

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

**O.M.P. 221/2014**

Reserved on: 30<sup>th</sup> January 2015

Decision on: 24<sup>th</sup> February 2015

TRACTEL TIRFOR INDIA PVT. LTD. .... Petitioner  
Through: Mr. Girdhar Govind with Ms. Noor  
Alam, Advocates.

versus

NEHRU PLACE HOTELS LTD AND ANR. .... Respondents  
Through: Mr. Vikas Mishra with Mr. S.D.  
Behl, Advocates.

**CORAM: JUSTICE S. MURALIDHAR**

**JUDGEMENT**

**24.02.2015**

1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') is to an Award dated 1<sup>st</sup> November 2013 passed by the sole Arbitrator in the disputes between the Petitioner and the Respondent No.1.

2. A contract dated 30<sup>th</sup> June 2004 was entered into between Respondent No.1 and the Petitioner whereunder the Petitioner was to supply and instal a window cleaning system for the multi-storeyed parking and commercial complex of Respondent No.1 at Nehru Place, New Delhi. The contract was to be performed within a period of 8 to 12 weeks from the date of the execution of the contract. The value of the work was Rs. 11,35,000.

3. According to Respondent No.1, the work was not completed, even till 14<sup>th</sup> December 2005 on which date, an accident occurred in which two workers fell from great height while operating the cleaning system in the trolley lift and died. An FIR was registered under Section 288 and 304A of the Indian Penal Code. The families of both the deceased workmen claimed compensation. In its letter dated 2<sup>nd</sup> January 2006 addressed to the Petitioner, Respondent No.1 stated that the accident was the responsibility of the Petitioner and requested the Petitioner to settle the compensation to the families of the deceased workmen. In the meanwhile, since the families of the deceased workmen were pressing hard for the compensation, Respondent No.1 paid Rs. 6,94,606 to the family members under protest through the Workmen's Compensation Commissioner ('WCC'). The stand of Respondent No.1 was that the deceased workmen were never its employees and that the Petitioner was liable to refund it the aforementioned sum. Respondent No.1 further stated that the cleaning equipment provided by the Petitioner had to be discarded as junk because of the accident. Respondent No.1 had incurred expenditure on repairing the damage caused to the facade of the building and the glass work. That work was given by it to Ahlcons India Pvt. Ltd. ('AIPL') by a contract dated 27<sup>th</sup> December 2005.

4. On 10<sup>th</sup> January 2006 Respondent No.1 issued a legal notice to the Petitioner claiming a sum of Rs.1,19,75,809 which also included a claim for the loss of reputation and goodwill in the sum of Rs.1 crore. By a reply dated 25<sup>th</sup> January 2006, the Petitioner denied any liability.

5. By order dated 11<sup>th</sup> May 2007 in Arb. P. No. 363 of 2006, the sole Arbitrator was appointed to adjudicate the disputes. Respondent No.1 filed its statement of claims before the learned Arbitrator claiming *inter alia*, the following sums:

- (i) Rs.7,94,500 towards refund of the part-payment made to the Petitioner for installation of the window cleaning system;
- (ii) Rs.5,03,396 paid to AIPL towards repair of facade of the building and glass work;
- (iii) Rs.6,94,606 paid by Respondent No.1 to the WCC under protest;
- (iv) Rs.56,760 towards liquidated damages ('LD') on account of the failure of the Petitioner to hand over the cleaning equipment work within the stipulated time and
- (v) Rs.1 crore being estimated amount of loss of goodwill and reputation.

6. The aforementioned sums were claimed together with interest @ 24% pa. Respondent No.1 also claimed *pendent lite* and future interest @24% apart from the costs of the arbitral proceedings.

7. Along with its reply to the statement of claim the Petitioner made a counter-claim praying that Respondent No.1 should be asked to pay the balance amount of Rs. 3,40,500 which was arbitrarily withheld by it together with interest @24% pa with effect from 15<sup>th</sup> December 2005 till the actual date of the payment.

8. On behalf of Respondent No.1/Claimant, Mr. Barun Dey was

examined as PW-1. He filed his affidavit of evidence and was cross examined. On behalf of the Petitioner Mr. Suresh Uniyal was examined as RW-1. He filed his affidavit of evidence and was cross-examined.

9. In the impugned Award dated 1<sup>st</sup> November 2013, the learned Arbitrator first held that he had the jurisdiction to decide the disputes between the parties. He then dealt with the Issues No. 2,8 and 9, viz., whether Respondent No.1 was entitled to refund of Rs. 7,94,500 paid by it to Petitioner as part-payment of the value of the work performed by the Petitioner; whether the Petitioner was entitled to the balance sum of Rs.3,40,500 being its counter-claim and; whether the Petitioner was entitled to interest on the said sum @ 24% p.a. as claimed by it. The learned Arbitrator concluded that there was nothing to show that it was negligence of the Petitioner that had caused the accident or that the Petitioner had not taken adequate care to prevent foreseeable consequences. Therefore, Respondent No.1 could not take advantage of the accident and claim refund of the contract amount for which the Petitioner had worked. Likewise, since the Petitioner did not dispute that it had not completed the work it could not claim the balance amount under the contract. Accordingly, the learned Arbitrator held that Respondent No.1 was not entitled to refund of Rs.7,94,500 paid by it to the Petitioner to the extent of work performed; that the Petitioner was not entitled to the balance sum of Rs.3,40,500 or to any interest on the said amount.

10. The learned Arbitrator then considered whether Respondent No.1

was entitled to refund of Rs.50,396 paid by it to AIPL for the repair of the facade of the building and the glass work. The learned Arbitrator concluded that no document has been placed by Respondent to show whether the work got done from AIPL was actually in furtherance of the damage sustained on account of the accident. Accordingly, the said claim was rejected.

11. The learned Arbitrator then considered whether Respondent No.1 was entitled to recover a sum of Rs.6,94,606 paid to the WCC. He noticed that both the Petitioner and Respondent No.1 had gone to great lengths to disown the deceased workmen as their employees. Both the Petitioner and Respondent No.1 had filed their respective attendance registers. It was noticed that neither document could be ascribed with any probative value since they were either incomplete or the originals were not produced. The attendance register of Respondent No.1 was for the months of November and December 2005 and one person had affixed his signatures for all the employees. The names of the deceased workmen did not figure in the said attendance register. As far as the attendance register of the Petitioner was concerned, it was only for the months October 2005 to February 2006. Here again, the names of the deceased workmen did not figure. The witness for the Petitioner, RW-1, admitted that not all of its employees' names had been shown in the attendance register. The accident took place on 14<sup>th</sup> December 2005 and yet the attendance register for that date was not furnished by the Petitioner. Consequently, even the documents produced by the Petitioner were not found to be of any probative value.

12. After discussing the entire evidence that was placed before him, the learned Arbitrator concluded that the deceased persons should be held to have been working for the Petitioner and therefore deemed to be its employees. The liability to pay the compensation for their deaths was on the Petitioner. Therefore, Respondent No.1 was held entitled to refund of a sum of Rs.6,94,606 paid by it to the WCC.

13. The learned Arbitrator concluded that the work had not been completed within the stipulated period of completion and therefore Respondent No.1 was entitled in terms of Clause 10 of the contract to LD to the extent of 5% of the total value of the contract, which worked out to Rs.56,750. The claim of Respondent No.1 for loss of goodwill and reputation was rejected as there was no material placed by Respondent No.1 to prove such a claim. The learned Arbitrator granted Respondent No.1 interest @9% pa and Rs.2 lakhs as costs.

14. Mr. Girdhar Govind, learned counsel for the Petitioner, first submitted that the findings of the learned Arbitrator on Issue No.4 concerning the compensation paid to the families of the deceased workmen were perverse. According to him, there was no evidence on record to show that the two deceased workmen were the employees of the Petitioner. He submitted that the learned Arbitrator erred in ignoring the evasive and self-contradictory replies given by PW-1 the witness of the Respondent No.1 before the learned Arbitrator. While at one stage, PW-1 stated that he was in employment of the Respondent No.1 when the work order was placed, to a further question he replied that he had

joined on 24<sup>th</sup> October 2004, whereas the work order was dated 31<sup>st</sup> May 2004.

15. Mr. Govind submitted that the FIR nowhere mentioned that the persons who died were in the employment of the Petitioner. The records filed by the Petitioner in fact showed that the two deceased persons were not its employees. The burden was on Respondent No.1 as Claimant to show that the two deceased workmen were the employees of the Petitioner. However, it failed miserably to discharge that burden.

16. Mr. Govind submitted that the learned Arbitrator failed to adopt a judicious approach and had passed the Award in flagrant violation of the principles of natural justice. The appreciation of evidence by the learned Arbitrator was perverse and therefore the Award could not be sustained in law. The Award was opposed to the public policy of India and was liable to be set aside in terms of Section 34 (2) (b) (ii) of the Act.

17. On the other hand, Mr. Vikas Mishra, learned counsel for Respondent No.1, supported the impugned Award. He pointed out that only two items of the claims of Respondent No.1 had been allowed by the learned Arbitrator, viz., the amount paid by it to the WCC and the LD in the sum of Rs.56,750. He submitted that the Court is not sitting in appeal over the impugned Award and merely because another view was possible to be taken on the basis of the evidence, the Award was not liable to be interfered with. He submitted that the learned Arbitrator

had undertaken a very detailed analysis of the evidence and given elaborate reasons for the conclusions. The view taken by the learned Arbitrator was a reasonable one and could not be said to be perverse. He accordingly submitted that no ground was made out for interference of the impugned Award of the learned Arbitrator.

18. At the outset, the Court would like to observe that the scope of its powers of interference with an Award under Section 34 of the Act is limited. In ***ONGC v Western Geco International Ltd. (2014) 9 SCC 263***, the Supreme Court pointed out that the Award should be shown to be so “perverse or so irrational that no reasonable person would have arrived at the same”. In ***Associate Builders v DDA 215 (2014) DLT 204 (SC)***, the Supreme Court held that interference would be called for only when the finding was based on no evidence, or the arbitral tribunal had taken into account something irrelevant or “ignores vital evidence in arriving at its decision”. It was further held that a contravention of any substantive law or provision of the Act would itself be considered as a 'patent illegality' warranting interference.

19. In the light of the above law, the Court takes up for examination the substantive claim allowed by the learned Arbitrator, viz., the refund of the sum of Rs.6,94,606 paid by Respondent No.1 as compensation to the families of the deceased workmen. The question before the learned Arbitrator was whether it was the Petitioner or Respondent No.1 which was liable to pay that compensation amount. The accident occurred on 14<sup>th</sup> December 2005. The two deceased workmen, while operating the

cleaning equipment, fell from a great height and died. Clearly, at that point of time, the contract of cleaning which had been awarded by Respondent No.1 to the Petitioner was still in operation.

20. Both the Petitioner and the Respondent No.1 produced their respective attendance registers. The names of the two deceased workmen did not figure in either register. The register maintained by the Petitioner was found to be more detailed than the one maintained by Respondent No.1. However, for the date of the accident i.e. 14<sup>th</sup> December 2005, no attendance register was produced by the Petitioner. There was no explanation furnished by the Petitioner for its failure to do so. Instead, the Petitioner produced indemnity bonds dated 27<sup>th</sup> January 2006 furnished by the dependants of the deceased workmen before the WCC and an affidavit dated 23<sup>rd</sup> January 2006 of one of the family members of the deceased. In the indemnity bond two deceased workmen were stated to be “working with the management” and it was claimed that the accident occurred “because of the negligence of the management”. The mere fact that the word “management” was used could not be taken as proof of the deceased workmen being the employees of Respondent No.1. The Petitioner also produced before the learned Arbitrator a copy of a letter dated 3<sup>rd</sup> May 2006 addressed by it to the Regional Provident Fund Commissioner (RPF) enclosing Forms 6A and 3A. The learned Arbitrator found that on the pages enclosed with the letter there was no seal of authentication of the EPF Office. In fact nobody had signed the enclosed pages and forms. The witness (RW-1) had also not stated anything in his affidavit of evidence in

regard to such pages. Even the ESI records did not have any date.

21. The analysis of the documentary evidence by the learned Arbitrator in the impugned Award reads as under:

“The documents filed for this purpose viz. The incomplete attendance register, the unsigned EPF records and even the present undated ESI records do not inspire confidence. Nothing is stated about these documents in the affidavit by way of evidence of RW1 except to say that the documents are being marked. No details as to who prepared these documents, who submitted the documents before the authorities and when it was submitted are forthcoming. Various questions such as why the relevant portion of the attendance sheet was not produced before this Tribunal, why the EPF records are unsigned, why the ESI records are undated have gone without any explanation at all. Even the requirement of identifying the signature of the persons who has signed the records as employees of the respondent has not been complied with in the affidavit by way of evidence. Hence, these documents cannot be taken as evidence of any fact. These documents are not admissible in evidence.”

22. The Court finds that the documentary evidence produced by either party was insufficient to enable the learned Arbitrator to come to a definitive conclusion on the question whether the deceased workmen were employees of the Petitioner or Respondent No.1. The Court is not persuaded to hold that the above analysis of the evidence by the learned Arbitrator suffers from any irregularity or perversity as alleged by the learned counsel for the Petitioner. With the documentary evidence not proving the case of the Petitioner, the question that next arises is whether the oral evidence was any better in proving the facts.

23. One factor which was significant and noticed by the learned Arbitrator was that no insurance policy had been taken out by the Petitioner in terms of Clause 22 of the contract for the deceased workmen. This was essential since the contract imposed a duty on the Petitioner to adhere to construction safety practices. The very nature of the work involved a hazardous activity and required work to be performed at a great height. The insurance policies were to be in joint names of both the Petitioner and Respondent No.1 and the minimum limit of coverage was to be Rs.5 lakhs per person per occurrence. Indeed, the failure to take out such an insurance policy meant that Clause 22 of the contract had not been adhered to by the Petitioner.

24. The learned Arbitrator analysed the evidence of Mr. Uniyal, RW-1, the witness of the Petitioner. He admitted that on the date of the accident, the work had not been completed and the system had not been handed back to Respondent No.1. He admitted that the Petitioner also had not employed any security guard at the site. He stated that none of the Petitioner's employees were present at the site. If indeed the contract was still in operation there was no justification for the employees of the Petitioner not being present at the site. Despite the documents showing that the work had not been completed, and RW-1 confirming this fact, the Petitioner stated in its pleadings that it had completed the work within the stipulated period. This pointed to the contradictions in the pleas of the Petitioner and made its witness unreliable. The learned Arbitrator rightly concluded that till such time the system had not been handed back to Respondent No.1 after completion of the contract, the

liability of the Petitioner thereunder continued. The accident had occurred at a time when the system was under the control of the Petitioner.

25. Mr. Govind read out the entire evidence of the witnesses for both the Petitioner and Respondent No.1. No doubt, in his cross-examination there are some contradictory answers given by PW-1, the witness for Respondent No.1. There were contradictions in the answers given by the witness for the Respondent No.1, whether in fact he was employed with the Respondent No.1 on the date of the work order. However, these answers by themselves do not prove the case of the Petitioner. The fact remains that neither party was able to produce the relevant documents to show conclusively that the two deceased workmen were not their respective employees. Obviously, both the parties were not either maintaining the proper records, or worse still, were not prepared to admit that the deceased workmen were employed by each of them. The learned Arbitrator was required to take a call on what was the most plausible scenario. Nothing was able to be elicited from PW-1 to prove that the two deceased employees were engaged by Respondent No.1.

26. Turning to the evidence of RW-1, the witness for the Petitioner, apart from baldly alleging that it was Respondent No.1 which with *mala fide* intention allowed some unauthorized persons to operate the equipment, there was nothing reliable brought on record to substantiate such allegation. Why the attendance sheet for the most crucial date i.e. 14<sup>th</sup> December 2005 was missing has not been explained by the

Petitioner. It was for the learned Arbitrator to finally take a call on the above evidence and come to a reasonable conclusion. In the circumstances, the conclusion reached by the learned Arbitrator that the two deceased employees should be taken to be the employees of the Petitioner cannot be said to be perverse or improbable. Merely because another view is possible to be taken on the evidence does not persuade the Court to set aside the impugned Award on that ground. Two precious lives were needlessly lost in an unfortunate accident. The tragedy was compounded by the fact that no insurance policy was taken to account for such a contingency. The accident happened at a time when the contract was still in force and the system had not been handed back by the Petitioner to the Respondent No.1 after completion of the work. Therefore, the Petitioner could not be absolved of the liability for the unfortunate deaths of the two workmen.

27. Consequently, the Court is not persuaded to interfere with the impugned Award to the extent it has directed the Petitioner to bear the liability for the compensation paid to the families of the deceased workmen.

28. As regards LD, the impugned Award has given sufficient reasons for allowing the claim of Respondent No.1. The Court is unable to find any error having been committed by the learned Arbitrator in allowing the said claim. The interest @ 9% pa is reasonable and the costs awarded to Respondent No.1 are neither excessive nor legally impermissible.

29. No grounds have been made out under Section 34 of the Act for interference with the impugned Award. The petition is dismissed.

**S. MURALIDHAR, J.**

**FEBRUARY 24, 2015**

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