

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

ARBITRATION PETITION NO.950 OF 2013

Union of India)
Through Executive Engineer,)
Mumbai Central Division No.I, CPWD)
M.K. Road, Churchgate,)
Mumbai – 400 020.) .. Petitioner

Vs.

M/s. Sarathi Enterprises)
1101, Udhyan II, Off. Marol Military Road,)
Saki Naka, Andheri (East),)
Mumbai- 400 072.) .. Respondent

Mr.G.R. Sharma i/by Mr.D.P. Singh for the petitioner.
Ms.Shilpa Kapil for the respondent.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 1st April 2015
PRONOUNCED ON : 20th April 2015

JUDGMENT :-

1. By this petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short “the said Arbitration Act), the petitioner has impugned the arbitral award dated 6th March 2013 allowing some of the claims made by the respondent and rejecting the counter claims made by the petitioner. Some of the relevant facts for the purpose of deciding this petition are as under :

2. The respondent was the original claimant in the arbitral proceedings whereas the petitioner herein was the original respondent.

Pursuant to a notice inviting tenders issued by the petitioner, the respondent submitted its bid for providing and fixing vitrified tiles flooring over existing flooring from ground to sixth floor at Aayakar Bhavan, Mumbai.

3. On 22nd July 2010, the petitioner issued a letter of acceptance in favour of the respondent in respect of the said work. The petitioner requested the respondent to arrange to start the work at once as 12 months time was given for completing the same. The bid of the respondent was the lowest bid. The respondent had quoted an amount of Rs.1,62,44,100/- which was 6.22% below the estimated cost of Rs.1,73,21,362/-. The parties,thereafter, signed the contract agreement. Special Condition No.8 of the contract provided that 'unless otherwise specified, the brand/make of the material, as specified in the item, nomenclature shall be used in the work. In case of non availability of the brand specified in the contract, the contractor shall be allowed to use alternate equivalent brand of material subject to submission of documentary evidence of non availability of the specified brand.

4. It is the case of the petitioner that the respondent had considered all the aspects in the tendered documents and had quoted its rates keeping in view the prevailing market rates for various items inclusive of vitrified tiles of size 60x60 cm manufactured by M/s.H & R Johnson (India) Ltd. having the brand known as 'NUVOLTA DC/OBERON DC.' It is the case of the petitioner that only in case of non availability of the brand specified in the contract, the respondent could be allowed to use alternate equivalent brand of material after submission of documentary evidence of non availability of the specified brand.

5. Since the respondent was not providing and fixing vitrified tiles as per the terms of the agreement, the petitioner issued a show cause notice on 7th October 2010 calling upon the respondent to show cause as to why an action against the respondent be not taken against the respondent on account of the breach of the contract.

6. The respondent replied to the said show cause notice vide letter dated 27th October 2010. By a letter dated 16th November 2010, the petitioner issued a letter thereby determining the contract and informing the respondent that the earnest money deposit and the security deposit were already recovered and the performance guarantee stood absolutely forfeited to the government and should be absolutely at the disposal of the government. The respondent was further informed that the petitioner would take out such part of the work out of hand of the respondent as remained unexecuted for giving it to another contractor to complete the work and then the respondent shall have no claim for compensation for any loss sustained by the respondent by reasons of the respondent having purchased or procured any materials or entered into any engagements or made any advances on account of or with a view to the execution of work or performance of the contract. The said letter was without prejudice to the rights of the petitioner to take action under any other clauses or sub-clauses of the agreement and to realize government dues and losses and damages whatsoever under those provisions of the contract.

7. The respondent by its advocate's letter dated 26th November 2010 responded to the said letter dated 16th November 2010 and alleged that the repeated pressurizing tactics for the use of Johnson tiles despite

the fact that the contract provided otherwise was a clear abuse of dominant position. The respondent placed reliance on Section 4 of the Competition Act, 2002 in support of this contention. In the said letter, the respondent alleged that the respondent had always shown inclination towards performance on its part of contract and had always shown willingness to use equivalent brand for executing the work, however, the petitioner never approved the equivalent brand though the contract provided for supply of the equivalent brand. By the said letter, the respondent conveyed that the respondent was still ready and willing to execute the said work subject to approval of equivalent brand. The respondent conveyed that if the petitioner was insisting on execution of work with H & R Johnson, the respondent will request the petitioner to foreclose the contract and refund the performance guarantee amount without liability on either side. The respondent reserved its right to claim damages, if the said proposal was not acceptable to the petitioner.

8. By a letter dated 7th December 2010, the petitioner replied to the legal notice dated 26th November 2010 and conveyed the respondent that sufficient time was given from the date of the award of the contract till the issuance of final notice as per the contract but the respondent had failed to start the work. It was also conveyed that all the bidders were made clear to have the fair competition amongst them and at no stage of tendering the process, the respondent was prohibited from participating fair competition. It was further stated that thus it was merely a breach of contract from the respondent and hence the final notice.

9. The dispute arose between the parties. The matter was

referred to arbitration. The petitioner also made enquiry with manufacturing company i.e. M/s.H & R. Johnson (India) Ltd. In response to the said enquiry made by the petitioner, the said M/s. H & R. Johnson (India) Ltd. informed the petitioner that the requirement of the petitioner for DC design 600x600 Marbonite Nuvolta tiles for Income Tax Building Project at Mumbai was regular and fast moving design of their make.

10. Before the learned arbitrator, the respondent made various claims. The said claims were resisted by the petitioner on various grounds by filing written statement. The petitioner also made counter claim before the learned arbitrator. By an arbitral award dated 6th March 2013, the learned arbitrator allowed the claim no.1 made by the respondent towards refund of earnest money deposit and performance guarantee and directed the petitioner to pay a sum of Rs.11,58,632/- to the respondent. In so far as the claim no.3 i.e. loss of profit demanded by the respondent is concerned, the learned arbitrator rejected the said claim. The learned arbitrator awarded simple interest @10% p.a. on the claim no.1 in favour of the respondent. The learned arbitrator directed both the parties to bear the arbitration cost. In so far as the counter claim made by the petitioner is concerned, the learned arbitrator rejected the same. This arbitral award is impugned by the petitioner on various grounds.

11. Mr.Sharma, learned counsel for the petitioner invited my attention to various terms and conditions of the contract including condition no.8 of the special condition of the contract and submits that the respondent after evaluating the terms and conditions of the tender, had submitted the documents of competitive grade keeping in mind its obligation to supply various items including vitrified tiles of required

size manufacturing of H & R Johnson (India) Ltd. having a particular brand or equivalent. He submits that only if the said particular brand was not available as specified in the contract, the respondent could have been allowed to use the specified brand or material only after the respondent submitting the documentary evidence for non availability of the specific or equivalent brand. It is submitted that in response to the petitioner's enquiry, the said company informed the petitioner that the requirement of the petitioner was regular brand and was available. He submits that the respondent thus committed breaches of the terms and conditions of the contract by not providing the particular brand specified in the contract though the same was available. The respondent, in any event, did not submit any documentary evidence of non-availability of the said specified brand and thus there was no question of the petitioner permitting the respondent to supply any alternate equivalent brand in view of the breach of the terms of the contract.

12. Learned counsel submits that since the respondent committed a breach by not supplying the requisite brand of the material, the petitioner after giving show cause notice to the respondent and after considering reply of the respondent which was not satisfactory, the petitioner was justified in terminating the contract awarded to the respondent and in forfeiting the security deposit including performance guarantee. He submits that difference between the 1st lowest and the 2nd lowest bidders was more than Rs.30 lacs in the tender of estimated cost Rs.173 lacs. He submits that the respondent thus by quoting lower rate obtained the contract and thereafter, refused to supply material as provided in the contract in breach thereof. The petitioner was thus justified in forfeiting the security deposit and the performance guarantee.

13. Learned counsel appearing for the petitioner then submits that the learned arbitrator has rendered a contradictory and inconsistent finding in the impugned award. The learned arbitrator has also held that in the absence of list of equivalent brands in the contract, the interpretation of the respondent herein was not acceptable. It is held that the respondent did not succeed on the basis of the contract conditions.

14. He submits that on one hand, it is held by the learned arbitrator that he was inclined to agree with the petitioner herein that only M/s. H & R. Johnson (India) Ltd. was to be used and in case of non-availability of M/s. H & R. Johnson (India) Ltd., equivalent brand as an alternative could have been utilized and on the other hand, the learned arbitrator after rendering such findings in favour of the petitioner has held that Special Condition No.8 was in violation of section 23 of the Indian Contract Act, 1872 and section 3 of Competition Act, 2002 and the contract should be considered void in view of the said alleged violation. He submits that the provisions of Competition Act, 2002 were not applicable to the parties at all. The impugned award applying the provisions of Competition Act, 2002 to the parties is patently illegal. He submits that in the contract, the petitioner had already provided that if M/s. H & R. Johnson Vitrefied Tiles was not available, then the contractor was permitted to use alternative to the said tiles. Therefore the petitioner was not put on dominant position and thus question of applicability of provisions of the said Competition Act, 2002 did not arise.

15. Learned counsel also invited my attention to the findings of the learned arbitrator that Income Tax Department had not specifically

mentioned disregarding the statement of Department that the Income Tax Department wanted tiles as per the sample and description supplied by it. He submits that the said samples were answering the description of Johnson Vitrified tiles and thus it could not be said that Income Tax Department had not given its choice for the said Johnson vitrified tiles. He submits that the parties are always free to invite in the terms and conditions of the contract a particular quality and brand and the same would not attract the provisions of the Competition Act, 2002.

16. Learned counsel for the petitioner submits that there was no prayer in the statement of claim for declaration of the Condition No.8 of Special Conditions as void or contrary to section 23 of the Indian Contract Act. Learned arbitrator exceeded his jurisdiction by declaring the contract as void.

17. Learned counsel for the respondent on the other hand submits that since the petitioner had given final notice on 7th December, 2010, the notice dated 16th November, 2010 issued by the petitioner was not a termination notice. The petitioner thus could not have forfeited the security deposit and could not have encashed the performance guarantee. It is submitted by the learned counsel that since the manufacturers of the said Johnson Vitrified tiles were demanding exorbitant rate, the respondent had offered to supply the equivalent tile, which the petitioner refused to accept. The respondent has thus not committed any default in offering the alternative brand. She submits that the learned arbitrator has rendered a finding which is not perverse and thus this court cannot interfere with this finding of fact. Learned counsel for the respondent

submits that the petitioner could not have insisted for a use of a particular brand and thus imposing such condition in the contract was in violation of sections 3 and 4 of the Competition Act, and thus contrary to section 23 of the Indian Contract Act, 1872. She submits that the contract was immoral and oppose to public policy and thus the learned arbitrator was justifying in holding such condition of contract as void.

18. It is submitted by the learned counsel that the learned arbitrator has only granted refund of earnest money deposit and security deposit in favour of the respondent and has not awarded claim for loss of profit. The award rendered by the learned arbitrator is fair and reasonable and shall not be interfered with by this court.

19. Learned counsel for the respondent placed reliance on Delhi Schedule Rates for the year 2007 and would submits that even in the said schedule rates, the brand name of the product prescribed therein stood deleted. She submits that it is thus clear that the petitioner could not have insisted for a particular brand or tiles contrary to sections 3 and 4 of the Competition Act, 2002. She submits that the Income Tax Department never insisted for supply of Johnson Vitrified tiles. The learned arbitrator has thus rightly rendered a finding to that effect.

20. Learned counsel for the respondent placed reliance on the judgment of Supreme Court in case of ***K.V.Mohammed Zakir vs. Regional Sports Centre 2010(1) Supreme Court Journal 4*** and in particular paragraph 6 and would submits that this court should not substitute its own view for the view taken by the arbitrator while dealing

with the proceedings for setting aside an award. Paragraph 6 of the said judgment read thus :-

“6. We have heard counsel for the parties and we have perused the award. The award runs into considerable detail as it is a speaking award. While dealing with this part of the claim, the arbitrator in paragraph 5.11, 5.12 and 5.13 of the award has given detailed reasons. We are of the view that the settled position in law is that Court should not substitute its own view for the view taken by the arbitrator while dealing with the proceedings for setting aside an award. It is equally well settled, where the arbitrator acts within jurisdiction, 'the reasonableness of the reasons' given by the arbitrator is not open to scrutiny by Courts. However, if the reasons are such as no person of ordinary prudence can ever approve of them or if the reasons are so 'outrageous in their defiance of logic' that they shock the conscience of the Court, then it is a different situation. And in an appropriate case the Court may interfere. However, the degree of such unreasonableness must be greater than the standard in a certiorari proceeding. We find that the arbitrator in this case has reached a finding of fact on the materials on record about the delay on the part of the respondent and it has also been held by the arbitrator that because of such delay the claimant was put in great difficulty in completing the work in time. It is nobody's case that by doing so the arbitrator has acted beyond his jurisdiction or committed any legal misconduct.”

21. Learned counsel for the respondent placed reliance on the judgment of Supreme Court in case of ***Reva Electric Car Company Private Limited vs. Green Mobil (2012) 2 SCC 93*** and in particular paragraph 54 and it is submitted that the arbitral tribunal can declare a provision of the agreement as void. Paragraph 54 of the said judgment of the Supreme Court in case of *Reva Electric Car Company Private Limited (supra)* reads thus :-

“54. Under Section 16(1), the legislature makes it clear that while considering any objection with respect to the existence or validity of the arbitration agreement, the arbitration clause

which formed part of the contract, has to be treated as an agreement independent of the other terms of the contract. To ensure that there is no misunderstanding, Section 16(1)(b) further provides that even if the Arbitral Tribunal concludes that the contract is null and void, it should not result, as a matter of law, in an automatic invalidation of the arbitration clause. Section 16(1)(a) presumes the existence of a valid arbitration clause and mandates the same to be treated as an agreement independent of the other terms of the contract. By virtue of Section 16(1)(b), it continues to be enforceable notwithstanding a declaration of the contract being null and void. In view of the provisions contained in Section 16(1) of the Arbitration and Conciliation Act, 1996, it would not be possible to accept the submission of Ms Ahmadi that with the termination of the MoU on 31-12-2007, the arbitration clause would also cease to exist.”

22. Learned counsel for the respondent also placed reliance on the judgment of Supreme Court in case of ***World Sport Group (Mauritius) Limited vs. MSM Satellite (Singapore) Pte. Limited (2014) 11 SCC 639*** and in particular paragraphs 30 and 42. She submits that there was no provision in the contract that the arbitrator cannot declare a provision of the contract void.

23. In rejoinder, Mr.Sharma, learned counsel for the petitioner submits that the notice dated 7th December, 2010 was not a final notice but a notice dated 16th November, 2010 was a final notice. He submits that the respondent was bound by the terms of the contract. The respondent deliberately chose to quote reduced rates and below the estimated bid and after obtaining the contract from the petitioner failed and neglected to supply the material to the petitioner on the false pretext. The petitioner was thus justified in forfeiting the security deposit and money by exercising right under the provisions of the contract. He

submits that Income Tax Department was the end user. The Competition Act 2002 was not applicable to the contract entered into between the parties. He submits that the award shows patent illegality on the face of the award. The findings rendered by the learned arbitrator are totally perverse and this court shall interfere with such perverse finding and shall set aside the same.

REASONS AND CONCLUSIONS :-

24. A perusal of the contract entered into between the parties clearly indicates that the respondent was under obligation to use the brand/make of the material as specified in the nomenclature unless it was specified. Only in the case of the non-availability of the brand specified in the contract, the contractor was permitted to use alternative equivalent brand of the material subject to submission of documentary evidence of non-availability of specified brand. The relevant clause of the contract is extracted as under :-

“Size of tile 60 x 60 cm, make NUVOLTA DC of H & R Johnson (India) Ltd. or equivalent ”

“Unless otherwise specified, the brand/make of the material as specified in the item nomenclature shall be used in the work. In case of non availability of the brand specified in the contract the contractor shall be allowed to use alternate equivalent brand of the material subject to submission of documentary evidence of non availability of specified brand. The necessary cost adjustment on account of above change shall be made for the material with wastage and contractor's profit.”

25. The petitioner had produced before the learned arbitrator a letter issued by M/s. H & R. Johnson (India) Ltd. informing the petitioner

that the said brand of vitrified tiles which was described in the contract was a regular item and was available. The respondent did not bring it to the notice of the petitioner that the said brand was not available. The only case of the respondent was that the manufacturer of the said brand was demanding exorbitant price. The respondent did not produce any documentary evidence of non-availability of the said specified brand to the petitioner. A perusal of the record indicates that the rate quoted by the respondent was after considering the terms and conditions of the contract. The rates quoted by the respondent was 6% below the estimated price. The difference between the first lowest price and the second lowest bidder was more than Rs.30 lacs.

26. It is thus clear that the respondent deliberately quoted the rates which were found the lowest with a view to obtain the said contract and thereafter not to supply the particular brand in terms of the contract. The petitioner was thus not bound to permit the respondent to supply any other brand when the brand mentioned in the contract was available in the market. A perusal of the impugned award clearly indicates that the learned arbitrator has rendered a finding in favour of the petitioner that the respondent was liable to use the only H & R. Johnson Vitrified Tiles and in case of non-availability of the said tiles, equivalent brand as an alternative could have been utilised. Learned arbitrator also held that in the absence of equivalent brand, the interpretation of the contractor shall not be acceptable and thus the contractor did not succeed on the basis of the contract condition. It is not in dispute that the respondent has not challenged the said finding and the same has achieved finality.

27. Learned arbitrator however has declared the Special Condition No.8 as violative of Section 23 of the Indian Contract Act, 1872 and Section 3 of the Competition Act, 2002 without giving any reason. A perusal of the statement of claim clearly indicates that it was not the prayer of the respondent that any part of the condition of contract shall be declared as void by the learned arbitrator. The learned arbitrator in my view has exceeded his jurisdiction by declaring condition of contract as void allegedly to be in violation of section 23 of the Indian Contract Act and section 3 of the Competition Act, 2002.

28. Be that as it may, it is not in dispute that in the contract entered into between the parties, the petitioner had provided that if the brand NUVOLTA DC of H & R Johnson was not available, the respondent was permitted to use alternative equivalent brand however on the condition that the contractor would submit a certificate of non-availability of the specified brand. On perusal of the definition of 'Enterprise' defined under section 2(h) of the Competition Act, 2002 it is clear that the petitioner would not satisfy the definition of the 'Enterprise' since the petitioner was not engaged in any activity relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate. It is thus clear that sections 3 and 4 of the Competition Act, 2002 which was relied upon by the learned arbitrator in the impugned award would not even apply to the petitioner. The provisions of the Competition Act, 2002 extended to the petitioner by the learned arbitrator shows patent illegality on the face

of the award. The entire award allowing claim nos. 1 and 2 in favour of the respondent is based on such patently illegal findings rendered by the learned arbitrator.

29. Insofar as the findings of the learned arbitrator that the Income Tax Department had never mentioned use of H & R Johnson in correspondence is also perverse. A perusal of the record indicates that Income Tax Department had provided a sample to the petitioner showing their requirement of the brand to be used in the work awarded to the petitioner which was matching with the H & R Johnson brand. Be that as it may, it is not in dispute that the contract had provided for a particular brand. The learned arbitrator though rendered a finding of fact that the interpretation of the contractor was not acceptable in the absence of equivalent brand in the contract, the learned arbitrator has rendered a perverse finding that the Income Tax Department had not mentioned the use of the H & R Johnson in the correspondence. The award shows total perversity and deserves to be set aside.

30. Insofar as judgment of Supreme Court in case of *K.V.Mohammed Zakir(supra)* relied upon by the learned counsel for the respondent in support of the submission that interpretation of the learned arbitrator shall not be substituted by the court is concerned, in my view since the interpretation of the provisions of the contract and declaring the contract as void is patently illegal and without jurisdiction, and is impossible interpretation which shocks the conscience of the court, this court can interfere with such interpretation. Supreme Court in the said judgment has held that if the reasons rendered by the arbitrator are such

as no person or ordinary prudence can ever approve of them or if the reasons are so 'outrageous in their defiance of logic' that they shock the conscience of the court, then it is a different situation and the court in appropriate court may interfere with such award. This court has ample power to interfere with such award and set aside the same under section 34 of the Arbitration Act.

31. Insofar as judgment of Supreme Court in case of ***Reva Electric Car Company Private Limited (supra)*** relied upon by the learned counsel for the respondent in support of the contention that the arbitrator can declare the contract as void is concerned, Supreme Court in the said judgment has held that if the arbitral tribunal concludes that the contract is null and void, it should not result, as a matter of law, in an automatic invalidation of the arbitration clause. In my view the said judgment does not assist the petitioner. Even otherwise there was no prayer for declaring the contract as void in the statement of claim filed by the respondent. The learned arbitrator thus could not have declared the said contract or any part thereof as void. The said judgment of Supreme Court in case of *Reva Electric Car Company Private Limited (supra)* thus does not assist the case of the respondent.

32. Insofar as judgment of Supreme Court in case of *World Sport Group (Mauritius) Limited (supra)* relied upon by the respondent is concerned, the said judgment is not at all applicable to the facts of this case and the reliance placed thereon is totally misplaced.

33. Learned counsel for the respondent could not dispute that such provisions giving right to the petitioner to forfeit the security deposit

and retention money existed in the contract. Learned counsel for the respondent did not challenge the said rights exercised by the petitioner on any other ground. In my view the findings rendered by the learned arbitrator is inconsistent and contradictory and shows patent illegality on the face of the award. The findings rendered by the learned arbitrator are perverse while declaring the contract entered into between the parties as void and deserves to be set aside. In my view the award is totally unsustainable being in conflict with public policy and deserves to be set aside.

34. Arbitration Petition is made absolute in terms of prayer clause (a) in so far as claim nos.1 and 2 allowed by the learned arbitrator and the corresponding interest thereon is concerned. Award in respect of claim nos.1 and 2 is set aside. Rest of the award is upheld. There shall be no order as to costs.

R.D. DHANUKA, J.