

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

% *Judgment delivered on: January 15, 2013*

+ **OMP No.30/2013**

M/S SMCC-SCC-PVCC JV Petitioner
Through Mr.S.W.Haider, Adv.

versus

RAIL VIKAS NIGAM LTD Respondent
Through None

CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner filed objections under Section 34 of the Arbitration and Conciliation Act, 1996 against the impugned award dated 31st August, 2012 published by the learned Arbitrator.
2. Brief facts of the case are that the petitioner entered into a contract agreement dated 31st July, 2006 to complete the work “Gauge conversion of Garhi Harsaru-Farukhnagar Branch Line, track circuiting of BG loop line of Delhi-Rewari Section and track works in connection with RRI of Delhi Sarai Rohilla, Patel Nagar and Delhi Cantt. on Northern Railways” with completion period which was to expire on 20th June, 2007. Performance guarantee of ₹34,33,889/- was furnished by the petitioner on 31st July, 2006.
3. When the above said works did not proceed for six months after the award of the contract, the respondent started writing letters to the petitioner about poor progress on which the petitioner assigned the responsibility for

delay on the respondent. Subsequently, vide letter dated 26th December, 2006 the petitioner approached the respondent for reimbursement/ compensation of expenses alleged to have been incurred by the petitioner and loss of profit on proportionate basis amounting to ₹1,85,69,444/-. The petitioner further stated that either the respondent should settle the above issues amicable else the aforementioned letter dated 26th December, 2006 be treated as the petitioner's final notice under relevant clauses of the contract. The respondent vide letter dated 28th December, 2006 replied to the petitioner that L-sections and cross sections have been handed over to the petitioner for starting the work. The respondent further advised that the petitioner should also carry out inventory checking of existing track etc., and to collect rails and sleepers from different locations. The respondent also asked the petitioner to submit the copies of purchase orders placed for the material and to collect ESPs for yards.

4. In response to the respondent's letter, the petitioner replied vide letter dated 3rd January, 2007, the relevant paragraph of which reads as under:-

“3. It is impossible at this stage to take inventory of materials and verify L-section, cross-section, as this will lead to tress passing as per RPF act and unless the section is taken over from the Northern Railway and handed over to us and inventory of material can't be prepared. SH.90R can't be led to the section as these will be mixed up with Northern Railway P-Way materials lying in the section.

4. We have already intimated your good self that our earlier orders of supply of P-Way materials have become barred and advance money paid to the suppliers had been forfeited by the suppliers due to the failure of PVNL.

Last Para - By this time we have been put to expenses of Rs.2.00 crores and we request your good self that the amount as detailed in our dated 26.12.2006 may kindly be settled and determined at an early date so that our cash flow can be used for concrete execution of work to enable us to recognize and remobilized, certainly we require our cooperation at every step.”

5. In response to the petitioner’s above letter dated 3rd January, 2007, the respondent replied back on 15th January, 2007 stating that:-

“It is matter of the fact and record that no mobilization as yet has been made by you nor any arrangement has been made by you for starting the work.

Your statement that the orders of materials have been time barred is not correct as you never obtained any permission for supply of such materials & approvals thereof as per conditions of the agreement.

From the contents of your various letters it is evident that you are writing non factual, presumed and fictitious matters with an intention of gains by false claims at a later date.”

6. When the petitioner filed an application under Section 11 of the Arbitration and Conciliation Act, 1996 read with Section 151 CPC for appointment of an independent Arbitrator being Arb.Appl.No.251/2010, it was admitted by the petitioner that a Supplementary Agreement was executed on 5th April, 2007 whereby the aforesaid agreement dated 31st July, 2006 was closed and the respondent assured and undertook to pay the final bill to the petitioner. The case of the petitioner at that time was that since the respondent failed to comply with the terms of the Supplementary Agreement as no payment was made against the final bill, therefore, despite of following up with the matter there was no option left with the petitioner

but to issue the final bill dated 29th December, 2008 claiming an amount of ₹2,56,08,772/-. However, in the reply, the respondent took a stand that the respondent had already made the payment of ₹2,61,112/- vide cheque No.288601 dated 12th April, 2007 to the petitioner against its final bill and nothing remained due to the petitioner.

7. The petitioner's application filed under Section 11 of the Act was allowed vide order dated 24th February, 2011 and the Court appointed Mr.D.C.Pandey, General Manager (Electrical), Rail Vikas Nigam Limited, a Government of India Enterprise, as the sole Arbitrator to adjudicate the disputes arising between the parties including the preliminary objections if any, taken by the respondent.

8. The arguments of the petitioner before the Arbitrator were that there was no provision of Supplementary Agreement in the contract, therefore, the so-called Supplementary Agreement entered by both the parties on 5th April, 2007 did not withstand. The said agreement was executed under pressure and coercion. Even, the respondent did not offer full and final payment of bill amounting to ₹2,61,112/- neither the same was ever received by the petitioner. The petitioner claimed the amount of ₹2,56,08,772/- towards final payments.

9. On the other hand, preliminary objection was raised by the respondent that the arbitration initiated by the petitioner was not maintainable as the agreement containing the arbitration clause had been closed by the Supplementary Agreement dated 5th April, 2007 executed between the petitioner and the respondent. The Supplementary Agreement provided that the agreement for said work was closed without repercussions on either side; all claims would stand settled; all disputes amicably resolved and neither

party would invoke any clause. It is also a matter of fact that the Bank Guarantee No.4/06-07 dated 31st July, 2006 of ₹34,33,889/- along with full and final payment of ₹2,61,112/- as per the Supplementary Agreement was released by the respondent to the petitioner. It was also argued by the respondent that there was no coercion, pressure or duress on the petitioner for signing of the Supplementary Agreement. Rather, it was done at the request of the petitioner itself and in view thereof, no claims are admissible.

10. Clauses 1, 2, 3 & 4 of the Supplementary Agreement dated 5th April, 2007 read as under:-

“(i) The said agreement executed for the above said work of Garhi Harsaru-Farukhnagar Gauge conversion etc. is closed without repercussions on either side with mutual consent and a final bill shall be paid to the contractor for the sleepers transported to Garhi Harsaru Stations on Northern railway from Jakhora Station on North Central railway where after all the claims of the contractor stand settled and nothing remains due to him. The contractor accordingly submits this No Claim Certificate.

(ii) That performance security of the contractor shall be returned by the employer without any deductions etc.

(iii) That all disputes existing so far between both the parties arising out of the said agreement stand resolved amicably and neither of the parties shall hereafter raise any dispute and seek arbitration or any other remedy after this amicable settlement.

(iv) That neither of the parties shall invoke any clause of the said agreement for any of the matter of dispute.”

11. It is not denied by the petitioner that pursuant to the Supplementary Agreement, contract Performance Security was released; work done was recorded into Measurement Book duly signed by the petitioner and final

payment statement was prepared and the respondent also released payment towards final payment as per case of the respondent. No protest or objection was lodged by the petitioner either at the time of execution of the Supplementary Agreement or at the time of refund of Bank Guarantee on 12th April, 2007 or at the time of preparation of MB or at the time of final payment statement or at the time of receiving cheque for the work done and even thereafter about 20 months.

12. As per Supplementary Agreement dated 5th April, 2009, the contract dated 31st July, 2006 was closed with the execution of the Supplementary Agreement, thus, there can be no dispute between the petitioner and the respondent under the closed agreement, which was with the mutual consent of both the parties. The separate remedy was taken by the petitioner that it had entered into the supplementary agreement under pressure or coercion. The final bill dated 29th December, 2008 was submitted after 20 months of closure.

13. The Arbitrator after considering all the objections and submissions of the petitioner on all aspect reached at the conclusion that this arbitration was not maintainable and no claims remain, for the following reasons:-

“(i) The contract was closed with execution of Supplementary Agreement with mutual consent. The correspondences show that the two parties were in negotiations as regards the settlement of the final bill and there was no compulsion on claimant, much less any pressure, coercion or duress for signing of Supplementary Agreement.

(ii) The claimants had not tendered any protest either at the time of execution of the Supplementary Agreement OR at the time of refund of bank guarantee on 12.04.2007, OR at the time of preparation of MB & final

payment statement OR at the time of receiving cheque OR immediately thereafter.

(iii) As per the law, an agreement may be either verbal or written with mutual consent of two or more than two persons. Such type of agreement sustains and valid. In this case Supplementary Agreement has been executed with mutual consent and thereafter contract was closed by paying the due amount.

(iv) The claimant had misrepresented the fact initially by denying that the final payment made by the respondent through cheque dated 12.04.2007 amounting Rs.2,61,112/- was not received by him (claimant). During hearings, the respondent produced the documentary evidence of not only having paid the above amount but also the acknowledgement by the claimant to this effect. I have personally seen and verified these documents which are genuine and correct. Full and final payment of Rs.2,61,112/- was released by the respondent to the claimant on 12.04.2007 which was duly accepted by the claimant.

(v) In my opinion, the context of the ruling of Hon'ble Supreme Court judgment in case of NTPC Ltd. vs. M/s. Reshmi Construction which was made the basis by the claimant (relied on document) for their Arbitral disputes that even after submitting the No Claims Certificate, his rights for raising claims don't cease differs from the present case as summarized below:

In case of NTPC Ltd. vs. M/s. Reshmi Construction the respondent lodged its protest and reiterated its claim immediately after receiving the payment of the final bill, as a matter of fact on the same day of signing of NO DEMAND CERTIFICATE. The effect of then correspondences between the parties show that the final bill was accepted by respondent "without prejudice". The implication of the term "without prejudice" means – (As elaborated in ruling of NTPC Ltd. vs. M/s. Reshmi Construction judgment):

(1) that the cause or the matter has not been decided on merit & (2) that fresh proceedings according to the law were not barred.

The conduct of the applicant (NTPC) would show that on receipt of the notice of the respondent (M/s. Reshmi Construction) through its advocate dated 21.12.1991 the same was not rejected outright but the existence of dispute was accepted and the matter was sought to be referred to the Arbitrator.

In the present case no protest was lodged by the claimant either at the time of execution of Supplementary Agreement, which was at the claimant's request OR at the time of refund of Bank Guarantee on 12.04.2007 OR at the time of preparation of MB OR final payment statement OR at the time of receiving cheque for the work done.

(vi) 2nd sub-paragraph of para 7 of the Supreme Court's judgment in Spl. Leave to Appeal No.8306/2008-Union of India & Others Vs. Hari Singh (DOJ-10.09.2010) reads as under :

“....The ‘receipt’ given by the appellants and accepted by the respondents, and acted on by both parties proves conclusively that all the parties agreed to a settlement of all their existing disputes by the arrangement formulated in ‘receipt’. It is clear example of what used be well known as common law pleading as ‘accord and satisfaction by a substituted agreement’. No matter what were the respective rights of the parties inter se they are abandoned in consideration of the acceptance by all of a new agreement. The consequence is that when such an accord and satisfaction takes place the prior rights of the parties are extinguished. They have in fact been exchanged for the new rights; and the new agreement becomes a new departure and the rights of all the parties are fully represented by it.”

The above ruling makes it amply clear that all claims or disputes or rights are fully represented by the Supplementary Agreement entered between the claimant viz. M/s. SMCC-SCC PVCC (J.V.) and the respondent viz. Rail Vikas Nigam Ltd.

(vii) In the present case the respondent (RVNL) made the full and final payment of the final bill and to which the claimant certified by signing the bill without any protest or reservation. The claimant with the intention of receiving further payments, after about 20 months raised yet another claim and tried to bring up a dispute.”

14. The relevant part of Section 34 is reproduced herein for ready reference:

“34. Application for setting aside arbitral award –

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub- section (2) and sub section (3).

(2) An arbitral award may be set aside by the Court only if-

(a) the party making the application furnishes proof that-

- (i) a party was under some incapacity, or
- (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
- (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iv) the arbitral award deals with a dispute not contemplated by or not falling within the

terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

- (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or
- (b) the Court finds that-
 - (i) the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
 - (ii) the arbitral award is in conflict with the public policy of India.

Explanation.- Without prejudice to the generality of sub- clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.”

15. As can be seen, the objections filed by the petitioner are not covered by any of the grounds enumerated in Section 34 or any other section, hence, the award cannot be set aside. Merely saying that the award is against the public policy is not enough; the petitioner has to make out a strong case

within four corners of the provision. In the present case, the petitioner has failed to demonstrate any ground to show that the award can be set aside despite of the fact that the petitioner owe a duty to do so and that too convincingly, for the Court to come to a finding that the arbitral award is in conflict with the provisions.

16. It is settled law that the scope for interference by the Court with an award passed by the Arbitrator is very limited. The Court, while hearing objections against the arbitral award, is not sitting as a Court of appeal and cannot re-appreciate the evidence.

- (i) In **Puri Construction Pvt. Ltd. Vs. Union of India**, AIR 1989 SC 777, the Supreme Court held that a court while examining the objections taken to an award is not required to examine the correctness of the claim on merits and the scope is very limited.
- (ii) It was further held by the Supreme Court in **State of UP vs. Allied Constructions**, IV (2003) SLT 873 that:
 - (a) ‘the Court is precluded from reappearing the evidence’.
 - (b) ‘Once it is found that the view of the arbitrator is a plausible one, the Court will refrain itself from interfering’.
- (iii) In **Gujarat Water Supply and Sew Vs. Unique Erectors**, AIR 1989 SC 973, the Supreme Court held that:

“Even in a case where the arbitrator has to state reasons, the sufficiency of reasons depends upon the facts and circumstances of the case and the Court does not sit in appeal over the award and review the reasons.”

(iv) In New Delhi Apartment Group Housing Society Vs. J.S. Mittal, 2007 (4) Arb. LR 565 Del DB para 9, the Division Bench of Delhi High Court held that:

“The decision of the Supreme Court in ONGC Vs. Saw Pipes has no doubt interpreted the expression “public policy of India” to include cases of patent illegality but that is far from saying that a court exercising powers under Section 34 can sit in appeal over the findings of fact recorded by the Arbitrator or interpretation placed upon the provisions of the agreement particularly when such interpretation is a possible interpretation initiated in no way by any perversity or any kind. It is true that extreme situation where a finding of fact or interpretation recorded by arbitrator may be found to be perverse may, at times, call for interference, but that does not mean that the court should be ever so ready to substitute its own interpretation for that of the arbitrator just because the alternative interpretation appeal to the court more than the one placed by the arbitrator. The court would, in our view, be well advised to exercise restraint in the matter and resist the temptation of interfering unless such an interference is found to be absolutely necessary to correct a patent illegality or error of jurisdiction.”

17. For the above said reasons and well-settled law, this Court is not satisfied with any ground stated in the objections raised in the petition. The objections are, therefore, dismissed. No costs.

(MANMOHAN SINGH)
JUDGE

JANUARY 15, 2013