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

+ **Date of Decision: 04.02.2011**

% **C.S.(OS) NO.1005/2008**

M/S ARCHANA STEEL PRIVATE LIMITED Plaintiff
Through: Mr. Rajesh Banati, Adv.

versus

UNION OF INDIA AND ANR. B+ Defendants
Through: Mr. Prasenjeet Mohapatra, Adv.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

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

VIPIN SANGHI, J. (Oral)

I.A. No. 321/2009

1. These are objections preferred by the petitioner under Sections 30 & 33 of the Arbitration Act, 1940 to the award dated 28.04.2008 made by the Sole Arbitrator Smt. Chetna Kumar, Financial Adviser and Chief Accounts Officer/Finance & General, Northern Railways, Baroda House, New Delhi. The learned Arbitrator, by the impugned award has allowed the claim of the respondent, Union of

India of Rs.17,63,096/- along with interest @ 10% per annum. The learned Arbitrator has rejected the counter claim of the petitioner for Rs.6,40,000/-.

2. In relation to the disputes which arose between the parties Sh. S.A. Singh, Sole Arbitrator and CME/Planning Northern Railway, Baroda House, New Delhi made an unreasoned award bearing No.CME/SAS/ARB/91/1 dated 01.09.1993. The Union of India was the claimant. The claim was for a sum of Rs.17,63,096/-. The objector/contractor had filed a counter claim of Rs.6,40,000/-. The arbitrator awarded Rs.5,60,000/- apart from interest and costs in favour of the Union of India. This award was challenged by the petitioner by filing I.A. No. 6484/1996 in CS(OS) No. 2240/1993. The said application was disposed of vide order dated 08.12.2004.

3. The court observed that *"It appears that the counter claims of respondent was not at all considered"*. The court further observed *"A perusal of the award shows that not a word has been said therein about the counter claims of the respondent. Learned counsel for the objector has cited case law to the effect that if the arbitrator does not consider the counter claims of the respondent, **award is to be set aside on the ground of misconduct.**" (emphasis supplied)*

4. The court made reference to the following decisions – ***Bharat Heavy Electrical Limited Vs. M/s BST Engineering Services***, 1995 (2) Arb Law Reporter 403; ***K.V. George Vs. The Secretary to***

Govt., Water and Power Deptt, Trivandrum & Another, AIR 1990 SC 53 and Punjab Housing Development Board and Anr. Vs. Ludhiana Builders and Engineers (P) Ltd., 2001(3) Arb.LR (SC) 9, relied upon the petitioner.

5. The operative part of the order passed by the court reads as follows:

“Award is hereby set aside and remitted back to the learned Arbitrator for deciding afresh in accordance with law.

With this direction, suit stands disposed of.

Parties are directed to appear before the learned arbitrator on 27.12.2004”. (emphasis supplied)

6. Upon the matter being remanded, a fresh Arbitrator was appointed by the respondent. Learned counsel for the petitioner submits that before the freshly appointed Arbitrator namely Sh. Ravi Prabhat, the petitioner specifically sought to raise a clarification that it was only the counter claims of the petitioner which had been remitted back for re-adjudication, and that the claims of the respondent Union of India were not to be taken up for re-adjudication afresh. He submits that the learned Arbitrator Sh. Ravi Prabhat accepted this stand of the petitioner and passed the order dated 14.12.2005 which, inter alia, reads as follows:

“At the outset, the Respondent submitted that since the Award given in the instance case by the Learned Arbitrator Shri S.A. Singh was set aside by the Hon’ble High Court with the directive to examine the issue afresh, the original

claim of the Respondent shall stand and should also form part of the instant arbitration proceedings. It was clarified to the Respondent that a specific Award was given by the Learned Arbitrator Shri S.A. Singh and the Hon'ble Court set aside the Award which in the understanding of the arbitration would mean nothing but the Award per se. The claim of the Respondent was adjudicated upon by the Learned Arbitrator and the Award was set aside by the Hon'ble High Court."

7. The only grievance raised by the petitioner in the present application, and which is urged before me, is that despite the limited remand made by the court for re-adjudication of the counter claims of the petitioner, the learned Arbitrator, while making the impugned award has re-considered all the claims and counter claims and made the award for an amount of Rs.17,63,096/- along with interest @ 10% per annum in favour of the respondent Union of India, which is much larger than the earlier awarded amount of Rs.5,60,000/-.

8. The submission of Mr. Banati, learned counsel for the petitioner is that the learned Arbitrator could not have re-opened the claims of the respondent Union of India which had been awarded only to the extent of Rs.5,60,000/- in the earlier award dated 01.09.1993, and awarded the larger amount of Rs.17,63,096/-. He submits that by doing so, the learned arbitrator had misconducted herself. Mr.Banati submits that the respondent Union of India accepted the said award of Rs.5,60,000/- on its claims, and did not challenge the earlier award dated 01.09.1993. He further submits that during the pendency of consideration of the petitioner's objections in I.A. No. 6484/1996, the

petitioner had even sought the release of the balance amount withheld by the respondent, after withholding the amount of Rs.5,60,000/-. In those proceedings, the respondent had, after withholding the amount of Rs.5,60,000/-, released the other withheld amounts of the petitioner. Mr. Banati submits that the respondent had accepted that it was entitled, under the contract, to receive only a sum of Rs.5,60,000/- as adjudicated by the learned Arbitrator in the award dated 01.09.1993. It was, therefore, not open to the respondent to press its claim for the amount of Rs.17,63,096/- when the matter was arbitrated afresh before the learned Arbitrator. He submits that during the pendency of the arbitration proceedings, Sh.Ravi Prabhat the erstwhile Arbitrator was replaced by the present Arbitrator Smt. Chetna Kumar, and she has not followed the order passed by Sh. Ravi Prabhat on 14.12.2005 while making the impugned award.

9. Mr. Banati submits that while remitting the award, all that the court could have done was to remit the award for re-consideration of the counter claims, and could not have remitted the entire award for re-consideration, including even the claims of the respondent Union of India. In support of his submission, he places reliance on the following decisions:

1. ***K.K. John Vs. State of Goa***, JT 2003 (Suppl.2) SC 197;
2. ***Punjab Housing Development Board and Another Vs. Ludhiana Builders and Engineers (P) Ltd.***, 2001(3) Arb.L.R. 29(SC); and

3. *Bharat Heavy Electrical Ltd. Vs. M/s BST Engineering Services*, 1995(2) Arb.L.R. 403.

10. On the other hand, learned counsel for the respondent submits that the order dated 08.12.2004 passed by this court in Suit No. 2240/1993 is amply clear. It very clearly states that *"the award is hereby set aside and remitted back to the learned Arbitrator for deciding afresh in accordance with law"*. He submits that the entire award had been set aside on the ground of misconduct of the Arbitrator for non-consideration of the counter claims of the petitioner herein.

11. The learned arbitrator has dealt with the aforesaid contention of the petitioner in the award in the following manner:-

"7.2 The Respondents in their written submission 20.9.2007 have stated that Shri S.A. Singh, Sole Arbitrator vide the award dated 01.9.1993 awarded an amount of Rs.5,60,000/- in favour of UOI but not a word was said about the Counter Claim of the M/s Archana Steel Pvt. Ltd. regarding their counter claim amount of Rs.6,40,000/-, that no objections were filed by the UOI meaning thereby that UOI accepted the Award. M/s. Archana Steel Pvt. Ltd. however filed an objection to the Award dated 01.9.1993 requesting the Hon'ble Delhi High Court to set aside the Award of Rs.5,60,000/- and remit it to the Arbitrator to adjudicate their claim of Rs.6,40,000/-. During the pendency of the objection petition, the Hon'ble Delhi High Court vide order dated 16.9.1997 directed the UOI to release Rs.12,03,096/- (Rs.17,73,096 – Rs.5,60,000) to M/s. Archana Steel Pvt. Ltd. which the UOI did. Thereafter, the Hon'ble Delhi High Court vide their order dated 08.12.2004, set aside the Award dated 01.9.1993 and as per the interpretation of M/s Archana Steel Pvt. Ltd., directed the UOI to appoint an Arbitrator for adjudication of Rs.6,40,000/- only.

The above contention of the Respondents is factually incorrect. The Hon'ble High Court vide their judgment of 8.12.2004 have ordered as under:

"Award is hereby set aside and remitted back to the learned Arbitrator for being decided upon afresh in accordance with law".

They have not limited the arbitration to adjudication of Rs.6,40,000/- alone as stated by M/s Archana Steel Pvt. Ltd. Since the award has been set aside, it has to be dealt with de novo in its entirety. The refund order referred to above by M/s Archana Steel Pvt. Ltd. was during the pendency of the objection petition. The final order is that of 8.12.2004 and cannot be interpreted as limiting the arbitration to adjudication of Rs.6,40,000/- only".

12. Having heard the submissions of learned counsels, perused the order dated 08.12.2004 passed in CS(OS) No.2240/1993, the impugned award and the submissions and judgments relied upon by the petitioner, I am of the view that there is no merit in the petitioner's objection and it cannot be said that the learned arbitrator has misconducted herself, or the proceedings, in dealing with the claim of the respondent, Union of India afresh.

13. Firstly, I may examine the purport and effect of the order passed by this Court in CS(OS)2240/1993 dated 08.12.2004. A perusal of the said order clearly shows that the Court proceeded on the basis that as per the case law cited by the petitioner *"if the Arbitrator does not consider the counter claims of the respondent (sic) petitioner, **award is to be set aside on the ground of misconduct.**"* (emphasis supplied). Therefore, the Court proceeded on the basis that due to non-consideration of the counter claims, the entire award is

liable to be set aside on the ground of misconduct of the Arbitrator. In the operative part of the said order, this Court in no uncertain terms directed:- *"award is hereby set aside and remitted back to the learned Arbitrator for deciding afresh in accordance with law"*. Therefore, what was set aside was not only a part of the award but the entire award. No part of the award was saved and preserved from being setting aside. Moreover the Court consciously remitted back the disputes to the learned Arbitrator **"for deciding afresh in accordance with law"**. Therefore the learned Arbitrator was required to have a fresh look into all matters and disputes between the parties, i.e the claims and counter claims. The learned Arbitrator was bound by the directions issued by the Court, and could not have ignored the clear and unambiguous directions of the Court.

14. If the petitioner was so minded, the petitioner should have, at the time of the passing of the order dated 08.12.2004 impressed upon the court not to set aside the award made in favour of the respondent for the amount of Rs.5,60,000/-. Obviously, the petitioner was satisfied with the setting aside of the award of Rs.5,60,000/- made in favour of the respondent UOI at that stage. It is not even the petitioner's case that when the objections filed vide I.A.No.7484/1996 were preferred, those objections only pertained to the non-consideration of the petitioner's counter claims, and they did not pertain to the award of Rs.5,60,000/- made in favour of the respondent. The petitioner neither

preferred a review, nor sought any clarification of the order dated 08.12.2004, nor appealed against that order. The petitioner, therefore, clearly took its chance to have all the disputes i.e the claims and counter claims re-adjudicated afresh and was satisfied with the entire award being set aside.

15. The submission of Mr. Benati that the respondent had not challenged the award of Rs.5,60,000/- and had accepted the said amount as the only amount due in respect of the respondent's claims cannot be accepted.

16. Merely because objections may not have been preferred by the respondent to the award whereby the respondent's claims to the extent of Rs.5,60,000/- were awarded as opposed to its claim of Rs.17,63,096/-, it does not mean that the Court was powerless to set aside the award under Sections 30 and 33 of the Arbitration Act, 1940. If the Court found that the learned Arbitrator had misconducted himself, the Court was not powerless to set aside the entire award. This is evident from a plain reading of Section 17 of the Arbitration Act, 1940 which states that *"where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award....."*. The power to remit the award under

the Arbitration Act, 1940 is contained in Section 16. This Section empowers the Court to remit the award or any matter referred to arbitration to the arbitrators or umpire for reconsideration upon such terms as it thinks fit-

“(a) Where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred;”

17. As the award dated 01.09.1993 was not a reasoned award, it was not possible for the Court to conclude one way or another, as to whether or not the counter claims had been taken into consideration while making the lumpsum award for Rs.5,60,000/-. It appears that it is for this reason that the entire award was set aside and the disputes remitted back for adjudication afresh.

18. Merely because during the pendency of the objections to the arbitral award, the respondent may have released the withheld amounts over and above the amount of Rs.5,60,000/-, it does not mean that the learned arbitrator did not have the jurisdiction to entertain and adjudicate the claims of the respondent upon the award being remitted vide order dated 08.12.2004. The respondent, at the relevant time, proceeded on the basis that it had been awarded a sum of Rs.5,60,000/-. A party may not be fully satisfied with the award in its favour. However, yet it may choose not to challenge the said award. That by itself cannot mean that when the award, even to the

extent that it was made in its favour is set aside, that party would be precluded from reasserting its entire claim when the matters are being adjudicated afresh.

19. The extract from the order dated 14.12.2005 passed by Shri Ravi Prabhat, Sole Arbitrator is meaningless for two reasons. Firstly, the learned arbitrator could not have restricted the scope and effect of the order dated 08.12.2004 passed by this Court, whereby the entire award had been set aside and the matter remitted back to the Arbitrator for reconsideration afresh. Secondly even a perusal of the order dated 14.12.2005 passed by the learned Arbitrator shows that the said order does not support the contention of the petitioner. Rather it supports the contention of the respondent. In that order, the learned Arbitrator observed that *"the Hon'ble court set aside the award which in the understanding of the Arbitrator would mean nothing but the award per se. The claim of the respondent was adjudicated upon by the learned Arbitrator and the award was set aside by the Hon'ble High Court."*

20. Therefore, even Shri Ravi Prabhat proceeded on the basis that the entire award had been set aside and it was not as if the award had been remitted only for reconsideration of the counter claims of the petitioner.

21. If the submission of Mr. Benati were to be accepted that only the counter claims had to be reconsidered upon the award being

remitted, there would have been no occasion for the court to set aside the award of Rs.5,60,000/- made in favour of the respondent UOI. All that the Court would have done was to have remitted, not the award but the counter claims of the petitioner to the Arbitrator on the ground that they have been left undetermined. It is not that for remitting the counter claims, the award had necessarily to be set aside. It was set aside as it was an unreasoned award and, presumably, the court felt that it was not possible to separate the counter claims from the claims.

22. According to Mr. Banati, the counter claims of the petitioner had not at all been adjudicated. There was no question of the counter claims being adjudicated “afresh”, as they had not been adjudicated at all. The use of the expression “afresh” postulates that there had been an adjudication earlier. What had been adjudicated earlier was the claims. The use of the expression “afresh” pertains to the claims of the Union of India.

23. Pertinently, as aforesaid, the petitioner did not come back to the Court after passing of the order dated 08.12.2004, and before the passing of the impugned order, to seek any modification/clarification/review of the said order, and did not appeal against it, to say that the claims of the respondent UOI could not be reopened. The order dated 08.12.2004 has attained finality and the same cannot be reopened or challenged in these proceedings.

24. The decisions relied upon by Mr. Banati do not advance his

case. In **K.K. John** (supra), the Court had expressly remitted the award to the Arbitrator only on two issues. Despite that, the Arbitrator proceeded de novo to make an award. It was in those circumstances that the High Court set aside the award in appeal. The Supreme Court concurred with the judgment of the High Court.

25. Reliance placed by Mr. Banati on **Punjab Housing Development Board** (supra) is also of no avail. In this case, the counter claim had not been considered. In para 7 of the judgment, the Supreme Court observed as follows:

"7. Determination of the amount due to be paid by the appellants to the respondent is also inter-linked with determination of the counter claims made by them. Therefore, the Award passed by the Arbitrator and the orders of the courts below confirming the same are liable to be set aside and the matter remitted to the Arbitrator for adjudication of the counter claims filed by the appellants. It is made clear that the Arbitrator will not reopen the adjudication of the claims made by the respondent on merits, but will only consider the merits of the counter claims raised by the appellants and then decide the amount which is to be paid by one party to the other. This appeal is disposed of in the manner aforementioned. No costs".

26. The reason why the entire award has been set aside in the present case is found in the aforesaid observation of the Supreme Court. Determination of the amount due by one party to the other is also interlinked with determination of the claims made by the other. However, in **Punjab Housing Development Board** (supra), the Supreme Court expressly stated that the arbitrator will not re-open the

adjudication of the claims made by the respondent on merits, but will only consider the merits of the counter claims raised by the appellant and then decide the amount which is to be paid by one party to the other. Pertinently, though the position in **Punjab Housing Development Board** (supra) was cited before the Court and taken into consideration while passing the order dated 08.12.2004, the Court consciously did not pass a similar direction. On the contrary, the Court set aside the award and directed for adjudication “afresh”. The expression “afresh” obviously refers to the claims of the respondent/Union of India, and not to the counter claims of the petitioner which had not at all been adjudicated.

27. The decision in **Bharat Heavy Electricals Limited** (supra) also does not aid the case of the petitioner. In this case also, the Court consciously set aside the award and directed consideration and decision by the arbitrators afresh.

28. For the aforesaid reasons, I find no merit in the objections preferred by the petitioner and the same are accordingly dismissed, leaving the parties to bear their respective costs. The award is made a rule of the court and decree is passed in terms thereof. The respondent will be entitled to interest from the date hereof till the date of payment/realization at the rate of 10% p.a.

VIPIN SANGHI, J

FEBRUARY 04, 2011

'BSR'/sr