

\$~12

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

+ **FAO(OS) (COMM) 94/2017**

M/S CALCUTTA HALDIA PORT ROAD COMPANY LTD

..... Appellant

Through: Mr. Ramesh Kumar, Adv.

versus

M/S ARSS INFRASTRUCTURE PROJECTS LTD Respondent

Through: Ms. Kiran Suri, Sr. Adv. with
Mr. Hitendra Nath Rath, Adv.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE YOGESH KHANNA

ORDER

%

28.04.2017

Caveat No.419/2017

Learned counsel for the caveator has entered appearance.

Caveat stands discharged.

CM No.15890/2017 (*exemption*)

Allowed, subject to just exceptions.

FAO(OS)(COMM) No.94/2017 & CM No.15891/2017 (*stay*)

1. The appellant is aggrieved by the judgment of the learned Single Judge which rejected its challenge under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, hereinafter referred to as the Act). It contends that the learned Single Judge failed to find patent illegality in the

award by the Arbitral Tribunal for a sum of Rs.2 crores as refund, (being the refund claim on the part of the respondent/claimant and the interest thereon to the tune of Rs.1.55 crores).

2. The facts are that for the purposes of a work, an agreement had been entered into by the petitioner on 24.07.2002, with one M/s CWHEC - HCIL (JV) i.e. the contractor for four-lining of a part of a National Highway. The contractor had to discharge its responsibilities, import certain equipment including two pavers which are the subject matter of controversy in the present case. On account of disputes between the contractor and the appellant, the equipment were seized by the appellant after the contract was terminated on 26.04.2007. The equipment was put to sale; the respondent bidder had offered the highest amount and was declared successful. When it attempted to take possession of the two pavers, it was discovered that they were subject to seizure by the Customs Department on account of non-payment of dues. They were prevented from doing so on the strength of a letter of the Customs Department intimating about this liability. The respondent's claims were referred to Arbitration.

3. The appellant contended on the basis of a condition of the auction notice i.e. Clause 2(f) that the bidder had to bear sales tax and "all relevant taxes, levies, duties, etc. which may be required for removing the plants, equipments and materials from the seller's premises shall also be payable by the bidder as extra".

4. The Arbitral Tribunal disagreed with the appellant's contentions both as to the construction of the bid condition – extracted above as well as Section 64A of the Sale of Goods Act, 1930 which had been rest into service

to say that any change in the statutory liabilities was to be at the account of the buyer. The Arbitral Tribunal therefore awarded the claimed amount of Rs.2 crores and interest thereon i.e. Rs.1.55 crores.

5. The appellant's challenge under Section 34 of the Act was negatived by the impugned judgment. The Single Judge observed and found as follows:-

“19. It is important to observe that the petitioner was selling the pavers as its deemed owner and, therefore, could not escape the liability on account of custom duty which was chargeable on the pavers as the incidence of their import into the country. This Court is unable to accept that the findings of the Arbitral Tribunal are perverse, patently illegal or warrant any interference under Section 34 of the Act. There is some controversy as to whether the petitioner was aware of the liability and had received summons from the custom authorities prior to the auction. However, the said controversy would not be material since the finding that the petitioner being the deemed owner of the pavers, was liable to pay the import duty is neither patently illegal nor perverse.

20. The contention that the respondent was not entitled to refund of the consideration cannot be accepted. The petitioner had failed to effect the delivery of the pavers and the same had been reduced to scrap. In the circumstances, the Arbitral Tribunal had concluded that the respondent was entitled to a pro-rata reduction in the consideration paid for all the materials and equipment. This conclusion is neither perverse nor patently illegal and cannot be considered as contravening the fundamental policy of Indian law.

21. The contention that the award for refund of Rs.2 crores is without basis is also bereft of any merit. The respondent had asserted that it had included a sum of Rs.2 crores on account of

pavers as a part of its consolidated bid of Rs.11.25 crores. In addition, the respondent had also produced the proforma invoices from the manufacturers of the pavers to establish their value. The respondent had computed the cost of two pavers including custom duty to be Rs.2,82,37,903/- in the year 2003-04. Accordingly, the respondent had also computed the WDV of the pavers to be Rs.1,25,29,306/- after accounting for depreciation on the rates prescribed under the Income Tax Act, 1961. Further, the respondent had pointed out that the value of all assets had been computed by the petitioner at Rs.7.16 crores and the respondent's bid was 62% higher than the floor price. Thus, the premium included in the bid on account of pavers was computed at Rs.71,41,704/- being the pro rata premium paid by the respondent on the floor price of all materials/equipment. In view of the above, the contention that the respondent had not produced any material to substantiate its claim that it had included Rs.2 crores in its bid for the two pavers, cannot be sustained. It is well settled that the Court while considering a petition under Section 34 of the Act would not examine the sufficiency of material or re-appreciate the evidence considered by the Arbitral Tribunal."

6. It was contended extraneously by the appellant's counsel that both on the awarded principal amount i.e. Rs.2 crores and the interest the Arbitral Tribunal committed manifest and patent illegality. It was submitted that the Tribunal fell into error in overlooking that the contract between the parties stipulated that the buyer had to bear the taxes and statutory liabilities which in this case were Rs.2 crores. Furthermore, the evaluation of the goods, was an aspect not considered in its proper perspective by the Tribunal. Lastly, counsel urged that not only did the Tribunal overlook material evidence while arriving at these findings, it also awarded an interest without any underlying principle.

7. This Court is of the opinion that the impugned judgment cannot be faulted. The Arbitral Tribunal's findings with respect to the principal liability hinge upon its detailed appreciation of the evidence. Apparently, the appellant had nowhere informed itself in a meaningful and diligent manner as to the potential liabilities that were payable in respect of the pavers that were seized by the Customs Department. Though during the course of the hearing, learned counsel stressed that the contractor had purchased the pavers, that *ipso facto* in the opinion of the Court does not amount to due diligence, more fundamentally, appreciation of evidence is in the exclusive domain of the Arbitral Tribunal under the Act. If there are two plausible views – both as to the facts of a particular case as well as the appreciation of a legal principle, unless there is manifest unreasonableness, or something which fundamentally flies on the face of established legal principles, the Court would desist from interfering with the awards. This is all the learned Single Judge deduced from the reading of the relevant case law.

8. In these circumstances, the Court is of the opinion that the appeal is undirected; and therefore the same is dismissed.

S. RAVINDRA BHAT, J

YOGESH KHANNA, J

APRIL 28, 2017

kks