found appropriate; in other words, the Arbitration Clause had worked itself out. We must emphasise at the very outset that in ***Reshmi Constructions***, since the Bench was smaller than that in ***Nathani Steels***, the

Court could only have followed the dicta expounded by the previous larger Bench. Referring to the 'fact situation', their Lordships underscored that the Final Bill was always under dispute, that is, prior to and immediately after its preparation. Since no firm conclusion had been arrived at, the Arbitration Clause had not worked itself out. The principles of estoppel would not work as a bar to the arbitration proceedings, *inter alia*, on the application of the maxim *necessitas non habet*, which contemplates that necessity is always an excuse in law. In a sense, the parties were not in *pari delicto* since the NTPC had an upper and heavy hand *vis-a-vis* the contractor whose payments had been held up. We do not propose to discuss the plethora of precedents since subsequent judgments, except for *Union of India – vs- **Popular Builders**, Calcutta (2000) 8 SCC 1*, perforce would be relevant for the factual matrix existing before us, the law already have been settled by a larger Bench. In ***Popular Builders***, the Three-Judge Bench concluded that the Respondent/Claimant had accepted the Final Bill without any protest and, therefore, circumstances did not warrant reference of claims to arbitration. In this analysis, it appears to us at the first instance that if the Court is satisfied that the accord and satisfaction had been arrived at by the execution of a full and final receipt and/or a final bill, in the absence of any fraud,

duress, coercion or the like, the Arbitration Clause would have come to its logical end and no proceedings under the A&C Act would be maintainable to upset the Apple Cart. According to *SBP & Co. -vs- Patel Engineering Limited*, (2005) 8 SCC 618, the statute mandates that this exercise is carried out and completed by the Court. However, it is the Arbitral Tribunal which is the master of facts. We find it difficult to come to an invariable conclusion that the Arbitral Tribunal is precluded from entering into this controversy and instead we are conclusively governed by the referral order of the Court. In other words, even after a reference is made to the Arbitral Tribunal, if on a consideration of the evidence collected by it there is overwhelming reason to conclude that accord and satisfaction had been arrived at between the parties, it would record a finding to this effect and refrain from proceeding further. This duty lies heavily on the shoulders of the Arbitrator in cases where a reference has been made to it, independent of the Court. It is also necessary to draw a distinction that the Tribunal may possess jurisdiction to return a finding on the crucial aspect of accord and satisfaction and thereafter carry on its proceedings dependent on its conclusion. If the Arbitral Tribunal opines that accord and satisfaction has been reached, it would conclude its proceedings; if its conclusions were to the

contrary, it would complete its duties by a final adjudication of the claims.

5. The grievance ventilated before us on behalf of the Appellant is that though the Arbitrator has gone into the controversy of 'No Claim Certificate' having been signed under coercion, he committed a factual error in stating that no pleadings in respect of those claims had been filed to this effect and, therefore, the same is not maintainable. Other Objections raised are also of a similar nature, indicating an error of fact committed by the Arbitrator. The learned Single Judge has refused to go into these Objections against the Award since it was of the view that the Award could have been set aside only if it was contrary to any of the substantive provisions of the A&C Act, the contract between the parties or public policy or is patently illegal.

6. The Appellant before us has yet again failed to show any such grave and manifest illegality in the Award of the learned Arbitrator that would warrant the exercise of powers vested in the appellate forum under Section 37 of the A&C Act where the scope of interference and supervision is still narrower.

7. A Division Bench of this Court in *S.R.P. Industries Ltd. – vs- GEA Process Engg. Ltd.*, 2009(VI) AD Delhi 160, of which one of us (Vikramajit Sen, J.) was a member, has observed thus:-

7. In the nascent stages of arbitration, when it was still to be ubiquitously accepted as an alternative forum 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 Supreme 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 lead to misconstruction. In other words, the provisions of 1996 Act have to be interpreted being uninfluenced by the principles underlying the 1940 Act. In order to get help in construing these provisions it is more 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.

8. Returning to the facts of the case before us, as we have already recorded, despite noticing ***Nathani Steels*** and ***Reshmi***

Constructions, the learned Single Judge chose to go into the facts of the case. The Arbitral Tribunal obviously ignored the argument that there was an absence of pleadings with regard to the existence of coercion and duress and nevertheless returned the finding that in the conspectus before him there was no substance in the allegation that the Claimant was forced to sign the 'No Claim Certificate'. This being a finding of fact, which is not perverse, ought not to have been looked into by the Court. In the event, however, the learned Single Judge has affirmed the findings by holding that no ground for interference had been made out. We are loathe to enter upon the factual arena which would be an essential requirement for assailing the impugned Judgment.

9. The Appeal is without merit and is dismissed with costs of Rupees 10,000/-.

10. Trial Court records be sent back.

(VIKRAMAJIT SEN)
JUDGE

(MANMOHAN SINGH)
JUDGE

February 26, 2010
tp