

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

+ **RFA No.237/2010**

% **23rd January, 2012**

NARAINDAS R ISRANI Appellant
Through: Mr. Amit Kakra, Advocate with Mr.
Amit Punj, Advocate.

versus

RAIL INDIA TECHNICAL & ECONOMIC SERVICES LTD
..... Respondent
Through

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

R.P. No.64/2012 and C.M. No.1329/2012 (condonation of delay)

1. This appeal was disposed of on 11.11.2011 by passing the following order:-

“1. The challenge by means of this Regular First Appeal is to the impugned judgment dated 10.11.2009 of the Trial Court which dismissed the suit by holding that the subject matter of the suit was adjudicated upon by the Arbitrator, and therefore the Civil Court has no jurisdiction.

2. At this stage, learned counsel for the appellant states that the appellant has already challenged the Award under Section 34 of the Arbitration and Conciliation Act, 1996, and challenge has been laid also with respect to findings of claim No.46.

3. Accordingly, this appeal is dismissed as not pressed with the liberty to raise all objections as available in law in the OMP filed under Section 34 of the Arbitration and Conciliation Act, 1996 as against the Award pertaining to claim No.46.

4. The appeal is accordingly disposed of with the aforesaid observations.”

2. This order was passed after the case was argued in detail and the earlier counsel who represented the appellant thought it fit that challenge should be made to the Award with respect to claim No.46 in terms of Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as ‘the Act’) inasmuch as the challenge to the Award was already pending. It is trite that a civil suit does not lie where the issue can be the subject matter of objections under Section 34 of the Act.

3. The facts of this case are that the appellant was awarded a contract for construction of houses by the respondent and under which contract disputes arose, one of the disputes being the delay on behalf of the appellant/contractor in completing the contract. As a result of this, the respondent imposed liquidated damages in terms of the relevant clause in the contract. This aspect of the claim of liquidated damages was dealt with by the Arbitrator in the following terms:-

“Claim No.46.- Claimants Claim ₹ 16,10,869/- on account of work done but not paid in the final bill.

The final bill was passed by the Respondents on 27.11.96 for the work executed by the claimants. An amount of ₹ 16,10,869/- (corrected to ₹16,46,131/- which was adjusted towards liquidated damages of ₹ 19,19,799-98p. levied under Clause 2 of the Agreement (Ref. C-2) in October, 1996 i.e. after two and a half years from the date of recorded date of completion of the work.

The Claimants submit and clarify that the right of the Respondents under Clause 29(i) of the agreement was to withhold any amount due towards the Claimants till adjudication by the Id. Arbitrator or Court and cannot make any final adjustment or recovery of this amount. The recovery cannot be effected without proper adjudication by a Competent court or by an Arbitrator as per Clause 29 of the Contract. Since the respondent have not chosen to adjudicate the matter through competent court within the limitation period of 3 years, the amount withheld in the final bill is not legal and may be Respondent's agreement.

The claim is for refund of liquidated damage. The respondent briefly states that work was prolonged due to various defaults of the claimant brought out in various slow progress issued vide exhibits R-6, R-8, R-11, R-15, R-16 to R-20, R-25, R-35, R-36, R-38, R-48, R-68, R-74, R-75, R-76 to R-79, R-81 to R-85, R-88, R-89 (MOM), R-90 to R-106. The liquidated damages have been rightly recovered in terms of the clause 2 of the agreement on the direction of the competent authority who after considering all the points had levied the LD.

Discussions and conclusions.

The claimant case is not whether the penalty imposed is correct or not since the case is subjudice. The arbitrator has therefore not deliberated on this aspect. Their case is that the claimant has no right to recover the amount except through the process of arbitration or adjudication by a court. The respondent contention is that penalty has been rightly levied under clause 2 of CA. After going through the provisions of Contract, I am of the view that the respondent had the powers to levy LD/compensation. The amount recovered is, therefore, as per the contract.

I, therefore, award 'NIL' amount against this claim." (emphasis added)

4. Though the Award is not too happily worded, the final few lines (which have been emphasized by me above) of the Arbitrator dealing with

claim 46 show that the claim was in fact dismissed also on merits.

5. The claim of the appellant for liquidated damages was dismissed on merits by the Arbitrator, though the observation is made with respect to the same being an excepted matter inasmuch as the issue was the right of the respondent to withhold and adjust the amount of liquidated damages on account of delay caused by the appellant/contractor. In the present case, the defence of the respondent to withhold and adjust the amount on account of liquidated damages was very much an issue before the Arbitrator, and was accordingly pronounced upon. Also the claim in the suit was for moneys which were appropriated by the respondent towards liquidated damages and once the defence of appropriation of amounts towards liquidated damages succeeds and the Award on this aspect would be sustained, the suit was bound to be dismissed. As already stated above, the sustainability of the Award is already under challenge in a petition under Section 34 of the Arbitration and Conciliation Act, 1996 filed by the appellant.

6. I have given the aforesaid detailed facts and narration though I was not required to do so in a review application against a consent order inasmuch the review application is filed by a new counsel on record and argued by another counsel. Both these counsel who are appearing before me today were not the counsel when the RFA was withdrawn on 11.11.2011 with

liberty to raise the issue in the appeal by raising an objection under Section 34 of the Act. I may add that the Supreme Court recently in the case of *State of Maharashtra Vs. Hindustan Construction Company Ltd. (2010) 4 SCC 518* has held that after the expiry of period of limitation for filing of the objections, the objections can in fact be amended. It has been further held by the Supreme Court in the case of *Bharat Sanchar Nigam Ltd. Vs. Motorola India Pvt. Ltd. (2009) 2 SCC 337* that imposition of liquidated damages on account of alleged delay in delivery of goods is arbitrable and not excepted from the scope of arbitration. The claim of moneys of the appellant in the suit will thus be decided in the objections under Section 34 on the issue/defence of the respondent to appropriate the amounts claimed by the appellant as liquidated damages on account of delays caused by the appellant in the completion of the contract of construction of houses. The head note “A” of the judgment in the case of *Bharat Sanchar Nigam Ltd. (supra)* reads as under:-

“Held:

It is clear from the arbitration clause i.e. Clause 20.1 that matters which will not fall within the arbitration clause are questions, disputes or differences, the decision to which is specifically provided under the agreement. Clause 16.2 of the agreement is not a clause wherein any decision-making power is specifically provided for with regard to any question, dispute or difference between the parties relating to the existence of breach or the very lack of liability for damages i.e. the levy of liquidated damages. Quantification of liquidated damages may be an excepted matter as

argued by the appellants, under Clause 16.2 of the agreement, but for the levy of liquidated damages, there has to be a delay in the first place. The decision contemplated under Clause 16.2 of the agreement is the decision regarding the quantification of the liquidated damages and not any decision regarding the fixing of the liability of the supplier. The High Court correctly pointed out that the authority of the purchaser (BSNL) to quantify the liquidated damages payable by the respondent supplier arises once it is found that the supplier is liable to pay the damages claimed. It is necessary as a condition precedent to find that there has been a delay on the part of the supplier in discharging his obligation for delivery under the agreement

From the reading of Clause 15.2 of the agreement, it is clear that the supplier is to be held liable for payment of liquidated damages to the purchaser under the said clause and not under Clause 16.2. The High Court in this regard correctly observed that it was not stated anywhere in Clause 15 that the question as to whether the supplier had caused any delay in the matter of delivery will be decided either by the appellant BSNL or by anybody who has been authorized on the terms of the agreement. Reading Clauses 15 and 16 together, it is apparent that Clause 16.2 will come into operation only after a finding is entered in terms of Clause 15 that the supplier is liable for payment of liquidated damages on account of delay on his part in the matter of making delivery. Therefore, Clause 16.2 is attracted only after the supplier's liability is fixed under Clause 15.2.

Thus, there is no provision in the agreement, apparent on the face of it, relating to a decision made by any specified authority on the issue of levy of liquidated damages, as is contemplated under Clause 20.1 of the agreement which is excepted from the purview of arbitration. No decision coming within the scope of excepted matters under Clause 20.1 is envisaged by any portion of the agreement regarding the liability of the supplier to liquidated damages.

In the present case, there is a clear dispute as to the fact whether there was any delay on the part of the respondent supplier in delivering the goods to the appellants. Thus, there is a dispute between the parties on the question whether any breach was committed in this case.

The true essence of any arbitration agreement is to arbitrate

the matters in a cordial way in respect of issues where there is a dispute between the parties. To construe the limited words in Clause 16.2 as being so all encompassing would destroy the very foundation of the bargain between the parties. The appellants in the present case are acting in an unfair way by seeking to exclude, from arbitration, what they had agreed to arbitrate in the first place.

In view of the above, it is held that the disputes raised by the respondent are arbitrable and not excepted from the scope of arbitration. For this reason, it cannot be accepted that the appointment of the arbitrator by the High Court was unwarranted in this case.” (underlining added)

This case in view of the aforesaid legal and factual position was therefore, after arguments being advanced in detail, withdrawn by the earlier counsel.

7. There is a disturbing trend these days that counsel who have absolutely no clue or idea as to what was argued when the main matter was argued, file fresh vakalatnama and argue cases without appreciating, understanding, or knowing what had transpired in the Court when the main judgment/order was passed dealing with the main matter. This is one such case. I understand the compulsion of the client to succeed at all cost but I fail to understand the attitude of the counsel in this respect. Quite clearly, the present review petition against a consent order alleging that the consent ought not to have been given, is an abuse of process of law. The counsel, who has argued the appeal on 11.11.2011 has not filed any affidavit with this review petition that he did not give the consent, and nor is the case before me that the earlier counsel had given his consent without consideration.

8. Accordingly, this review petition being an abuse of process of law and an endeavour to repeatedly re-agitate the same matter, is dismissed with costs of ₹ 20,000/-. Costs shall be deposited within two weeks from today in the account of Registrar General of this Court maintained in UCO Bank, Delhi High Court Branch, New Delhi, for being utilized towards juvenile justice.

9. List before the Registrar for compliance of the order for deposit of costs on 10th February, 2012. In case, costs are not deposited, Registrar will list the matter before the Court so that further action as per law can be taken against the appellant.

VALMIKI J. MEHTA, J

JANUARY 23, 2012
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