THE HON'BLE SRI JUSTICE K.C.BHANU
AND
THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

CIVIL MISCELLANEOUS APPEAL No.417 OF 2008

JUDGMENT: (per Hon'ble Sri Justice K.C.Bhanu)

This Civil Miscellaneous Appeal, under Section 37 of the Arbitration and Conciliation Act, 1996 (for short, 'the Act') is directed against the order and decree, dated 30.03.2007, in Arbitration Original Petition No.975 of 2001 passed by the IV Additional District & Sessions Judge, Visakhapatnam.

2. The brief facts that are necessary for disposal of the appeal may be stated as follows:

As per the work order under Contract Agreement No.CEDD/VIZ/09 of 88-89, dated 17.12.1988, the contract was entered into between the appellant and respondent No.1-Union of India. The value of the contract is Rs.1,40,16,000/-. The initial date of completion of work was fixed by 11.09.1989, but it was extended upto 31.01.1992. The appellant had completed installation of 24 lifts well within the extended period. As per Clause 27 of the Contract Agreement, the price quoted by the appellant shall be based upon the cost of raw material, components and labour as on the date of submission of the tender and work shall be deemed to be related to wholesale price index for industrial products and All India Average Consumer Price Index Number for the industrial workers and in case of any variation in the index number, the price shall be calculated as per the formula given in clause 27.1 of the Contract Agreement. The appellant was prompt in completion of works, but the contract was prolonged due to factors like delay in inter related civil and electrical works of lift well, machine room and power supply provided by the Union of India.

During the course of execution of agreement, the appellant claimed some amounts towards price variation as per the formula laid down in contract No.27. Thereupon, the Union of India paid the same without any protest. However, when the finial bill was submitted for an amount of Rs.43,95,121/-, the Union of India paid only Rs.31,00,000/- leaving the balance amount of Rs.12,95,121/- without assigning any reason. In spite of several representations, the Union of India did not release the balance amount. The appellant addressed a letter on 05.05.1992 to the Union of India, for which reply was given. Therefore, the matter was referred to the arbitrator. The arbitrator, after considering the material available on record, came to the conclusion that the extra amount payable to the Contractor for the extra material is not admissible and the escalation amount finalized by the Union of India is correct. Challenging the award, the Original Petition was filed. The Court below, after considering the material on record, dismissed Arbitration Original Petition. Challenging the same, the present appeal filed.

3. Learned Senior Counsel appearing for the appellant vehemently contended that as per the Contract Agreement, the appellant is entitled to escalation of prices; that the delay for execution/installation of lifts is only due to non-readiness of site; that the opinion of the Law Minister would clearly go to show that the appellant is entitled to price variation claim on material as per the formula in terms of the contract agreement and therefore, he prays to set aside the impugned order.

4. On the other hand, learned counsel for respondent Nos.1 and 2 contended that the arbitrator had given a finding based upon the material and the same has been accepted by the Court below; that the appellant did not show that the findings recorded by the arbitrator were not in accordance with the terms of the Contract Agreement and therefore, he prays to dismiss the appeal.

5. The short point that falls for consideration is whether the appellant is entitled to price variation amount for installation of lifts in terms of the Contract Agreement?

6. **<u>POINT</u>:**

The factual matrix is not in dispute. Clause No.27.1 of the Contract Agreement deals with price variation formula. The whole sale price index for metal produces would be prevailing in the 1st Saturday of the month covering the date, three months prior to the date of delivery of first lot of manufactured material for each elevator separately. This special condition shall prevail over the general condition No.63 of IAFW-2249 (MES General Conditions of Contract) and the provisions of Condition 68 'I' bid shall not be applicable.

7. It is not in dispute that as per the terms of Contract Agreement, the lifts should be procured by the contractor within the stipulated time. If he has not procured the lifts within the stipulated time, then he is not entitled to price variation on escalation of prices of material. The formula as contemplated in Clause 27 of the contract would only be applicable in case the contractor has procured all the equipments at least four (4) months in advance of the stipulated date of completion of work as per Clause 10 (e) of Schedule 'A', which reads as follows:

> "the contractor shall therefore proceed with the procurement of all the equipments immediately on placement of work order so as to enable him to commence and complete the installation, testing and commissioning within the specified time allowed i.e., 4 months for completion of the entire works."

8. The work order was given on 17.12.1988 and within four (4) months thereafter, the contractor has to procure all the equipments. There is no pleading and evidence to show that on what date the contractor procured the equipments. If he has procured the

equipments within the time in terms of the work order and if there is no delay in commencing the work, then only he is entitled to price variation formula relating to escalation of prices. There is no pleading that he procured the equipment within four (4) months from the date of receipt of work order. If the contractor procured the equipment after four (4) months, then he is not entitled to any amount on price variation formula relating to escalation of prices. Therefore, in the absence of any pleading and evidence, the appellant cannot claim amount due on escalation of prices. Therefore, the arbitrator rightly held that the appellant is not entitled to escalation of prices and there are no laches on the part of the Union of India in not giving the work order within the time as per the schedule of the Contract Agreement.

9. However, learned counsel for the appellant placed reliance on the following decisions:

1) **STEEL AUTHORITY OF INDIA LIMITED V. GUPTA BROTHER STEEL TUBES LIMITED**[1], wherein it is held thus (para 18):

> "18. It is not necessary to multiply the references. Suffice it to say that the legal position that emerges from the decisions of this Court can be summarized thus:
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> (i) In a case where an arbitrator travels beyond the contract, the award would be without jurisdiction and would amount to legal misconduct and because of which the award would become amenable for being set aside by a court.
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> (ii) An error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by courts as such error is not an error on the face of the award.
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> (iii) If a specific question of law is submitted to the arbitrator and he

answers it, the fact that the answer involves an erroneous decision in point of law does not make the award bad on its face.

(iv) An award contrary to substantive provision of law or against the terms of contract would be patently illegal.

(v) Where the parties have deliberately specified the amount of compensation in express terms, the party who has suffered by such breach can only claim the sum specified in the contract and not in excess thereof. In other words, no award, no award of compensation in case of breach of contract, if named or specified in the contract, could be awarded in excess thereof.

(vi) If the conclusion of the arbitrator is based on a possible view of the matter, the court should not interfere with the award.

(vii) It is not permissible to a court to examine the correctness of the findings of the arbitrator, as if it were sitting in appeal over his findings."

2. **SUMITOMO HEAVY INDUSTRIES LIMITED V. OIL AND NATURAL GAS CORPORATION**[2], wherein it is held thus (paras 19 to 21):

"19. Clause 5.11.3 lays down that the contractor shall observe and comply with and shall ensure that all his sub-contractors also observe and comply with the laws, regulations or requirements of any States which are littoral States with respect to any sea areas comprised at site, and of any international authority or international convention or other rule of international law or custom applicable thereto. This is subject to the exception in Clause 5.11.2 which provides as follows:

"The contractor shall conform in all respects, and shall ensure that all his sub-contractors also conform in all respects with the provisions of any statute, ordinance or laws as aforesaid except where such laws, statutes or ordinances conflict with any laws, statutes or ordinances of the United States of America and Japan, contractor confirms that there is presently no law or regulation which should preclude its performance of the works under the contract."

20. Clause 13 provides for "Contract Price and Payment/Discharge Certificate". Clause 13.1 lays down the contract price, which is mentioned earlier. Clause 13.2 lays down the *payment procedure* and sub-clause 13.2.7 provides as follows:

"13.2.7 – The Company shall not be responsible/obliged for making any payments or any other related obligations under this contract to the contractor's sub-contractor/vendors. The contractor shall be fully liable and responsible for meeting all such obligations and all payments to be made to its sub-contractors/ vendors and any other third party engaged by the contractor in any way connected with the discharge of the contractor's obligation under the contract and in any manner whatsoever."

21. Next relevant Clause 17 relates to "Laws/Arbitration". Clause 17.1 is on applicable laws, which lays down that "*all questions, disputes or differences arising under, out of or in connection with this contract shall be subject to the laws of India."* Clause 17.2 provides for arbitration in the event of any dispute and for appointment of one arbitrator each by the parties, that the arbitration will be held at London, and further that the decision of the arbitrators and in the event of their failing to arrive at an agreed decision, the decision of the umpire shall be final and binding on the parties.

3. **OIL AND NATURAL GAS CORPORATION Ltd., V SAW PIPLES Ltd.,**[3] wherein it is held thus (para 12)

"12. The question, therefore, which

> requires consideration is whether the award could be set aside, if the Arbitral Tribunal has not followed the mandatory procedure prescribed under S.24, 28 or 31 (3), which affects the rights of the parties? Under sub-section (1) (a) of S.28 there is a mandate to the Arbitral Tribunal to decide the dispute in accordance with the substantive law for the time being in force in India. Admittedly, substantive law would include the Indian Contract Act, the Transfer of Property Act and other such laws in force. Suppose, if the award is passed in violation of the provisions of the Transfer of Property Act or in violation of the Indian Contract Act, the question would be – whether such award could be set aside? Similarly, under sub-section (3), Arbitral Tribunal is directed to decide the dispute in accordance with the terms of the contract and also after taking into account the usage of the trade applicable to the transaction. If Arbitral Tribunal ignores the terms of the contract or usage of the trade applicable to the transaction, whether the said award could be interfered? Similarly, if the award is non-speaking one and is in violation of S.31 (3), can such award be set aside? In our view, reading S.34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it couldn't be set aside by the Court. If it is held that such award could not be interfered, it would be contrary to basic concept of justice. If the Arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside under S.34."

The arbitrator is the sole judge of the facts and law involved in the case before him and even his decision is not supported by any reasons is not open for review by the Court, unless an objection to the legality of the award is apparent on the face of it. Section 34 of the Act provides for setting aside the Arbitral Award. The appellant must show that his case falls under any one of the grounds enumerated in sub-Section (2) of Section 34 of the Act. There is no pleading and material evidence to show that award is liable to be set aside.

10. Basing on the rations laid down in the above referred judgments, learned counsel for the appellant stated that the arbitrator has not appreciated the material on record and came to a wrong conclusion. He also placed reliance on condition No.63 of IAFW-2249 (MES General Conditions of Contract) and contended that condition No.63 shall not have any precedent over Schedule 'A' of General Conditions and parties are bound by the terms of Contract Agreement. But, we are unable to accept the said contention for the reason that insofar as price variation claim is concerned, the appellant did not produce any material to show that it procured the machinery and the bills relating to the purchase of said machinery within four (4) months after giving the work order. After procuring the equipment, if the appellant was not allowed to install the lifts and if there are any laches on the part of Union of India, then only the appellant company can invoke the terms of Contract Agreement. In the absence of any pleading to show that it procured the material within four (4) months after the work order was given, the appellant company is not entitled to any amount for escalation of prices. Therefore, the decisions relied upon by the learned counsel for the appellant have no application to the present facts of the case. The findings of the Court below are based upon proper appreciation of evidence on record particularly with reference to the terms and conditions of the Contract Agreement. The arbitrator has not exceeded his jurisdiction in giving a finding. Therefore, the appeal is devoid of merit and it is liable to be dismissed. Hence, the point is answered accordingly.

11. Accordingly, the Civil Miscellaneous Appeal is dismissed. There shall be no order as to costs. Miscellaneous Petitions, if any,

pending in this appeal shall stand closed.

K.C.BHANU, J

M.SEETHARAMA MURTI, J

FEBRUARY 09, 2015
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[1] (2009) 10 Supreme Court Cases 63

[2] (2010) 11 Supreme Court Cases 296

[3] AIR 2003 SC 2629