

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***ORDINARY ORIGINAL CIVIL JURISDICTION*****ARBITRATION PETITION NO. 92 OF 2013**

Union of India,)
Through the Commandant,)
Embarkation Headquarters, Nav Bhavan)
Building, 2nd Floor, 10, R.Kamani Marg,)
Ballard Estate, Mumbai – 1.) **..... Petitioners**

Versus

Mr. J.P. Yadav,)
Proprietor, Vikas Commercial Roadways,)
Indian Inhabitant, carrying on business in the)
name and style of “Vikas Commercial Roadways”))
94, Vikas Kunj, Sector 18-A, Nerul (West),)
Navi Mumbai – 400 706) **..... Respondents**

Mr.S.R.Rajguru, a/w. Mr.A.R.Varma, Mr.Pradip Pardeshi for the Petitioners.

Mr.Jaydeep Mitra, a/w. Mr.Vishal Kanade, i/b.Mr.Sandeep Waghmare for the Respondents.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 9th APRIL, 2015

PRONOUNCED ON : 20th APRIL, 2015

JUDGMENT :

By this petition filed under section 34 of the Arbitration and Conciliation Act, 1996, (for short the said Arbitration Act), the petitioners have impugned the arbitral award dated 4th October, 2012 passed by the learned arbitrator thereby allowing some of the claims made by the respondents and rejecting the counter claims made by the respondents. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. The petitioners were the original respondents whereas the respondents were the original claimants in the arbitral proceedings. On 2nd December, 2008, the petitioners issued notice inviting tenders for hiring of transport from Mumbai for the period from April 2009 to 31st March, 2010. In response to the said notice, the respondents submitted their tender on 5th December, 2008. It is the case of the petitioners that the respondents had not quoted the rate of Rs.200/- per Km subject to minimum distance of 300 Km. On 5th December, 2008 the respondents signed the instructions to the tenderers. On 29th June, 2009 the petitioners issued a letter of acceptance awarding contract to the respondents for the period 19th June, 2009 to 31st March, 2010.

3. On 21st July, 2009, the petitioners placed order on the respondents for transportation of fighter tanks imported by the petitioners. It is the case of the petitioners that on 24th July, 2009 only 40 tanks could be dispatched and on 28th July, 2009 only 4 tanks could be dispatched from Mumbai to CAFBD, Kirkee on the ground that the captain of the ship refused to open the hatch of the ship to upload the imported fighter tanks. It is the case of the petitioners that there was delay of four days because of extreme weather conditions beyond human control.

4. On 27th July, 2009 the respondents submitted their bill for transportation of tanks to Kirkee by 44 trailers at the rate of Rs.200/- per Km for 300 Kms as minimum chargeable distance @ Rs.60,000/- for each trailer i.e. for total amount of Rs.26,40,000/- and also submitted bill for Rs.9,90,000/- for detention charges for 44 prime movers with trailers.

5. The respondents by their letter dated 24th September, 2009 informed the petitioners that they had not received payment for the bills and requested to arrange

to release the said payment within a week, otherwise the respondents would charge the interest to the petitioners at the rate of 24% per annum after 35 days. The petitioners informed the respondents vide their letter dated 30th September, 2009 that the bills in respect of 44 trailers hired for transportation of the tanks to Kirkee was received by the petitioners on 30th July, 2009 and the same was forwarded to the Accounts Officer. The queries raised by the Accounts Officer were being replied and the payment was expected to be made shortly. The petitioners conveyed that as per clause 19(a) and 19(b) there was no provision in the contract for charging interest.

6. On 3rd November, 2009 the Accounts Officers made a payment of Rs.14,34,400/- as per approval of the Controller of Defence Accounts towards bill no.2051 dated 27th July, 2009 for Rs.26,40,000/- leaving balance of Rs.12,05,600/-. It was the case of the petitioners that the said balance amount was not paid in view of the non-approval of the said amount by Pr CDA (SC), Pune.

7. The petitioners by their letter dated 19th November, 2009 informed the respondents that the next consignment of the fighter tanks was likely to arrive at Mumbai Port Trust in the last week of November 2009 and requested the respondents to provide trailers at the contract rate approved by the competent authority.

8. The respondents by their letter dated 19th November, 2009 informed the petitioners that the respondents had not received final payment of the earlier bills and requested the petitioners to release the said amount subject to minimum transportation distance being 300 Km. The petitioners by their letter dated 20th November, 2009 rejected the said request and informed the respondents that the

respondents would be paid as per the rates alleged to have been quoted in the tender which was approved by the competent authority i.e. for actual kilometers run by the vehicle at Rs.200/- per km and not on the basis of minimum distance being 300 km and requested by the respondents to provide the trailers when asked for by the petitioners.

9. The respondents by their letter dated 23rd November, 2009 informed the petitioners that the respondents were entitled to payment for the minimum distance of 300 km and the bills submitted by the respondents on that basis were not cleared by the petitioners. The respondents requested the petitioners not to blacklist the respondents.

10. It is the case of the petitioners that by letter dated 10th March, 2010, the petitioners informed the respondents that the competent authority had permitted payment of balance amount of Rs.12,05,000/- subject to the respondents giving an undertaking not to claim any interest and not to make any further claim in respect of the said contract and not to file any arbitration or court case. The respondents submitted a supplementary bill on 10th March, 2010 for Rs.12,05,000/- in respect of the transportation of tanks distance of 137 km at Rs.200/- per km and on 11th March, 2010 filed an undertaking as called upon by the petitioners to the effect that in future the respondents would not claim any interest or any more amount and would not file any arbitration or court case after receiving the balance amount.

11. On 5th April, 2010, the petitioners released the said amount of Rs.12,05,000/- to the respondents which was released by the Accounts Officer, Pune on 30th March, 2010. By letter dated 15th April, 2010, the respondents alleged that the undertaking dated 10th March, 2010 was submitted under compulsion by the

respondents because of financial crisis and it was not proper on the part of the petitioners to compel the respondents to furnish such undertaking. The respondents also informed the petitioners that their bill for Rs.9,90,000/- towards detention charges were still outstanding. The respondents requested the petitioners not to take any such undertaking for releasing the amount of the said bill and requested to release the said amount immediately failing which the respondents would invoke arbitration agreement.

12. The petitioners vide their letter dated 12th July, 2010 informed the respondents that the bill no.2051 dated 27th July, 2009 of Rs.14,34,400/- was released by the competent authority, Pune on 3rd November, 2009 and supplementary bill no.818 dated 23rd March, 2010 of Rs.12,05,600/- was released 30th March, 2010 and was paid on 5th April, 2010 to the respondents. The petitioners contended that as per clause 7(j) of the terms and conditions, the detention charges were not applicable. The petitioners also conveyed that the acceptance of the tender was signed by the respondents on km/destination basis and not on the basis of minimum distance being 300 km. The petitioners returned the said bill no.2052 dated 27th July, 2009 to the respondents.

13. The dispute arose between the parties and was referred to the learned arbitrator. On 7th September, 2011, the respondents filed their statement of claim inter alia praying for an amount of Rs.22,35,900/- comprising of three claims (1) amount due and payable towards detention charges in the sum of Rs.9,90,000/- (2) interest on the amount unpaid bills at Rs.6,95,900/- and (3) towards compensation and damages for loss of business and breach of contract for Rs.5,50,000/-. The respondents also prayed for interest at the rate of 18% per annum on the sum of Rs.22,35,900/- from the date of lodging of the claim till payment. The said

statement of claim was resisted by the petitioners by filing written statement. None of the parties led any oral evidence before the learned arbitrator. The learned arbitrator rendered an arbitral award on 4th October, 2012 directing the petitioners to pay to the respondents the detention charges in respect of the vehicle detained as per the rates quoted by the respondents in their tender for detention charges. The learned arbitrator also directed the petitioners to pay simple interest on Rs.26,40,000/- at the rate of 18% per annum w.e.f. 1st October, 2009 till the date of actual payment and also awarded claim at Rs.3,60,000/- as and by way of compensation. The learned arbitrator directed the petitioners to pay the said amount on or before 4th November, 2012 and directed payment of 18% simple interest in case of non payment of the said amount before 4th November, 2012. This award of the learned arbitrator has been impugned by the petitioners in this petition.

14. Mr.Rajguru, learned counsel for the petitioners submits that under clause 7(j) of the contract, in view of adverse weather condition, the respondents were not entitled to any detention charges from the petitioners. He submits that the learned arbitrator has awarded the said claim contrary to the clause 7(j) of the contract. He submits that though the learned arbitrator has held that the delay was caused due to reasons not attributable to either party in view of the condition beyond human control, the learned arbitrator has awarded the said claim for detention charges contrary to the said clause 7(j) of the contract. He submits that the learned arbitrator has applied the concept of natural justice while dealing with the said claim and has allowed the said claim contrary to the contract based on the equity which is not permissible.

15. Insofar as claim no.(B) i.e. for interest awarded by the learned arbitrator on

the delayed payment of Rs.26,40,000/- is concerned, learned counsel for the petitioners submits that the respondents had made a claim for minimum 300 km for transportation which was contrary to the terms of the contract. In any event, the respondents had submitted an undertaking to the petitioners on 30th March, 2010 before releasing a sum of Rs.12,05,000/- to the effect that the respondents would not make any claim for interest or any other claim. It is submitted by the learned counsel that it was not the case of the respondents that the said undertaking was submitted by the respondents under duress or coercion and was submitted voluntarily. He submits that the letter dated 15th April, 2010 of the respondents after receiving the said payment of Rs.12,05,600/- was by way of an after thought and no further claims could have been made by the respondents contrary to such undertaking. He submits that in any event in view of clauses 19(a) and 19(b) of the contract, no interest was liable to be paid by the petitioners for the time taken for procedural work. He submits that under the said provisions, the delay if any, in payment on account of audit observations/objections also was liable to be excluded and no interest was payable during the said period. He submits that the award of interest is contrary to clauses 19(a) and 19(b) of the contract and is in conflict with public policy.

16. Insofar as claim no.(C) i.e. for compensation awarded by the learned arbitrator in the sum of Rs.3,60,000/- is concerned, it is submitted that the respondents neither proved the breach on the part of the petitioners nor proved the said claim. The said claim awarded by the learned arbitrator is based on no evidence.

17. Mr.Rajguru, learned counsel for the petitioners placed reliance on the judgment of Supreme Court in case of *Nathani Steels Ltd. vs. Associated*

Constructions 1995 Supp(3) SCC 324 and in particular paragraph (3) and would submit that since the respondents had given an undertaking not to make any claim in future against the petitioners, the learned arbitrator could not have awarded the said claim contrary to such undertaking.

18. Mr.Mitra, learned counsel for the respondents on the other hand, insofar as the claim for detention charges is concerned, invited my attention to the written statement filed by the petitioners before the learned arbitrator. He submits that it was the case of the petitioners that due to very harsh weather conditions, the captain of the ship had refused to open the hatch to unload the tanks which was beyond the human control. It was the case of the petitioners that only four trailers got delayed that too because of extreme weather condition beyond human control. He submits that the learned arbitrator has thus rightly considered the said claim having found that none of the parties were responsible for such unavoidable circumstances. He submits that the said claim made by the respondents was contractual claim payable under clause 1(c) of the contract. He submits that rain had stopped on most of the time and there was no continuous bad weather condition. Learned counsel tried to justify the said claim and the reasons rendered by the learned arbitrator.

19. Insofar as claim no.(B) i.e. for interest is concerned, it is submitted by the learned counsel that though the petitioners were liable to pay to the respondents for transportation for minimum 300 km per day, the petitioners had illegally withheld the balance payment of Rs.12,05,600/- and only released Rs.14,34,400/- against the bill of Rs.26,40,000/-. The respondents were repeatedly calling upon the petitioners to release the said amount. The petitioners were insisting the respondents to carry out other work on the basis of actual kilometers contrary to

the terms of the contract. The petitioners had withheld the balance amount quite sometime as a result thereof, the respondents were suffering financial hardship. The petitioners were insisting for submission of an undertaking before releasing the balance amount. He submits that in these circumstances, the respondents were under pressure and duress submitted the said undertaking. The said undertaking was submitted on 10th March, 2014. The petitioners released the said amount on 5th April, 2010 only because of such undertaking forcibly obtained from the respondents. The respondents immediately raised a protest vide their letter dated 15th April, 2010 placing on record that the said undertaking was forcibly obtained by the petitioners and was submitted by the respondents under duress and issued due to financial restrain.

20. He submits that no such undertaking could have been forced by the petitioners for releasing legitimate dues of the respondents. He submits that the petitioners did not raise any issue of jurisdiction before the learned arbitrator based on such undertaking rendered by the respondents. The learned arbitrator however has referred to such undertaking in the impugned award and has held that the same was not relevant.

21. Learned counsel for the respondents then submits that the provisions of contract i.e. clauses 19(a) and 19(b) were not satisfied in the facts of this case. The Accounts Department of the petitioners had illegally withheld the balance amount of Rs.12,05,600/- which was subsequently released. There was no objection raised by the Audit Department. Though an opportunity was given by the learned arbitrator to the concerned officer of the petitioners to remain present and to explain this position, the petitioners did not produce any officer for evidence or for giving such clarification. He submits that the learned arbitrator has rightly

rendered a finding of fact that the payment was not withheld because of the audit objections but there was a delay in clearing the bill of the respondents due to interpretation of the contract. The said finding is not perverse and thus no interference is permitted under section 34.

22. Insofar as claim for compensation awarded by the learned arbitrator is concerned, the learned counsel for the respondents could not support the reasons rendered by the learned arbitrator while allowing the said claim.

23. Mr.Mitra, learned counsel for the respondents placed reliance on the judgment of the Supreme Court in case of ***National Insurance Co. vs. Boghara Polyfab Private Limited (2009) 1 SCC 267*** and in particular paragraphs 5, 42, 43 and 49. He submits that the practice of obtaining such undertaking and receipt in advance is deprecated by the Supreme Court. Supreme Court has dealt with the judgment in case of ***Nathani Steels Ltd. (supra)*** in case of ***National Insurance Co.(supra)***. Paragraphs 42 and 49 of the said judgment in case of ***National Insurance Co.(supra)*** reads as under :-

42. We thus find that the cases referred to fall under two categories. The cases relied on by the appellant are of one category where the Court after considering the facts, found that there was a full and final settlement resulting in accord and satisfaction, and there was no substance in the allegations of coercion/undue influence. Consequently, this Court held that there could be no reference of any dispute to arbitration. The decisions in *Nav Bharat*¹ and *Nathani Steels*³ are cases falling under this category where there were bilateral negotiated settlements of pending disputes, such settlements having been reduced to writing either in the presence of witnesses or otherwise. *P.K. Ramaiah*² is a case where the contract was performed and there was a full and final settlement and satisfac-

tion resulting in discharge of the contract. It also falls under this category.

49. Obtaining of undated receipts-in-advance in regard to regular/routine payments by government departments and corporate sector is an accepted practice which has come to stay due to administrative exigencies and accounting necessities. The reason for insisting upon undated voucher/receipt is that as on the date of execution of such voucher/receipt, payment is not made. The payment is made only on a future date long after obtaining the receipt. If the date of execution of the receipt is mentioned in the receipt and the payment is released long thereafter, the receipt acknowledging the amount as having been received on a much earlier date will be absurd and meaningless. Therefore, undated receipts are taken so that it can be used in respect of subsequent payments by incorporating the appropriate date. But many a time, matters are dealt with so casually that the date is not filled even when payment is made. Be that as it may. But what is of some concern is the routine insistence by some government departments, statutory corporations and government companies for issue of undated “no-dues certificates” or “full and final settlements vouchers” acknowledging receipt of a sum which is smaller than the claim in full and final settlement of all claims, as a condition precedent for releasing even the admitted dues. Such a procedure requiring the claimant to issue an undated receipt (acknowledging receipt of a sum smaller than his claim) in full and final settlement, as a condition for releasing an admitted lesser amount, is unfair, irregular and illegal and requires to be deprecated.

24. Mr.Rajguru, learned counsel for the petitioners in rejoinder submits that the petitioners had not insisted for furnishing any undertaking but the same was submitted voluntarily by the respondents. Learned arbitrator has thus no jurisdiction to entertain any claims made by the respondents in breach of the said undertaking.

REASONS AND CONCLUSIONS**25. Claim No.(A) Detention Charges**

The petitioners have challenged the award of detention charges by the learned arbitrator on the ground that the said claim is contrary to the terms of the contract and is awarded based on equity. On perusal of the award indicates that the learned arbitrator has rendered a finding of fact that due to heavy rains and weather conditions which was beyond the human control of either party, the delay could neither be attributed to the claimants nor the respondents. However the learned arbitrator held that the claimant could not be subjected to loss for conditions beyond human control and therefore was required to be compensated. Learned arbitrator has held that it was natural justice that the benefit and loss due to condition beyond human control was equally applicable to both the parties to the contract. In my view once the learned arbitrator has rendered a finding that the delay was attributable for the reasons not attributable to either party, the said situation was covered by clause 7(j) of the contract and no detention charges could have been awarded by the learned arbitrator contrary to the said clause. In my view, the learned arbitrator could not have awarded the said claim based on an equity and that also contrary to the terms of the contract. The impugned award in so far as claim of detention charges awarded by the learned arbitrator is thus set aside.

26. Insofar as claim no.(B) for interest for the delay in payment of Rs.26,40,000/- is concerned, a perusal of the record indicates that though initially the petitioners had withheld the amount of Rs.12,05,600/-, the said amount was subsequently released by the petitioners to the respondents belatedly. Since the said amount was not released by the petitioners for quite sometime, the respondents were addressing letters from time to time calling upon the petitioners

to release the said balance amount. Only after such repeated demand of the legitimate dues of the respondents, the petitioners insisted for submission of an undertaking to the effect that the respondents would not demand any claim of whatsoever nature and would not file any arbitration or other proceedings against the petitioners. In these circumstances the respondents who was facing financial difficulties was constrained to file such undertaking for the purpose of getting their legitimate dues. The petitioners ultimately released the balance amount in favour of the respondents only upon the respondents submitting such undertaking. Upon receiving the said amount, the respondents immediately placed on record that the said undertaking was forcibly obtained by the petitioners and was submitted by the respondents under pressure and financial constraint.

27. A perusal of the record indicates that the petitioners did not raise any issue before the learned arbitrator that in view of such undertaking rendered by the respondents, no such claim could have been made by the respondents in the arbitral proceedings. No issue of jurisdiction was raised by the petitioners in the written statement. During the course of the arguments, the petitioners produced a copy of such undertaking for perusal of the learned arbitrator. The learned arbitrator thus in paragraph (18) of the impugned award has rendered a finding that such undertaking while clearing the additional payment to the respondents was thus not found to be in order. I am thus not inclined to permit the learned counsel for the petitioners to urge the submission across the bar that the learned arbitrator had no jurisdiction to entertain any of the claims contrary to such undertaking rendered by the respondents.

28. In my view, the learned counsel appearing for the respondents has rightly placed reliance on the judgment of Supreme Court in case of *National Insurance*

Co. (*supra*). Supreme Court has deprecated the practice of the Government Departments and corporate sectors to obtain undated 'no dues certificates' and 'full and final settlements vouchers' or 'acknowledging receipt of a sum in full and final settlement of all the claims' as a condition precedent for releasing even the admitted dues. In my view, the petitioners could not have insisted for such undertaking from the respondents as a condition precedent for releasing the amount due and payable by the petitioners to the respondents. It was not the case of the petitioners that the petitioners had released any amount to the respondents contrary to the provisions of the contract. If according to the petitioners, the respondents were not entitled to make any other claims but was entitled to recover only the said sum of 12,05,600/-, the petitioners could have released the amount what was due and payable to the respondents according to the petitioners unconditionally. The petitioners could not have forced the contractor to issue such undertaking for not making any claim in future or not to file any proceedings. If the respondents would have made any claim in future which was not due to the respondents, the same would be always adjudicated upon by the court or in the arbitration proceedings as the case may be. I am respectfully bound by the judgment of Supreme Court in case ***National Insurance Co. (*supra*)***.

29. A perusal of the record indicates that the learned arbitrator has interpreted clauses 19(a) and 19(b) of the contract and has rendered a finding that there was no delay on account of the audit observations/objections but the payment was delayed due to interpretation of the contract by the Accounts Department. The petitioners were only referring to the Accounts Officer of the Accounts Department as the audit authority. Though the petitioners was granted an opportunity to produce the relevant record and to prove that there was any audit objections, the petitioners failed to prove the same. In my view, the learned arbitrator has not allowed the

said claim contrary to the terms of the said contract. The fact remains that the petitioners accepted their liability under the contract that they were liable to pay to the respondents for minimum 300 km at the rate prescribed and not on the actual destination basis. Having accepted this position, it was clear that the petitioners had delayed the said payment to the respondents. The findings thus rendered by the learned arbitrator is not perverse and cannot be interfered with by this court under section 34 of the Arbitration and Conciliation Act. The interpretation of the clause 19(a) and 19(b) of the contract by the learned arbitrator is a possible interpretation and cannot be substituted by another interpretation by this court. The learned arbitrator awarded interest w.e.f. 1st October, 2009 i.e. after 60 days of the due date till the date of payment. No interference is thus warranted with this part of the claim awarded by the learned arbitrator.

30. Insofar as claim no.(C) i.e. compensation awarded by the learned arbitrator at Rs.3,60,000/- is concerned, a perusal of the record indicates that though the learned arbitrator has held that the claim made by the respondents herein was without any supporting detail, the learned arbitrator has allowed the said claim for loss of profit at the rate of 15% per annum without any basis and based on no evidence. The learned counsel for the respondents could not justify this claim. In my view since the said claim is based on no evidence, the learned arbitrator could not have allowed the said claim. The claim for compensation has to be proved in addition to the allegation that the breaches were committed by the owner. In my view the said claim awarded by the learned arbitrator is patently illegal and deserves to be set aside.

31. I, therefore, pass the following order :-

- (a) Claim No.B i.e. interest on the amount on the unpaid bill alongwith corresponding interest thereon allowed by the learned arbitrator is upheld. The award of the remaining two claims is set aside.
- (b) Arbitration petition is disposed of in the aforesaid terms.
- (c) No order as to costs.

(R.D. DHANUKA,J.)