

THE HON'BLE SRI JUSTICE K.C. BHANU

AND

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

C.M.A.No.173 of 2010

-

JUDGMENT: (per Hon'ble Sri Justice M. Seetharama Murti)

The unsuccessful petitioner i.e., the respondent before the Arbitral Tribunal had preferred this appeal under Section 37 of the Arbitration & Conciliation Act, 1996 (for brevity 'the Act') assailing the order dated 23.03.2009 passed by the learned IV Additional District Judge, Visakhapatnam in AOP.No.262 of 2005.

2. We have heard the submissions of the learned counsel for the appellant and the learned counsel for the 1st respondent. The 2nd respondent is the learned Arbitrator.

3. The parties in this appeal shall hereinafter be referred to as the appellant and the claimant for convenience and clarity.

4. The introductory facts necessary for consideration, in brief, are as follows: - 'The appellant is a Government of India Enterprise and is engaged in the execution of work of project constructions all over India. The appellant had entered into a contract with the South Eastern Railway, Rayagada, Visakhapatnam Division for execution of certain works between Damanjodi (exclusive) to Kakirigumma (exclusive) on Koraput Rayagada Broad Gauge Railway lines construction project, phase-II, Section-1, *vide* contract dated 20.02.1990. Subsequently, the appellant had entered into a sub contract with the claimant for execution of the part of the work *vide* letter dated 17.01.1990. During the course of the execution of the said work covered by the said sub contract, disputes and differences had arisen between the parties to the agreement and therefore, the matter was referred to arbitration. Before the learned Arbitrator, the claimant had made various claims and the same were resisted by the appellant. The appellant herein while resisting the claims of the claimant had made a counter claim. On merits, the learned Arbitrator had awarded all the claims either in full or part as per the entitlement of the claimant as found by him; and, the learned Arbitrator had also awarded interest on the said claim amounts awarded, while

dismissing the counter claim of the appellant. Aggrieved of the award, the appellant had preferred an Original Petition under Section 34 of the Act before the civil Court. On merits, the civil Court had dismissed the said OP of the appellant confirming the award of the Tribunal in all respects. Therefore, the appellant had preferred this appeal before this Court.'

5. The learned counsel for the appellant would contend as follows: - 'The order of the civil Court which is impugned is contrary to law and is vitiated for not appreciating the grounds urged which are in accordance with the provision of Section 34 of the Act. The issue of limitation was not properly appreciated. The learned Arbitrator and the court below ought to have seen that admissions recorded by the Arbitrator i.e., the admissions of the claims of the claimant by the presenting officer of the appellant company are not binding on the appellant. The Court below ought to have seen that the persons who had allegedly consented before the learned Arbitrator on certain factual issues have no authority to give consent and that no verification as to competency of such persons to give consent was undertaken by the learned Arbitrator. The learned Judge of the Court below ought to have seen that the claim in regard to escalation of labour charges is an excepted matter and that therefore, the adjudication of the claim and the award for Rs.3,32,723/- allowing the said claim is vitiated, the same being beyond the scope of the contract and subject matter of arbitration. The claim of refund of sales tax is similarly an excepted matter and therefore, the said two claims ought not to have been adjudicated and allowed by the learned arbitrator. The said aspects were not properly appreciated by the Court below. The award of interest component and the calculations of the Arbitrator are erroneous. The learned Judge of the Court below had not appreciated the factual and legal contentions in proper perspective. The learned Judge of the Court below had failed to see that the appellant had raised a counter claim before the learned Arbitrator and that the same was not referred to and was not considered by the learned Arbitrator and that therefore, the award is vitiated by non application of mind and is liable to be set aside. The order of the Court below confirming such an award is unsustainable and is liable to be set aside.'

6. On the other hand, the learned counsel for the claimant would contend as follows: - 'The Railways did not withdraw the portion of the work executed by the claimant. The Railways had withdrawn the other portion of the work awarded to the appellant due to the poor performance by the appellant and its other sub-contractors. The

appellant had not challenged the final award dated 29.01.2005 which was passed after amendment of the original award dated 18.10.2004. Since the final award was not challenged within three months from the time allowed under law, the original petition filed before the Court below challenging the said award is barred by law of limitation. The claims made by the claimant were not barred by limitation. The question of limitation is a mixed question of fact and law. The work was completed in the year 1992. The final bill was not prepared. Unless the final bill is prepared and a dispute arises, the cause of action does not accrue and unless the cause of action accrues, the limitation does not start to run. Before the learned Arbitrator, both the parties had agreed on certain disputed aspects and there is no prohibition under law for both the parties coming to an agreement on a disputed issue before the learned Arbitrator. The Arbitral Tribunal is competent to encourage settlement of dispute and the dispute can be settled on the parties arriving at an agreement. The Tribunal is competent to use methods of mediation, conciliation and other procedures at any time during arbitral proceedings for encouraging settlement. The tribunal is competent to terminate the proceedings if, during the arbitral proceedings the parties have settled the dispute, and record the settlement in the form of an arbitral award and such an award will have the status of an arbitral award on the substance of dispute. The contention that the persons who gave consent on factual issues before the learned Arbitrator have no authority to give such consent on factual aspects is not at all raised before the learned Arbitrator. The learned Arbitrator considered the contract, the documents, addendum, which is a part of the contract, and had passed a reasoned award. The learned Arbitrator had assigned reasons for rejecting the counter claim. There is no illegality. Even when two views are possible, the view adopted by the Arbitrator must pass the muster as on factual aspects he has the final say in the matter. None of the grounds urged satisfy the factual and legal requirements. The Court below having considered all the aspects in proper perspective had rightly dismissed the petition of the appellant and therefore, this appeal is devoid of merit and is liable to be dismissed.'

7. We have given earnest consideration to the facts and the submissions. We have carefully gone through the Award and the order of the Court below, which is impugned.

8. The point that arises for determination is:

Whether the respondent/appellant herein had made out valid

and sufficient grounds for setting aside the order of the Court below and the Award of the Arbitral Tribunal?

9. POINT:

9.1 The introductory facts and the facts leading to the present stage of the matter are already stated supra, in detail.

9.2 The claims made by the claimant and the findings of the learned Arbitrator on the said claims are as under:

Claim No.1 is towards 9th RA Bill which was prepared and not paid. The said claim is for Rs.60,347/-. While dealing with this claim, the learned Arbitrator had noted that this claim was agreed to by the respondent i.e., appellant herein in the meeting held on 08.06.2002 and therefore, he had awarded the said amount in favour of the claimant.

The 2nd claim for Rs.29,873.32ps is in regard to the amount payable towards the final bill. The appellant had contended that it had to recover an amount of Rs.20,368/-. According to the reasons assigned in the Award, this point was also discussed at a meeting held at Bhopal on 18.08.2003 and in the said meeting it was recorded as follows: **‘Finally agreed amount with both the parties is Rs.28,871.14ps. A jointly signed statement was submitted by both the parties and the matter was closed’**. [reproduced verbatim]. Therefore, in view of the joint statement filed by both the parties the said claim was allowed by the learned Arbitrator and was awarded.

The 3rd claim was in regard to the increase in labour rates and price variation. As per the content of the award, this claim was also discussed in the meetings held on 08.06.2003 and 18.08.2003 and after such meetings, the respondent i.e., the appellant herein was directed to prepare the revised bill for price variation as per the agreement between the parties and submit the same. However, the appellant had failed to prepare such a bill and had also failed to produce the record. As per the addendum dated 28.08.1996 the payment of Labour Relief (increase in labour wages) is payable from 01.07.1990 and the payment of price variation is payable from January 1991. Therefore, considering the facts and circumstances and the non response on the part of the appellant to submit the revised bills in regard to the payment due to the claimant, the learned Arbitrator had awarded the said amount under the said claim. A detailed calculation was also enclosed in respect of this awarded amount is not in dispute.

In regard to the claim against price variation the appellant had prepared

a bill for the amount due. The learned Arbitrator after deducting the amount of Rs.3,18,708.80ps from the final bill had held that amount payable against the price variation from January 1991 is Rs.1,01,835.45ps as per the detailed calculation enclosed and had awarded an amount Rs.1,01,835.41ps to the claimant.

The next two claims are in regard to the release of security deposit and EMD; since the contract is concluded and the work is completed, there is no dispute in regard to the proposition that the claimant is entitled to the release of the security deposit amount as well as the EMD. Therefore, both the claims were allowed by the learned Arbitrator.

Coming to the refund of performance guarantee, it is an admitted fact that under the sub contract entered into between the parties, the claimant was required to make a deposit of 2% amount of the total contract value towards performance guarantee and there is no dispute that the said amount was deposited. As per the contract, after the completion of the work, the claimant is entitled to release of the said amount. Therefore, the said amount was awarded by the learned Arbitrator.

Coming to the claim of refund of extra cess recovered in a sum of Rs.16,809/- which was refundable, the claim of the claimant was accepted by the respondent before the learned Arbitrator. Hence the said amount was awarded.

Similarly as regards the last claim of release of damages of sleepers in a sum of Rs.16,455/- in the discussions before the learned Arbitrator in the meetings held during 27th to 30th of April 2004 it was confirmed that this damage of sleepers cannot be attributed to the claimant. Hence that amount was awarded.

9.3 Coming first to the contention of the claimant that the amended award was not challenged, it is to be noted that the Court below had held against the claimant for the reason that the amendment was carried out only in respect of a clerical error in calculation.

9.4 Coming next to the contentions of the appellant, it is to be noted that it was first contended that the claims are barred by law of limitation. However, no adjudication was made by the learned Arbitrator on this issue of limitation. In the case on hand, there is no material on record to show that there is a notice demanding the claim in the year 1992 to prove the accrual of cause of action. The admitted fact is that the work was completed in the year 1992, but the final bill was not prepared. Therefore,

as rightly contended, unless the final bill is prepared the cause of action would not accrue and until the cause of action accrues, the limitation does not start to run. Therefore, there is no merit in the contention that the claims are barred by limitation. Further, in the light of the fact that this issue was not adjudicated by the learned Arbitrator and in the absence of any material placed by the appellant, this issue of limitation which is a mixed question of fact and law cannot be answered in favour of the appellant. Having examined the award, we find that the contention that no reasons are assigned for awarding the claims cannot be countenanced. The legal proposition in regard to power of Arbitrator to pass an award on agreed terms is well settled and therefore, the award cannot be challenged on the ground that it was passed on agreed terms. What is to be next noted is the contention that the representatives of the appellant who had attended before the learned Arbitrator on behalf of the appellant and had admitted certain facts and liabilities are not competent to make such admissions and give concessions regarding liabilities and that the learned Arbitrator did not verify the competence of the said representatives of the appellant before acting upon such agreed terms and passing the award in respect of various claims on such basis. In other words, the contention is that the persons who have allegedly consented on certain facts and agreed in regard to certain terms before the learned Arbitrator have no authority to do so and that the learned Arbitrator had erroneously passed the award without verifying the competence of such persons representing the appellant herein. In fact, when such persons appeared before the learned Arbitrator and made admissions in regard to certain agreed terms and had expressed consent, no objection was raised that the persons who are doing so while representing the appellant have no authority to do so. In fact, there is no bar or prohibition under the Act that the parties to the arbitration cannot agree on any disputed point. The provision of Section 30 of the Act says that it is not incompatible with an arbitration agreement for an Arbitral Tribunal to encourage the settlement of the dispute and, with the agreement of the parties, the Arbitral Tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement and that if, during arbitral proceedings, the parties settle the dispute, the Arbitral Tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the Arbitral Tribunal, record the settlement in the form of an Arbitral Award on agreed terms and that any such award on agreed terms shall have the same status and effect as any other Arbitral Award on the substance of the dispute. According to

Section 30, an Arbitral Award on agreed terms shall be made in accordance with Section 31 and shall state that it is an Arbitral Award. Section 31 deals with form and content of the Arbitral Award. Section 32 of the Act speaks of termination of proceedings on the withdrawal of the claim without any objection from the respondent and also termination of arbitral proceedings by the final Arbitral Award where the parties agree and when the Arbitral Tribunal finds that the continuation of proceedings is un-necessary. Section 33 speaks of correction and interpretation of award and additional award. Therefore, as rightly contended by the learned counsel for the claimant, concept of agreement of parties and passing of an award on the agreement of parties is not alien to the Act. Section 30 clearly says in regard to the power of Arbitrator to pass the Award on agreed terms. It is an admitted fact that the appellant has not taken any action against its representatives, who have given consent and agreed to certain terms of settlement on various claims before the learned Arbitrator, and this fact would lay bare that they did not act without any authority or competency. Apart from the agreed terms at the meetings held, the learned Arbitrator had admittedly relied upon documents while awarding certain of the claims. Regarding increase in labour rates and the Award in that regard, it is contended that the said claims and the Award are against the terms of the contract. However, the learned Arbitrator had awarded such claims as per the addendum arrived at on an agreement between the parties to meet the payment of labour charges with effect from 01.07.1990. The said addendum is a part of the contract between the parties. Therefore, it cannot be said that the award is beyond the terms of the contract. The only contention regarding the counter claim of the appellant which was negatived is that the learned Arbitrator had not properly adjudicated the same and not assigned any reasons for rejecting the counter claim. In fact, the learned Arbitrator had assigned reasons such as non production of record and had also taken note of the fact that the Railways in its letter dated 06.04.1990 had stated that the work was completed to the satisfaction of the Railways etcetera. Therefore, the learned Arbitrator had not assigned any reasons for rejecting the counter claim is a contention without merit.

9.5 Thus, a careful perusal of the award as well as the order of the Court below insofar as all the claims adverted to supra would show that the learned Arbitrator had assigned reasons for allowing the said claims of the claimant and awarding the same and also for rejecting the counter claim of the appellant and that the learned Judge of the Court below had also assigned reasons while examining the

correctness of the award and confirming the same in respect of the above claims.

9.6 The following decisions are relevant on the aspect of extent of judicial intervention or the scope of interference of the Court. (1) **Delhi Development Authority v. R.S.Sharma and Company, New Delhi**; (2) **Associate Builders v. Delhi Development Authority**; (3) **M/s.Navodaya Mass Entertainment Ltd., v. M/s.J.M.Combines**; and (4) **Oil And Natural Gas Corporation Limited v. Western Geco International Limited**. The settled principles for interference with an Arbitral Award under Section 34(2) of the 1996 Act as per the decision of the Supreme Court in **Delhi Development Authority** (1 supra) are as follows:

a. **An award, which is**

(i) contrary to substantive provisions of law; or (ii) the provisions of the Arbitration and Conciliation Act, 1996 or (iii) against the terms of the respective contract; or (iv) patently illegal; or (v) prejudicial to the rights of the parties;

is open to interference by the court under Section 34(2) of the Act.

(b) The award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality.

(c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

In the decision in **Associate Builders** (2 supra), the Hon'ble Supreme Court referred to the ratios in various earlier decisions including the decision 1st cited and had further elucidated the law on the point and had further held that when a Court is applying the public policy test to an arbitration award, it does not act as a Court of appeal and consequently errors of fact cannot be corrected and that a possible view by the Arbitrator on facts has necessarily to pass muster as the Arbitrator is the ultimate master of the quality and quantity of evidence to be relied upon when he delivers his Arbitral award and thus, an award based on little evidence or no evidence, which does not measure up in quality to a trained legal mind would not be held to be invalid on this score and that once it was found that the Arbitrator's approach is not arbitrary or capricious then, his word is the last word on facts. In the decision in

M/s. Navodaya Mass Entertainment Ltd (3 supra) the scope of interference of the

Court was considered and it was held that even if two views are possible the view taken by the Arbitrator would prevail. In the decision in **Oil and Natural Gas Corporation Limited** (4 supra) it was held that the expression “fundamental policy of Indian law” includes all such fundamental principles that provide basis for administration of justice and enforcement of law in India. In this case on hand, none of the parameters for setting aside the award on the above claims are satisfied and there are no grounds to find that the award is against the fundamental policy of India or that the decision is perverse or irrational or not in compliance of the Principles of Natural Justice. Hence, the judgment of the Court below and the Award, in our well considered view, deserve to be confirmed insofar as the claims adverted to supra.

9.7 However, there is one more claim which was awarded by the arbitrator and confirmed by the Court below, which needs examination. The said claim is in regard to refund of sales tax. Admittedly, the said tax amount was deducted by the appellant from the amounts due and payable to the claimant. However, the contention of the claimant is that having deducted the sales tax the said amount was not paid by the appellant to the Government. Nonetheless, it is not the case of the claimant that for non payment of the deducted sales tax by the appellant to the Government, the claimant had paid the said sales tax to the Government. The learned counsel for the appellant had rightly contended that even though the record related to the sales tax for the assessment year was produced by the appellant, the learned Arbitrator had erroneously awarded an amount of Rs.42,856/-. Therefore, in the facts and circumstances of the case, the claimant is not entitled to this amount of refund of sales tax in a sum of Rs.42,856/-. Therefore, on claim wise examination of the claims made by the claimant before the learned Arbitrator, we find that the claimant is entitled to all the claims except the claim towards the refund of sales tax.

9.8 Coming to the award of interest, the learned Arbitrator had awarded interest on claim nos.3.02 and 3.03 for the relevant period; he had further awarded interest for the relevant period on the remaining claims. Since the Arbitrator is competent to award interest in the particular facts of the case during the pre litigation period and also during the pendency of arbitration proceedings, we find no reason to interfere with the award of interest during the said periods. However, while awarding future interest, the learned Arbitrator had awarded interest not only on the amounts

awarded but also on the interest amount which is included in the awarded amounts. It is impermissible under law to award interest on interest in view of the decision of the Supreme Court in **State of Haryana and others v. S.L.Arora and Company**. In view of the settled legal position, the claimant is entitled to future interest only on the awarded amount but not interest on interest.

9.9 Having thus carefully considered the contentions urged before this Court on behalf of the appellant and the claimant, we find no reason to interfere with the award except to the extent of awarding a claim of Rs.42,856/- towards refund of sales tax and future interest as indicated above.

10. Accordingly while confirming the award to the extent of Rs.6,92,574/- and also to the extent of interests amounts awarded on the claims i.e., Rs.3,21,573/- and Rs.3,22,944/- upto the date of the Award and also to the extent of expenses of Rs.3,400/-, we hold that the claimant is also entitled to future interest on the amount of Rs.6,92,574/- @ 12% per annum simple from the date of award till the date of payment or realization. The point is accordingly answered.

11. The appeal is allowed in part, accordingly and as indicated supra. There shall be no order as to costs.

Miscellaneous petitions pending, if any, in this appeal, shall stand closed.

K.C. BHANU, J

M. SEETHARAMA MURTI, J

08.04.2015

Vjl