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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. 687/2011

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Judgment dated 02.01.2012

PRADEEP VINOD CONSTRUCTION

CO. ENTINEERS AND CONTRACTORS

..... Petitioners

Through : Mr. Rajiv Bajaj, Adv.

versus

D.E.N./III N. RLYU DRM,S OFFIE

..... Respondent

Through

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J (ORAL)

1. Petitioner has filed the present objections under Section 34 of the Arbitration and Conciliation Act, 1996 (the said Act for short) for setting aside the impugned Award made and published by the learned Sole Arbitrator on 23.5.2011, by which, all the claims raised by the petitioner herein stand rejected.
2. The facts of the case, as mentioned in the present petition, are that the petitioner company was awarded work for providing R.L. Goods platform in RDSO-II and III in cement siding at SSB (Shakurbasti) in the section of ADEN/Delhi on 29.7.2002. The value of the work, as awarded, was Rs.1,25,32,128/-. The said work was to be completed in eight months i.e. on or before 28.5.2003. In pursuance of the acceptance, Agreement No.07/DLI of 2002-03 was signed between the parties, which *inter alia* was to be governed by General Conditions of Contract 1999, which provided settlement of disputes by way of arbitration. The nature of work was construction of the Rail level goods platform, construction of

circulating area for heavy truck movement and provision of platform shelter on the platform for smooth, efficient handling/unloading and stacking of cement from railway wagons on to the platform and further lifting of cement from the rail level platform by the cement companies/truck operators to their respective godowns. Foundations of the platform shelter and erection of the platform shelter was to be executed by the Railways departmentally and claimant petitioner herein, had to provide AC sheet roofing on the shelter so erected by Railway. Approximately 25 to 30 rakes were placed on each siding of RDSO-II and RDSO-III. Each cement rake, which consists of 50,000 bags of cement, was meant for private parties, generating huge revenue. It is only after conclusion of the said work, disputes and differences arose between the parties. The claimant, petitioner herein, in all raised fourteen claims.

3. Learned counsel for the petitioner submits that right from the date of appointment, the Arbitrator did not act within the purview of the Arbitration Act. Counsel further submits that fourteen hearings were held by the Arbitrator out of which the respondent did not attend seven to eight hearings. The Arbitrator, being a Railway employee, overlooked the failure of the respondent in attending the hearings whereas in case of the petitioner seeking adjournment the Arbitrator used to express his dissatisfaction. Counsel next submits that the Arbitrator did not act within the four corners of the agreement and also did not call for the original copy of the Agreement from the respondents as the original agreement was in the possession of the respondent.
4. I have heard counsel for the petitioner and also perused the objections assailing the impugned award dated 23.5.2011 passed by learned Arbitrator.
5. The first claim, which was raised, before the Arbitrator was with regard to

the wastage of labour in the sum of Rs.21,30,607/-.

6. It is contended by learned counsel for the petitioner that due to non-availability of sixty days block for each siding/line, as per tender conditions, the labour was unable to do work for approximately four hours a day instead of 8 hours working, which resulted in the labour being unutilized for four hours a day. It is further contended that as per Special Conditions of the Agreement respondents were to provide 60 days block for each siding/line. By not granting the block, the claimant, petitioner herein, could not place cement rakes, unload cement from wagons, stake cement on platform and also resulted in restricted movement of cement agents to operate, transport cement from platform, circulating area and connecting platform. Blocking as provided in the Special Conditions of the Agreement, would have resulted in stopping of all commercial activities, which would have resulted in loss of revenue to the respondent and, thus, the respondent did not block the movement.
7. The learned Arbitrator has rejected this claim of the claimant, petitioner herein, on the ground that the petitioner was to submit a detailed bar chart to the respondent and the block was to be provided for a period of sixty days on each platform separately as per Special Conditions of Agreement. Learned Arbitrator has rejected the claim on the ground that the petitioner herein did not submit any request for arranging the block or about preparations made to work under block for work of construction of goods platform within original D.O.C. to the officials.
8. Before the learned Arbitrator the petitioner herein also relied upon a communication addressed to Dy. CE/Works/N Rly Hq Baroda House dated 26.8.2002. The Arbitrator has failed to place reliance on the abovesaid communication as he has recorded a finding that this communication was prepared subsequently as it is on a letter pad with

phone numbers as on letter pad of year 2005 and afterwards. The phone numbers are of eight digits whereas the letter pad used upto 2003 mentions phone numbers upto seven digits. Learned Arbitrator has further gone on to hold that even assuming without admitting that the aforesaid communication is a genuine one the said communication does not enclose the bar chart, as required vide Clause 15.2 of Special Condition of Contract. The Arbitrator has further held that the arrangements made by the claimant, petitioner herein, or the date since when the work was proposed to be started in each platform has also not been given. The Arbitrator has also considered the fact that out of the original Date of COMPLETION of eight months, the block was to be arranged for 2 x 2 months i.e. four months only to minimize disruption to respondent's working. The Arbitrator has also held that while, the aforesaid communication never reached the concerned officials although it would have been much easier to ask for the block through site order book or letter addressed to sub-division/divisional officer supervising/responsible for executing the work as well as responsible for arranging the traffic block. The Arbitrator has further held that the working under traffic block requires more resources at a time so as to complete the work within sixty days including finishing work, removal of debris besides earthwork, compaction and fixing of con blocks. The Arbitrator further goes on to hold that non-completion of work within sixty days would have caused a penalty of Rs.5000/- per day, as per Clause 15.1 of Special Condition of Contract. The contractor had requested for extension of time for completion of work vide communications dated 26.3.2003 and 3.4.2003 wherein the claimant, petitioner herein, has mentioned one of the reasons for not completing the work by 28.5.2003 as 'block not provided'. The petitioner was given extension upto 31.3.2004 without subjecting the

petitioner to any penalty and in this way the petitioner has been a beneficiary of the above arrangement. The Arbitrator has also given a specific finding that the claims on the ground of non-availability of block are an afterthought and cannot be considered.

9. I find no infirmity in the reasoning given by learned Arbitrator. The Arbitrator has analysed the claim of the petitioner and also rightly held that assuming the petitioner had not completed the work within the time frame he would have been burdened with penalty at the rate of Rs.5000/-, per day, which the respondent did not impose upon the petitioner, which would show that benefit was given to the petitioner for the delay. The Arbitrator has also rightly held that no reliance can be placed on the letter dated 26.8.2002 as the same is not a reliable document. Neither the bar charts had been provided by the petitioner and, thus, it cannot be said that there is any infirmity in the finding of the learned Arbitrator towards claim no.1 of the petitioner herein.
10. The second claim raised by the petitioner is towards additional expenses incurred on executing all items of SOR and N.S. in the sum of Rs.12.00 lakhs.
11. Learned counsel for the petitioner submits that claim no.2, which was raised before the Arbitrator, was on account of additional expenses incurred on executing of all items of SOR and N.S., as materials were first got unloaded at far off distance from the actual site of work and then re-handled at the site of work, as all the space was occupied/utilized by cement and vehicle carrying cement in the absence of 60 days block for each siding/line as provided in the agreement.
12. This claim of the petitioner stands disallowed by the Arbitrator on the ground that the work primarily comprised of earthwork, small walls of brickwork and flooring of precast concrete blocks. The learned Arbitrator

rejected this claim on the ground that in view of the fact that claim no.1 with regard to blocking was rejected in the absence of any request on behalf of the petitioner the present claim can also not be considered. The Arbitrator further goes on to hold that it was well known to the claimant, petitioner herein, that the method of doing work is in segments instead of in one stretch in a block, which fact also stands concluded from the details of running bills submitted by the contractor. The Arbitrator has also held that the material required for a segment could easily have been stacked in the space available between two goods platform as per plan. In view of the fact that claim no.1 stands rejected and the finding of the Arbitrator stands upheld by this Court, the Arbitrator has rightly turned down claim no.2, which has been raised by the petitioner.

13. The third claim of the petitioner before the learned Arbitrator was towards additional expenses incurred on execution 340% more quantity of chapters no.11 and 12 of Schedule of Rates 80% extra tender percentage claimed on enhanced cost of chapters 11 and 12 of the Schedule of Rates.
14. Learned counsel for the petitioner submits that respondent has not followed Clauses 72, 73 and 51 provided in the contract agreement. Counsel further submits that originally the foundation of platform shelters were not included in the agreement and the same were to be provided by the departmental labour. The Department failed in providing the foundation. Subsequently, respondent issued instructions to the petitioner for execution of the foundation work of the platform shelter. It is contended by learned counsel for the petitioner that the learned Arbitrator has overlooked the fact that there was variation in quantities to the extent of 340% instead of 25% as provided in the contract agreement. Counsel further submits that the Arbitrator did not call for the original copy of the agreement and the General Conditions of the Contract.

15. The petitioner had raised this claim in the sum of Rs.3,82,440/-. While dealing with this claim of the petitioner, the learned Arbitrator has relied on Clause 39 of the General Conditions of Contract, which deals with rates for extra items of works. As per Clause 39 of General Condition “any item of work carried out by the contractor on the instructions of the Engineer which is not included in the accepted ‘schedules of rates shall be executed at the rates set forth in the Schedule of Rates Railways’ modified by the tender percentage and such items are not contained in the latter, at the rate agreed upon between the Engineer and the Contractor before the execution of such items of work and the Contractors shall be bound to notify the Engineer at least seven days before the necessity arises for the execution of such items of works that the accepted schedule of rates does not include rate or rates for the extra work involved. The rates payable for such items shall be decided at the meeting to be held between the Engineer and contractor in as short a period as possible after the need for the special item has come to the notice”.
16. While relying on the aforesaid clause the learned Arbitrator has held that the quantities whenever varied were agreed upon by the claimant and the claimant signed the addendum and corrigendum and no representation was submitted by the claimant as per schedule of GCC. Hence the learned Arbitrator declined the claim due to increased market prices. In view of the factual finding of the learned Arbitrator that the quantities whenever varied were agreed upon by the claimant, petitioner herein, and petitioner signed the addendum and corrigendum and the petitioner never submitted any representation as per the schedule of the GCC this Court cannot find any fault in the finding of the learned Arbitrator by which this claim of the petitioner stands rejected.
17. The fourth claim, which was raised, before the learned Arbitrator was

with regard to redoing re-rectification of works loaded during and movement of vehicles carrying cement and unloading of cement from the wagons on the platform.

18. It is contended by learned counsel for the petitioner that by the continuous movement of trucks carrying cement and unloading of cement from the Railway wagons on goods platform, the executed items of works such as brick work, cement concrete, copings, excavation, etc., items of works were damaged by trucks/vehicles and the same had to be redone by the petitioner on account of the respondent's not providing sixty days block for each siding/line, which would have prevented movement of vehicles. The petitioner thus claimed Rs.2.00 lakhs on this account.
19. This claim has been rejected by the Arbitrator firstly on the ground that the Arbitrator has reached a finding that the block was not be carried as no request was made by the claimant. The claimant also gained benefit of the fact that the penalty of Rs.5,000/- per day, for delay in executing the work, was not imposed upon the petitioner and as this claim also arises out of claim no.1 the Arbitrator has rejected this claim. The Arbitrator has also recorded a finding that at that stage it would not be possible to distinguish whether the re-rectification, if any, was due to non-availability of blocks/movements of vehicles/materials or otherwise.
20. The finding of Arbitrator is not perverse and having regard to the settled position of law there is nothing which requires this Court to interfere in the finding of the Arbitrator.
21. The petitioner had also raised a claim in the sum of Rs.1,08,045/- on an amount incurred for extra lead of 20 kms. for disposal of surplus materials to the dumping ground outside Railway premises.
22. It is contended by learned counsel for the petitioner that as per the instructions of respondents malba obtained from execution of work was

disposed off outside Railway boundary in the municipal dumping ground which was situated at Badali involving lead of more than 20 kms, whereas respondent paid lead upto 10 kms. at the rate of Rs.62.18, on the plea that on the Schedule of Rates maximum lead payable is 10 kms and beyond 10 kms, lead payment would be made on non-schedule rates.

23. This claim has been rejected by the learned Arbitrator on the ground that petitioner herein could not give proof of actual disposal/lead of malba, if any. The Arbitrator has also held that *“in fact no such payment for leading of malba, etc., was paid upto 10 km as per restriction imposed. Quantity of 472 cum was paid as per item 408a and 408b of SOR for 1st km and subsequently upto next 2.5 km only. In view of above the claim for extra lead beyond 10 km is not accepted.”*
24. In the absence of any proof submitted by the petitioner, the learned Arbitrator has rightly rejected this claim of the petitioner and, thus, it requires no interference by this Court.
25. Claim no.6 raised by the petitioner is that petitioner incurred expenses for employment of caution men for two platforms of two numbers on each platform for twenty months. The petitioner has claimed Rs.2.56 lakhs on this account.
26. Learned counsel for the petitioner submits that as per the special condition of the contract respondent did not provide sixty days block for each siding/line for construction of platform work and for the block of sixty days for each siding/line for execution of foundation work of shelter, which was executed after completion of platform, for which drawings were approved after fourteen months from the date of start.
27. The Arbitrator while rejecting this claim has relied upon Clause 2.6 of the Special condition of contract, according to which, the claimant is to take all precautionary measures for protecting personnel, etc. The work was to

be executed under the supervision of qualified men and under proper protection for which flagmen was to be provided by the respondent. The respondent had submitted before the Arbitrator that they had provided staff and flagmen at the site during construction work. Since there was a specific provision in the special conditions of contract by which responsibility of providing staff and flagmen was on the respondent, which was provided by the respondent, the claim made by the petitioner was rightly rejected by the Arbitrator and calls for no interference by this Court.

28. The claim no.7 raised by the petitioner is as under:

“The original period was eight months and maintenance period was 6 months as per tender conditions. With extension of time for 12 months, work had to be maintained for additional period of 12 months.”

29. This claim in the sum of Rs.2.40 lakhs has been rejected by the learned Arbitrator primarily on the ground that claim no.1 has been disallowed and the respondent alone cannot be held responsible for the extended period of completion due to non-availability of block and the maintenance period has to be after completion period. Learned Arbitrator has relied upon Clause 17A(iii) of General Conditions of Contract, as per which, in the event of any failure or delay by the Railway to hand over the possession to the contractor of the lands necessary for execution of the work or to give the necessary notice to commence the works or to provide the necessary drawings or instructions or any other delay caused by the Railway due to any other cause whatsoever, then such failure or delay shall in no way affect or vitiate the contract or alter the character thereof or entitle the contractor to damages or compensation therefor. But in any such case, the Railway may grant such extension or extensions of completion date as may be considered reasonable. While relying on the

- aforesaid Clause, the Arbitrator has disallowed this claim of the petitioner.
30. On the perusal of the impugned award, I find no infirmity in the reasoning of the learned Arbitrator and, thus, it requires no interference by this court.
31. Claim no.8, raised by the petitioner in the sum of Rs.4.32 lakhs, reads as under:
- “Extra expenses were incurred by the petitioner on deployment of machinery for additional period of 12 months in place of original period of 8 months i.e. from 28.7.2003 to 31.3.2004”
32. Claim no.9 raised by the petitioner, in the sum of Rs.2.88 lakhs, reads as under:
- “Prolongation in contract period. The staff remained at site for additional 12 months.”*
33. Claim no.10, raised by the petitioner in the sum of Rs.15.00 lakhs, reads as under:
- “The original period of 8 months was extended upto 31-03-2004. The contract period became 20 months due to non provision of 60 days block and non finalization of drawings for platform shelter.”*
34. Having regard to the finding of the learned Arbitrator with respect to Claims no 1 and 6. I am of the opinion that the aforesaid Claim nos. 8, 9 and 10 also stand decided along with the said two Claims and, thus, it requires no interference by this Court.
35. Other Claims which the Claimant, petitioner herein, has raised before the learned Arbitrator are not pressed, and as such requires no consideration by this Court.
36. The Law while dealing with the objections to the award under the Act of 1996 is well settled. The jurisdiction of the Court to interfere with the award rendered by an arbitrator is very limited and consequently the court while entertaining an objection petition under Section 34 of the said Act

cannot sit as a Court of Appeal and that evidence is not to be re-appreciated. Reliance is placed to the observation of the Apex Court in **Municipal Corporation of Delhi Versus Jagan Nath Ashok Kumar** reported in **(1987) 4 SCC 497** holding that “that the appraisal of evidence by the arbitrator is ordinarily never a matter which the Courts questions and considers. It may be possible that on the same evidence the Court may arrive at a different conclusion than the one arrived at by the arbitrator but that by itself is no ground for setting aside the award”.

37. Further in **Food Corporation of India Versus Joginderpal Mohinderpal and Anr** reported in **Jmt Today 1989 (2) SC 89** it has been held that “it is not necessary for a Court to examine the merits of the award with reference to the materials produced before the Arbitrator. The Court cannot sit in appeal over the views of the arbitrator by re-examining and re- assessing the materials” (SC pg. 95, Para 10).
38. The Hon’ble Supreme Court of India 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 in paragraph 52 by stating that –

52. “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...”

39. The Apex 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** reported in **(2003) 5 SCC 705** has comprehensively laid down the law relating to setting aside arbitral awards under Section 34 of the

Indian Arbitration and Conciliation Act, 1996. The Arbitration and Conciliation Act, 1996 contains seven grounds for setting aside arbitral awards. The Apex Court in this case has drawn "principles" from previous cases and has laid down certain unenumerated grounds for setting aside arbitral awards and 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".

40. The observations in the case of **Delhi Development Authority (Supra) and McDermott International Inc. (Supra)** are also reiterated in **National Hydroelectric Power Corporation Ltd. Versus M/S Karam Chand Thapar and Bros (CS) Ltd and Anr** reported in **2011 (1) R.A.J. 131 (Del)** with a further observation in paragraph 23 which is also worth noting and the same is extracted as under -

23. "It is further settled law that if the arbitrator's decision on certain claims is a possible view, though perhaps not the only correct view, the award cannot be examined by the Court. Where reasons have been given by the arbitrator, Court cannot examine the reasonableness of the reasons."

A very significant observation of the Apex Court with regard to Section 34 of the said Act in case of **State of Rajasthan Versus Puri Construction Co. Ltd And Another** reported in **(1994) 6 Supreme Court Cases 485** which is also worth noting on this issue has also been reiterated in **National Hydroelectric Power Corporation Ltd. (Supra)** in paragraph 23 and the same is extracted as under:-

"If the parties have selected their own forum, the said forum must be conceded the power of appraisal of evidence. Consequently, as the arbitrator is the sole judge of the quality as well as the

quantity of evidence, it will not be for this Court to take upon itself the task of being a judge on the evidence before the arbitrator.”

41. On the perusal of the impugned award and applying the law laid down by the Apex Court, I find that the learned Arbitrator had given cogent reasons for arriving at his conclusions. Since, there is no infirmity in the findings of the learned Arbitrator and the conclusion arrived by him is neither perverse nor which would shock the conscience of the Court, accordingly the present petition is without any merit and the same is dismissed.

G.S.SISTANI,J

JANUARY 02, 2012

msr