

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

Reserved on : 07.02.2013

Decided on: 13.03.2013

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FAO(OS) 89/2009

M/S. NATIONAL PROJECTS CONSTRUCTION
CORPORATION LTD.. Appellant

Through : Sh. Paritosh Budhiraja, Advocate.

versus

M/S. R.S. AVTAR SINGH & CO. Respondent

Through : Sh. Ajay Kumar, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

MR. JUSTICE S. RAVINDRA BHAT

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1. This appeal is directed against a judgment and order of a learned Single Judge of this Court, in CS (OS) 1497/1993 dated 15.10.2008, in respect of objections to an award, made in terms of provisions of the erstwhile (and now repealed) Arbitration Act, 1940.

2. The dispute arose between the parties with respect to foodgrain godown construction and was referred to Sh. T.S. Murthy, the Sole Arbitrator by letter dated 04.05.1989 in terms of Clause 36 of the General Conditions of the Contract. The Sole Arbitrator after

conducting the proceedings gave his award of Rs. 19,91,418/- in favour of the respondent and against the appellant on 31.07.1990. That award was set aside by judgment of a Learned Single Judge on the ground that the Sole Arbitrator misconducted himself in the proceedings thereby depriving the reasonable opportunity of hearing to the appellant. The respondent appealed that decision; the appeal was heard by a Division Bench which did not find any merit and directed the appellant to appoint another Arbitrator, pursuant to which Sh. G.K. Saxena was appointed. This arbitrator rendered a non-speaking lump sum award for Rs. 13,87,160/- in favour of the respondent and directed the appellant to pay interest @ 15% per annum from 02.07.1993 to the actual date of payment of the Award or date of decree, whichever is earlier. The appellant (NPCC) filed objections in Court, under Sections 30 and 33 of the Act, before Learned Single Judge of this Court who upheld the Arbitrator's award. NPCC is aggrieved, and has consequently preferred this appeal.

3. It is argued by NPCC that the Sole Arbitrator did not give reasonable opportunity to it to address oral arguments/submissions in support of its case despite a written request having been made. It is also argued that while awarding amounts, the arbitrator did not go into the relevant records and documents and instead made the award on lump sum basis. There were 14 claims and from a bare reading it was not possible to find out which claim was allowed and which was disallowed. NPCC's counsel relies on the decision reported as *Punjab State Electricity Board v. Punjab Pre-Stressed Concrete Works*, 2001

(VI) AD SC 33 and *Tamil Nadu Electricity Board vs. M/s Bridge Tunnel Constructions* 1997 III AD SC 458. It is argued that the Sole Arbitrator acted without jurisdiction in entertaining new claims/variased claims and adjudicated them without evidence.

4. It is argued that Part III of Claim No. 1 was in respect of statutory increase in price of steel and Claim no. 4 was on account of escalation of cost of material, labour and fuel. These were barred by Clause 12 of the contract. Claim No. 5 relied on by the petitioner/contractor was due to abnormal increase in quantities beyond the agreed quantities at enhanced rates. Claim No. 6 was on account of loss of profit due to abnormal reduction of quantities which was barred by Clause 32 of the General Conditions of the Contract. Claim No. 7 was on account of *chowkidari* charges incurred; these too were barred by Clause 13(b) of the contract. It was submitted that though Clause 5 of the agreement stated that the work is to be carried out as per the specifications and provisions of CPWD/FCI, but the same is related only for technical purposes and could not have any overreaching effect on the specific provisions of the contract between the parties. Similarly, Claim No. 8 was on account of prolongation of contract due to breach thereof by National Projects Construction Corporation Ltd. (NPCC) which could not be considered as concomitant to what was agreed upon in the contract. In support of its submissions, NPCC relies on the following decisions: *Associate Engineering Co. vs. Government of Andhra Pradesh and Anr.* AIR

1992 SC 232; and *Steel Authority of India vs. J. C. Budharaja, Government and Mining Contractor* AIR 1999 SC 3275.

Respondent's contentions

5. The respondent/claimant submits that both the parties filed their statement of claims, counter-statement of facts and counter-statement of claims and were heard at length and now it is too late to say that no reasonable opportunity was provided. It is argued that the arbitrator is fully entitled to make a non-speaking award and it is also permissible in law to give lump sum award. It is further contended that there is a fallacy in the argument raised on behalf of the appellant/objector to the effect that Part III of Claim No. 1 was barred by Clause 12 of the contract for the reason that the claim raised by the respondent was not on account of increase in the cost of material as covered under Clause 12 but on account of statutory increase of prices of steel, the basis of which was entirely different.

6. In respect of the objection by NPCC to Claim No. 4 (escalation of cost of material, labour and fuel), the claimant contends that this was protected under Clause 5 of the contract read with Clause 10 CC of the CPWD Manual. Clause 5 of the NIT stipulates that the work shall be carried out as per the specifications and provisions of CPWD/FCI unless otherwise directed by the Engineer in charge. As to the objection of NPCC that Claim No. 5, based on abnormal increase in quantities beyond the agreement quantities at enhanced rates and Claim No. 6, on account of loss of profit due to abnormal

reduction of quantities were barred by Clause 32 of the General Conditions of the contract, it was contended that the quantities given in the contract were approximate in nature as the date of floating the tender was 29.09.1984, whereas the date of awarding the contract was 06.02.1985, on which date the quantities were actually fixed. Clause 32 was not applicable after the quantities were fixed as it specified that the quantities noted in the schedule of quantities were approximate. Similarly, in respect of Claim No. 7, which was on account of *chowkidari* charges incurred by the claimant, it was stated that the expenses incurred were not related to the contract period and could not be held to be barred by the terms of the contract.

Single Judge's reasoning

7. It was held that an objection that the Sole Arbitrator did not have jurisdiction to deal with “excepted matters” could be raised at any time as the same goes to the root of the matter and can be taken even at the time of arguments for the reason that the law of limitation has no application to the objections raised under Section 33 of the Act; the impugned judgment referred to the decision in *MCD vs. Jagan Nath Ashok Kumar* (1987) 4 SCC 497. It was held that a perusal of the terms and conditions of the NIT would show that Clauses 12, 13(b) and 32 had to be read in the light of Clause 5 and since the Engineer-in-charge had not issued directions contrary to the provisions of CPWD, the petitioner was entitled to raise such a dispute.

8. Learned Single Judge further reasoned that it could not be stated that the conditions contained in the contract completely prohibited granting claims of the respondent, under Claim Nos. 1(iii), 4, 5, 6, 7 and that the learned Sole Arbitrator ignored the conditions and acted beyond the jurisdiction conferred upon him. It could not, therefore, be treated as an “*error going to the root of his jurisdiction*”. In such circumstances where the question is of interpretation of the terms of the contract, the award cannot be interfered with unless reasons for giving the award disclose an error apparent on the face of it. While a dispute as to the jurisdiction of the Sole Arbitrator is an error which can be examined by the Court under Section 33 of the Act on the ground that the Arbitrator had exceeded his jurisdiction; but a dispute as to the manner in which the jurisdiction is exercised, is an error within the jurisdiction of the Sole Arbitrator. Reliance was placed on *M/s Sudarsan Trading Co. vs. Govt. of Kerala and Anr.* (1998) 2 SCC 38; *Steel Authority of India Ltd vs. J.C. Budhiraja*, AIR 1999 SC 3275. In the present case, Claim No. 8, raised on account of prolongation of contract due to breach thereof, can be considered as concomitant to what was agreed upon and thus a part of the contract.

9. Lastly, he observed that since the Arbitrator was under no obligation to give reasons in respect of the decision arrived at by him, he cannot be faulted for giving a non-speaking lump sum award. It is not open to the Court to probe the mental process of the Sole Arbitrator and speculate when no reasons have been given by the Sole Arbitrator as to what impelled him to arrive at a conclusion. For this,

Hindustan Steel Construction Ltd. Vs. Raj Sekhar Rao (1987) 4 SCC 93 was cited. The Sole Arbitrator being the sole judge of the quality as well as quantity of the evidence, the Court cannot sit in appeal over the decision of the Sole Arbitrator by re-appreciating evidence before the Sole Arbitrator Ref.: *Jagan Nath (supra)*. Rather, endeavour should be made to support a non-speaking award as long as it adheres to the agreement governing the parties and is not invalidated due to the Sole Arbitrator's conduct.

10. Before analysing the rival submissions, it would be necessary to extract relevant clauses of the contract. They are extracted below:

“(a) Clause 12 stipulates that “rates quoted by the contractor shall remain firm and no escalation will be admitted on account of increase in cost of labour, materials, P.O.L. or for any other reason for the period of completion of work.”

(b) Clause 13(b) of the contract states that NPCC “will provide watch and ward and work supervising at a cost of Rs. 8000/- per month and the cost will be recovered from the sub-contractor.”

(c) Clause 32 of the General Conditions of the Contract deals with Statement of Approximate quantities, variation, additions, alterations, drawing and specifications and provides that:

“The quantities noted in the schedule of quantities are approximate and no claim shall be made against NPCC for reduction or enhancement of quantities. Any item of the work provided in the schedule and found not necessary during the progress of the

work may be omitted at the option of NPCC and no claim shall lie against NPCC on this account and prices quoted shall remain firm.”

(d) Clause 5 of the NIT stipulates that the work shall be carried out as per the specifications and provisions of CPWD/FCI unless otherwise directed by the Engineer incharge.

(e) Clause 10 CC of the CPWD Manual provides for the methodology in calculating escalation having regard to rates of fuel, wages and other specified inputs.

(f) Clause 32.8.1 provides for compensation in case of increase in price of materials and/or wages of labour required for execution of work (not for the materials supplied or services rendered at fixed price in accordance with clause 10 and 34 hereof), subject to certain conditions and also downward adjustment in case of decrease in rates in above items.

(g) Clause 32.8.2 states that Clause 10(CC) will not be applicable in all contracts where the stipulated period for completion is eighteen months or less.

(h) Clause 32.8.3.1 stipulates that the components of material, labour and P.O.L. for every work have to be pre-determined and incorporated in the contract. For this purpose, the works, shall be classified broadly as under :-

(i) Building works including sanitary and water supply.

(ii) Road works and pavement works in Airfields.

(iii) Development works.

(iv) Carriage works.

(v) *Internal Electrical installations.*

(vi) *External Electrical works.*

(vii) *Supplying and installation of machinery, like lifts, sub-stations, pump sets etc.”*

11. The Award in this case is a non-speaking one. There is authority in the form of a decision of the Supreme Court in *Raipur Development Authority and Ors. vs. Chokhamal Contractors and Ors.*, AIR 1990 SC 1426 that public agencies and public sector units should normally enter into contracts containing arbitration clauses which stipulate that the award should be a reasoned one. In this case, however, the peculiar facts are that the contract did not contain such a clause; the matter has a history of a previous award, which was brought to court, on the ground that the Arbitrator did not give any opportunity to the claimant. The award –involving a much larger amount was set aside. Thereafter, a new arbitrator was appointed. At that stage, the Court did not impose any fresh condition that the award should be a reasoned one; the conditions which prevailed at the contract formation stage, existed. It is in these circumstances, that the arbitrator made his non-speaking award which is under challenge in the present appeal.

12. Speaking about unreasoned awards, the Supreme Court, in *Gujarat Water Supply and Sewerage Board vs. Unique Erectors (Gujarat) (P) Ltd. and Anr.* AIR 1989 SC 973 observed that “*It is not obligatory on part of Arbitrator to give detailed reasons while delivering judgment.*” The scope and extent of examination by the

Court of the award made by an Arbitrator has been discussed in various decisions. It has been held that there is a trend in modern times that reasons should be stated in the award though the question whether the reasons are necessary in ordinary arbitration awards between the parties is pending adjudication by the Constitution Bench of this Court. Even if it be held that it is obligatory for the Arbitrator to state reasons, it is not obligatory to give any detailed judgment. An award of an Arbitrator should be read reasonably as a whole to find out the implication and the meaning thereof. Short intelligible indications of the grounds should be discernible to find out the mind of the Arbitrator for his action even if it be enjoined that in all cases of award by any Arbitrator reasons have to be stated. The reasons should not only be intelligible but should also deal either expressly or impliedly with the substantial points that have been raised. Even in a case where the Arbitrator has to state reasons, the sufficiency of the reasons depends upon the facts and the circumstances of the case. The Court, however, does not sit in appeal over the award and review the reasons. The Court can set aside the award only if it is apparent from the award that there is no evidence to support the conclusion or if the award is based upon any legal proposition which is erroneous. (Ref: *Indian Oil Corporation Ltd. v. Indian Carbon Ltd.* [1988] 3 SCR 426). Likewise, in *Food Corporation of India v. Jagdish Chandra Saha*, AIR 1994 SC 219 it was held that reasons are obligatory on the Arbitrator only where the arbitration clause contains such a requirement or where both

parties agree that the reasons should be given in a deed of submission or by a letter addressed by both parties to the Arbitrator.

13. In *Sudarsan Trading Co. v. Govt. of Kerala and Anr.*, [1989] 1 SCR 665 the Supreme Court observed that the court in a non-speaking award cannot probe into the reasoning of the award. The Court further observed that only in a speaking award the court may look into the reasoning of the award, and it is not open to the court to probe the mental process of the Arbitrator and speculate where no reasons are given by the Arbitrator as to what impelled him to arrive at his conclusion. Furthermore, the reasonableness of the Arbitrator's reasons cannot be challenged. The Arbitrator's appraisal of the evidence is never a matter for the court to entertain. This approach was again endorsed in *State of A.P. v. R.V. Rayanim* (1990) 1 SCC 433 and *Bijendra Nath Srivastava v. Mayank Srivastava and Ors.* AIR 1994 SC 2562.

14. Apart from the ground that the award was unreasoned, the Appellant NPCC had urged that the Award is also liable to be set aside because it is a “lump sum” award and did not specify the heads of claim which are allowed, and those which are rejected. Though the argument is facially attractive, it is not sound. It has been held in *State of Orissa and Others vs. M/s. Lall Brothers*, AIR 1988 SC 2018 that the fact that there is a non-reasoned award is no ground to set it aside, and that lump sum award is not bad *per se*. Earlier, in *Firm Madanlal Roshanlal Mahajan vs. Hukumchand Mills Ltd.* [1967] 1 SCR 105 it was held that the arbitrator could

give a lump sum award and that he would not be bound to give a separate award for each claim, that his award both on fact and law is final; there being no appeal from his verdict.

15. *Sudarsan Trading Co.* (supra) is an authority for the proposition that the Court cannot examine whether in arriving at its decision, the arbitrator acted correctly or incorrectly. It was held, pertinently – when the lower court had examined the reasons, in considering a challenge to such award, that:

“31. This, in our opinion, the court had no jurisdiction to do, namely, substitution of its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. Whether a particular amount was liable to be paid or damages liable to be sustained, was a decision within the competency of the arbitrator in this case. By purporting to construe the contract the court could not take upon itself the burden of saying that this was contrary to the contract and, as such, beyond jurisdiction. It has to be determined that there is a distinction between disputes as to the jurisdiction of the arbitrator and the disputes as to in what way that jurisdiction should be exercised. There may be a conflict as to the power of the arbitrator to grant a particular remedy.”

16. The question was again considered by a three-Judge Bench of the Supreme Court in *State of U.P. v. Allied Construction* (2003) 7 SCC 396 . The Court held that:

"4. Any award made by an arbitrator can be set aside only if one or the other term specified in Sections 30 and 33 of the Arbitration Act, 1940 is attracted. It is not a case where it can be said that the arbitrator has misconducted the proceedings. It was within his jurisdiction to interpret Clause 47 of the Agreement having regard to the fact-situation obtaining therein. (sic) It is submitted that an award made by an arbitrator may be wrong either on law or on fact and error of law on the face of it could not nullify an award. The award is a speaking one. The arbitrator has assigned sufficient and cogent reasons in support thereof. Interpretation of a contract, it is trite, is a matter for arbitrator to determine (see M/s. Sudarsan Trading Co. v. The Government of Kerala, : [1989]1SCR665). Section 30 of the Arbitration Act, 1940 providing for setting aside an award is restrictive in its operation. Unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a Judge chosen by the parties and his decision is final. The Court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the interference therewith would still be not available within the jurisdiction of the Court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law. As error apparent on the face of the records would not imply closer scrutiny of the merits of documents and materials on record. Once it is found that the view of the arbitrator is a plausible one, the Court will refrain itself from interfering."

17. In the present case, the NPCC mainly argued that Clause 12 prohibited claims for other amounts, and that since the contract was a lump sum one, no escalation was payable. Consequently, the arbitrator erred in granting amounts. Though this argument appears compelling, the fallacy lies in the fact that as against a claim in excess of Rs. 1

crore – of which the escalation claim was about Rs. 31 lakhs, the total amount awarded – as against all claims - was Rs. 13 odd lakhs. In these circumstances, apart from the reasoning which found favour with the learned Single Judge, this court is of opinion that one would have to divine the mind of the arbitrator, or by some magical sleight of reasoning, conclude that some part of the amount awarded was indeed towards such escalation claims. Clearly, such a course of action is impermissible for the Court, exercising powers under Sections 30 and 33 of the (old) Act. Besides, having regard to the overall conspectus of circumstances, especially the fact that the Arbitrator considered the submissions of the parties and chose to award only a fraction of the total claim, this is not a case which calls for interference by the court. This Court is also mindful of the fact that the learned Single Judge considered the records, and held that the materials did indicate that the Engineer in charge gave directions to carry out works in accordance with the CPWD standards, which conflicted with provisions of the specific terms, for which the contractor could have laid reasonable claims.

18. In this Court's opinion arbitrator alone is the sole judge of the quality as well as quantity of evidence and it will not be for this Court to take upon itself the task of being a judge of the evidence before the arbitrator. It may be possible that on the same evidence the Court might have arrived at a different conclusion than the one arrived at by the arbitrator but that by itself is no ground in our view for setting aside the award of an arbitrator. The Court is, therefore, of the view

that the learned single judge's reasoning does not call for interference in the facts and circumstances of this case. The appeal, therefore, fails, and is, accordingly, dismissed without any order as to the costs.

**S. RAVINDRA BHAT
(JUDGE)**

**SUDERSHAN KUMAR MISRA
(JUDGE)**

MARCH 13, 2013