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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. 822/2011

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Judgment dated May 30, 2013

M/S J.K. SPUN PIPE INDUSTRIES Petitioner
Through : Mr.H.C. Dhall, Adv.

versus

DELHI JAL BOARD & ANR Respondents
Through : Mr.Suresh Tripathy, Adv.

**CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI**

G.S.SISTANI, J.

1. Present objection petition has been filed by the petitioner under Section 34 of the Arbitration and Conciliation Act, 1996, seeking to set aside the Award dated 2.7.2011 passed by the learned Arbitrator, by which the learned Arbitrator has held that the respondent no.1 (claimant before the learned Arbitrator) has overpaid a sum of Rs.23,67,690/- to the petitioner herein. The learned Arbitrator has also held that the respondent on.1 Board is entitled to the amount with interest @10%, per annum, on the amount awarded, besides costs of Rs.95,000/- and the petitioner would be allowed to take back the stocks of 12,656 meters of pipe lying with the respondent no.1 Board.
2. The necessary facts, to be noticed for the disposal of the present objections, are that the petitioner was awarded work of supply of

47,000 meters of AC pressure pipe for a total cost of Rs.39,00,624/- vide supply order no.33 dated 6.2.1995 and an Agreement in this regard was also executed between the petitioner and the respondent no.1 Board incorporating the terms and conditions of the said agreement. As per the respondent no.1 Board the petitioner supplied only 44,328 meters of pipe against the above mentioned supply order. As per the respondent no.1 Board the pipes so supplied by the petitioner were below the specifications and the petitioner was asked to replace the pipes immediately vide communications dated 10.11.1995, 22.11.1995 and 13.12.1995. The petitioner replaced only 5000 meters of pipe but failed to replace the remaining pipe lying in the Central Store as well as those laid in various colonies in Trans Yamuna and Rural North Area. Subsequently the petitioner replaced 12,624 meters length of pipe but failed to replace the balance pipes. Respondent no.1 Board had made the following claims against the petitioner herein before the learned Arbitrator:

i)	Pipes as laid and failed at site:	30,828 Meters
ii)	Pipes lying at Store for Replacement	12,656 Meters
iii)	Pipe Lifted but not replaced	144 Meters
iv)	Length paid by the Respondent claimant	42,808 Meters
	and its cost is:	Rs.34,16,078.40

add 7% Sales Tax:	<u>Rs.1,36,643.40</u>
Total	Rs.35,52,721.54
LESS : 5%	<u>Rs.1,77,636.00</u>
Total :	<u>Rs.33,75,085.00</u>

3. As per the petition, respondent no.1 Board had also incurred an amount of Rs.17,05,000/- for laying of the pipes. Besides storage charges of Rs.21,007/- were also claimed. Respondent no.1 also forfeited Rs.20,000/-, deposited by the petitioner with respondent no.1 as earnest money. Respondent no.1 also claimed Rs.3,90,062/- as the penalty in terms of the Agreement however, a benefit was given to the petitioner of Rs.1.50 lakhs, which was already with the respondent no.1 Board. Respondent no.1 also claimed Rs.2,40,062/- as penalty. And interest @ 20% p.a. has also been claimed.
4. The case of the petitioner, before the learned Arbitrator, was that the petitioner had supplied 43,328/- meters of pipe, against the aforementioned supply order which had been duly inspected by Engineers India Limited, which was one of the main terms and conditions mentioned in the agreement executed between petitioner and respondent no.1. The petitioner had also submitted before the learned Arbitrator that the pipes, as laid and failed at site, were 30,828 meters. Respondent no.1 Board had made vague statements without giving the exact sites and number of pipes laid down by the petitioner. It is further the case of the petitioner that in terms of the

communication dated 11.12.1995 only 5,928 meters of pipe was not as per the standard and in fact respondent no.1 Board was responsible for laying of pipes as the manner of laying the pipe by respondent no.1 was defective and, thus, the petitioner cannot be held liable for the same. It is also the admitted case of the petitioner before the learned Arbitrator that 17,500 meters of pipe, by way of replacement, was supplied by the petitioner to respondent no.1 and on the complaints received from the respondent no.1 Board the petitioner held meetings with respondent's no.1 engineers and agreed to replace 5000 meters of pipe as recorded in the communication dated 17.1.1996. It has also been pleaded by the petitioner before the learned Arbitrator that the pipes were duly inspected by the Engineers India Limited and inspection reports were also issued by Engineers India Limited on 13.3.1995, 27.4.1995 and 11.6.1995, which would show that there was no manufacturing defect when the goods were supplied to the respondent claimant. It was also the case of the petitioner before the learned Arbitrator that there was no need, necessity or requirement for the petitioner to replace the defective pipes, the petitioner had replaced the defective pipes only as a matter of goodwill and to maintain excellent relations with the respondent no.1 Board.

5. It is contended by Mr.Dhall, learned counsel for the petitioner, that the award rendered by the learned Arbitrator is patently illegal and is in conflict with the public policy of India. It is next contended that

the learned Arbitrator has not decided the disputes between the parties in accordance with the agreement signed between the parties nor the Arbitrator has decided the matter issue-wise based on the issues which were framed by the learned Arbitrator. Mr.Dhall has primarily laid stress on the fact that once the pipes were inspected by the Engineers India Limited and on the basis of which inspection reports were made and the pipes were certified, no claim could have been raised by the respondent no.1 against the petitioner. It has further been strenuously argued by Mr.Dhall that the learned Arbitrator has failed to take note of the inspection certificate as also the inspection reports dated 27.4.1995, 11.6.1995 and 13.3.1995 and grievance, if any, would be against Engineers India Limited and not against the petitioner herein. It is also submitted that the principle of estoppel as enumerated under the Indian Evidence Act, 1872 would apply and no claim could have been made by the respondent no.1 against the petitioner in view of Section 115 of the Indian Evidence Act, 1872, which reads as under:

“115. Estoppel. – When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.”

6. In support of his arguments, learned counsel for the petitioner places reliance on Anantam Veeraju & Ors. vs. Valluri Venkayya @ Venkamma (died) & Anr. reported as AIR 1960 Andhra Pradesh 222. Relevant paragraph of which is reproduced as under:-

“Where a person obtains a benefit from the other party by a transaction of exchange, he must be taken to have accepted the validity of exchange. He cannot retain the property he got in exchange and at the same time seek to recover what he gave in return. He disables himself from even offering to return what had been obtained in exchange where he has sold them away”

Further reliance is placed on Baidyanath Rai & Anr. v. Satyanarain Rai & Ors. reported as AIR 1960 Patna 36. Relevant paragraphs of which is reproduced as under:-

“Here also, the plaintiffs, obtained time to pay the decretal amount on the condition that in the event of their failure to pay the sale would stand good. They defaulted. Having obtained time and prevented the defendants from contesting the validity of their objections, they cannot now, after their default has resulted in the confirmation of the sale, turn round and contest the legality and validity of the sale on the very same grounds on which the sale was impeached in the previous proceeding. In my opinion, the plaintiffs are estopped from questioning the legality of the sale in this case.”

Reliance is also placed on Swaminatha Ayyar vs. Saivu Rowthan & Anr. reported in AIR 1963 Madras 123. Relevant paragraph of which is reproduced as under:-

“5. A person cannot say at one time that a transaction is invalid and thereby obtain some advantage to which he could only be entitled on the footing that it is invalid and at another time say it is valid for the purpose of defeating another who is entitled to obtain an equal advantage with him on the footing that it is invalid.”

7. In my view, the principle of estoppel is not involved in the facts of this case and therefore the judgments sought to be relied upon by the counsel for the petitioner are not applicable. As far as the submission made by learned counsel for the petitioner that no finding has been given by the learned Arbitrator issue-wise is

concerned, I find no merit in the same. The learned Arbitrator has observed in the award that although nine issues were framed, however, during the arguments they were not even referred to and in fact it was agreed between the parties that the learned Arbitrator should only deal with the arguments of the parties and the points raised during arguments. The Arbitrator has categorically mentioned in the award that it is for this very reason that he proceeded to deal with the issues and did not deal the issues separately. In view of the agreement between the parties and the suggestion made by them before the Arbitrator the objections raised by the petitioner was liable to be rejected. Even otherwise the learned Arbitrator is not bound by the strict rules or procedures and it cannot be said that this award is liable to be set aside on this ground alone.

8. Respondent no.1 had filed its written statement to the claim before the Arbitrator wherein it was stated that 44,328 meters of pipe was supplied out of which the payment was made for a length of 42,808 meters of pipe. The pipe failed after laying and commissioned at the site. The matter was taken up with the petitioner vide letter dated 17.10.1995, by which the petitioner was informed about the failure of pipes at the site, the petitioner was asked to inspect the site and report the cause of failure of the pipes. Consequent thereto an inspection was carried out by the representatives of the petitioner herein during which few pipes were put to hydraulic test when it was observed that the pipes started bursting at a very low pressure, and

thus, the pipes supplied were found to be below the specifications. The petitioner was asked to replace the pipe immediately vide communication dated 10.11.1995. Respondent no.1 also issued letters dated 22.11.1995, 11.12.1995, 10.1.1996 and a telegram dated 18.12.1995 bringing to the notice of the petitioner the sub-standard pipes which were supplied by petitioner to respondent no.1. After much persuasion the petitioner agreed to replace the defective pipes vide their letter dated 17.1.1996. The petitioner replaced only 5000 meters of pipe but failed to replace the remaining pipes which were lying in the Central Store as also those which were laid in various colonies in Trans Yamuna and rural north areas. A show cause notice was also issued to the petitioner on 3.6.1996, however, the same was replied to by the petitioner wherein an attempt was made to shift the blame by the petitioner herein. Some of the pipes lying in the Central Store out of the replaced lots was also laid and put to commissioning at less than the pressure as per the agreement but the pipes were found to be leaking at many places and, thus, the same failed. This test was carried out in the presence of the parties and a test report dated 11.6.1996 was duly signed by the petitioner and respondent no.1, which was placed before the learned Arbitrator. The petitioner did not abide by the terms and conditions and guarantee furnished for the pipes supplied by them. A notice under Clause 3 was issued to the petitioner on 8.7.1996, which was not replied to by the

petitioner, however, vide letters dated 21.7.1996 and 26.8.1996 the petitioner informed respondent no.1 about the various extra precautions and measures taken by them for manufacturing the pipes and again requested to allow the petitioner to replace the defective pipes. Respondent no.1 allowed the petitioner to replace 12,500 meters of pipe. Subsequently the petitioner replaced 12,624 meters of pipe. Since the petitioner failed to replace the defective pipes in spite of being marked as ISI, a complaint was made to the Director, ISI, with a request to initiate action against the petitioner. Again various requests were made and number of letters were issued by respondent no.1 to the petitioner to replace the balance defective pipes. Meanwhile ISI took action against the petitioner and a case was registered against the petitioner based on the complaint of the respondent.

9. Mr.Tripathi, learned counsel for the respondent, submits that the objections filed by the petitioner cannot be entertained. The learned Arbitrator has rendered a reasoned award based on the facts and the evidence placed on record and the mere fact that the petitioner replaced some of the defective pipes would amount to admission on the part of the petitioner. It is further submitted that the objections are to be considered on the touchstone of the law laid down by the Supreme Court of India. In support of his arguments learned counsel for the respondent places reliance on Subhash Aggarwal Agencies vs. Bhilwara Synthesis Ltd and Ors. reported in (1995) 1 SCC 371:-

“17. The Indian Law is stated by N.D. Basu on Arbitration (Eighth Edition) at para 2228 at pages 835-836. It reads: Whether arbitrators should give reasons for decisions: *An award of arbitrators is not a reasoned judicial decision and the arbitrators need not give reasons for their decisions*, and even ignore any proposition advanced by the parties. The Court in filing an award wherein the arbitrators have failed to give a decision on any matter, the subject of dispute cannot be deemed to have exercised a jurisdiction not vested in it by law or to have failed to exercise a jurisdiction vested in it by law. An arbitrator is not bound by the technical rules of procedure which the court must follow, nor need record separate findings on the various points on which the parties are at issue or write a reasoned judicial decision, All that he is required to do is to give an intelligible decision which determines the rights of the parties in relation to the subject-matter of the reference. *While it is not necessary for an arbitrator to give reasons for his own conclusions or to give separate finding on each and every issue involved in the dispute*, every party that appoints an arbitrator has right to expect an intelligible decision which determines the rights of the parties in the various important points which are at issue. *Mere omission to give reasons does not vitiate the award*. It is not open to the court to speculate where no reasons have been given by the arbitrator as to what impelled him to arrive at a conclusion and to determine whether the conclusion was right or not.”

Learned counsel for the respondent also places reliance on the decision Gyarsi Bai & Ors. vs. Dhansukh Lal & Ors. reported in 1965

(2) SCR 154. Relevant paragraph of which is reproduced as under:-

“To invoke the doctrine of estoppel three conditions must be satisfied : (1) representation by a person to another, (2) the other shall have acted upon the said representation, and (3) such action shall have been detrimental to the interests of the person to whom the representation has been made. In the instant case it may be said that the first two conditions are satisfied : the appellant represented to the respondents that he was liable to render accounts to them in regard to the net proceeds of the mortgaged properties from the date of the plaint to the date of the preliminary decree, and on the said representation the respondents agreed to the

appellant drawing out from the Court about Rs. 35,515 deposited by them. But can it be said that the respondents had in any way acted to their detriment on the basis of the representation made by the appellant? The respondents had to pay the decretal amount to the appellant if they wanted to get possession of the properties. What they paid was less than what they had to pay under the decree. By paying the said amount they did nothing more than discharging their liability under the decree. The discharge by the respondents of their legal liability under the decree cannot in any sense of the term be described as detrimental to them."

10. I have heard learned counsel for the parties, considered their rival contentions and also perused the Award dated 2.7.2011 rendered by the learned Arbitrator. While hearing the objections the Court must not sit as a court of appeal over the award by reassessing and re-appreciating the evidence. The Award can only be challenged by the petitioner under the grounds mentioned in Section 34(2) of the Arbitration and Conciliation Act, 1996 under which no ground had been raised by the petitioner herein. Learned Arbitrator has noticed that most of the arguments advanced centered around the question as to whether or not the supplies made by the petitioner herein were defective or not. The learned Arbitrator has further noticed that the contracted quantity of pipes to be supplied was 47000 meters whereas only 44,328 meters of pipe had been supplied by the petitioner to the respondent no.1 upto 13.7.1995, out of which 31,528 meters of pipe had been actually laid, as per the following details, and thus a balance of 12,656 meters of pipe was lying in the Stores of respondent no.1:

Shahdara I	-	14696 meters
Shahdara II	-	11556 meters
North Area	-	3688 meters
Rural North Area Zone	-	1588 meters

11. The learned Arbitrator has also noticed that the petitioner did not replace 144 meters of pipe, although the same had been lifted by them to arrive at a decision that the pipes supplied were defective. Learned Arbitrator has also placed reliance on the communication dated 17.10.1995 addressed by the respondent to the petitioner, wherein it was pointed out that pipes have been used at sites located in Delhi. Complaints have been received for developing of cracks in the defective pipes at much lower water pressure than the designed pressure of 15 kg/cm. The petitioner was requested to inspect the site and report the cause of failure. The learned Arbitrator goes on to notice that consequent upon the complaint an inspection was carried out by the representatives of the respondent no. 1 during which when few pipes were put to hydraulic test they started bursting at a very low pressure. This fact was evident from the letter dated 10.11.1995 addressed by the respondent to the petitioner herein. The petitioner was also informed that the supply made by them was below the specifications and the petitioner was asked to replace the same. Since no steps were taken by the

petitioner herein to replace the defective pipes, respondent no.1 complained to the petitioner that the petitioner had taken no action for replacing the pipe and threatened to take action against the petitioner. Respondent no.1 also issued a telegram dated 18.12.1995 to the petitioner complaining that the pipes had failed at many places. The learned Arbitrator has noticed the letters filed by respondent no.1 dated 22.11.1995 and 11.12.1995, by which respondent no.1 complained a lot of problems of bursting of pipes and called upon the petitioner to replace the same. The learned Arbitrator further goes on to state that a meeting took place between the petitioner and respondent no.1 on 16.1.1996 as reference of the meeting was made in the petitioner's letter dated 17.1.1996. This letter would show that although the petitioner did make an effort to shift the blame regarding laying of pipes and manner of stacking the pipes, however, the petitioner acknowledged that they would replace all the pipes at the site and also lying stores at Okhla. Although despite the meeting and the acknowledgement the petitioner took no action in the matter, which was apparent to the learned Arbitrator by the letter of the respondent written in the month of May, 1996. Respondent no.1 agitated that despite numerous complaints from time to time and meeting between the petitioner and respondent no.1 and replacement being assured by petitioner to respondent no.1 no action had been taken by petitioner. A notice was also issued to the petitioner under Clause 2

of the Agreement. This notice also mentioned bursting of pipes, meetings held on 16.11.1996 and 21.5.1996 and the fact that representatives of the petitioner had agreed to replace the defective pipes found at the site as well as from the Central Store. Learned Arbitrator has also taken note of the fact that in response to the notice the petitioner admitted having agreed to replace the pipes. Thereafter a joint inspection was also held on 11.6.1996, when 120 meters of pipes were taken from the Central Store and 80 meters, out of the 120 meters, were laid. It was also observed that the pipeline which had been laid was leaking at seven places. As per the calculation and admittedly by June, 1995, a total of 44,328 meters of pipe had been supplied by the petitioner to respondent no.1 and in between 19.2.1996 and 27.2.1996 the petitioner herein had taken back 4876 meters of pipe and by 13.7.1995 the petitioner had replaced in all 17,500 meters of pipe leaving a balance of 26,828 meters out of a total of 44,328 meters. This finding was recorded by the learned Arbitrator based on the acknowledgement of the respondent in its letter dated 30.12.1996. A final show cause notice was issued by respondent no.1 to the petitioner on 8.7.1996, pointing out that the supplies were defective and reminded the petitioner about the meetings held on 16.1.1996 and 21.5.1996, according to which the petitioner had agreed to replace the pipes at site as well as from the Central Store. The notice also mentioned about the replacement of approximately 5,000 meters of pipe.

Respondent no.1 went on to complaint that despite ample opportunities having been granted to the petitioner and repeated assurances by the petitioner, defective pipes have not been replaced by petitioner. It was also brought to the notice that the replaced pipes were found leaking at joint inspection.

12. I find that the Arbitrator has also taken into account the fact that respondent no.1 filed a complaint with the Indian Standard Institute with regard to defective and sub-standard material supplied by the petitioner to respondent no.1, the fact that after the complaint the petitioner agreed for replacement of the defective pipes and by a communication dated 16.9.1997 petitioner assured the respondent that "they would be very keen to replace the pipes as mutually agreed upon". On scrutiny of the documents the learned Arbitrator has also recorded a finding that in all 17,500 meters of pipe was replaced; 12,565 meters of pipe was still lying with the respondent no. 1 in their stores, which was yet to be replaced; besides 144 meters though lifted by the petitioner had not been replaced thus making a total of 12800 meters. The detailed reasoning of the learned Arbitrator in coming to the conclusion with regard to pipes which were supplied, found defective, lying with the claimant in its stores, requires no interference. The Arbitrator has also rightly rejected the claim of the respondent in the sum of Rs.17,05,000/- for the amount incurred in laying of pipes. The Arbitrator has further rightly rejected the claim of the Board for storage charges. The

Arbitrator has also rejected the claim made by the respondent towards penalty on account of breach of contract and rightly as there is no provision in the agreement for any such penalty.

13. As far as the submission made by Mr.Dhall that the learned Arbitrator has failed to decide the counter claim raised by the petitioner herein is concerned, the same is factually incorrect as the learned Arbitrator at page 13 of the Award has dealt with the same. The petitioner had claimed a sum of Rs.4,63,098/- as balance amount due from respondent no.1 along with interest @24% per annum, besides Rs.93,600 towards transfer charges for taking back the pipes from Delhi to Nanded; Rs.4,21,600/- for delivering 12,500 meters of pipe from Nanded to Delhi and carrying back the same quantity from Delhi to Nanded, besides Rs.17,500/- towards testing charges; Rs.65,000/- towards boarding and lodging expenses; and Rs.1.50 lakhs already deposited with the respondent no 1. The learned Arbitrator has rightly rejected the claim of the petitioner in view of the fact that the respondent no. 1 made a payment for 42,808 meters of pipe and also for the reason that baring 12,624 meters of pipe rest of the pipe supplied by the petitioner was not only rejected but the petitioner agreed to take it back and replace the same, which replacement has never took place and for this ground the petitioner cannot be held entitled for the balance amount nor interest. The Arbitrator also rightly rejected the claim for transport charges as the pipes had to be transported only because

they were defective and for which the respondent cannot be held liable.

14. In my view the submissions made by learned counsel for the petitioner, based on 115 of the Indian Evidence Act, 1872 are of no use as Section 115 of the Evidence Act is not applicable to the facts of the present case as no estoppel is involved in the facts of this case. It is the petitioner who had agreed to replace the defective pipes, which is a facet admission on the part of the petitioner with regard to poor quality of pipes supplied. Merely because the pipes were tested by Engineers India Limited cannot be a ground in itself to accept the pipes which were defective. Joint inspections have revealed that the pipes burst even at a pressure, which was lower than the pressure as per the stipulation. In case the pipes were not defective the petitioner would never have agreed to replace the same and would have contested the matter.
15. Having regard to the reasoning given by the learned Arbitrator and the settled position of Law, I find the present objections without any merit and the same are accordingly dismissed.

(G.S.SISTANI)
JUDGE

MAY 30, 2013
msr//dk