

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved on January 12, 2015
Judgment Delivered on January 19, 2015

+

O.M.P. 164/2007

SH. PURNA NAND

..... Petitioner

Represented by: Mr.Avinash Trivedi, Advocate with
Ms.Ritika Trivedi, Advocate

versus

UNION OF INDIA & ANR.

..... Respondents

Represented by: None

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. The challenge in this petition is to the award dated 29.01.2007 limited to the extent that the learned Arbitrator has not allowed the claim No.3 of the petitioner herein for loss of business @ 15% amounting to Rs.26,84,467/-.
2. Some of the facts are that the petitioner submitted his bid for construction of foot over bridge with escalators for pedestrian across the Ring Road at (i) Moti Bagh near Gurudwara, Ring Road, New Delhi, (ii) near Venketaswara College at Ring Road, New Delhi. The estimated cost of the work was Rs.1,54,00,941/-. The petitioner along with the bid deposited an earnest money of Rs.3,08,015/-. The total contract value was Rs.1,78,96,447/-. The bid of the petitioner was accepted vide letter dated 23.02.2006. Pursuant to letter of acceptance dated 23.02.2006,

the petitioner submitted a Performance Guarantee of Rs.8,95,000/-. The dates of starting and completion of work were March 04, 2006 and July 03, 2006 respectively. The petitioner vide his letter dated March 02, 2006 raised an issue of drawing and the site having not been handed over to him till that date. The aforesaid letter was followed by his letter dated March 10, 2006 wherein he has reiterated his request regarding drawings. In his letter dated 27.03.2006 the petitioner reiterated his earlier request and had also stated that the rates of steel and other products have increased in the last one week, and requested that the price of the steel products need to be adjusted by the concerned department. On 07.04.2006 the respondent No.1 handed over preliminary drawings and sketches to the petitioner, which according to the respondent were enough to start the procurement of the steel material and fabrication of different members. This position has been accepted by the petitioner in his letter dated 10.04.2006 but reiterated his earlier stand regarding rates of steel products having been increased because of which he could not purchase the material in time due to non availability of the drawings. He makes a claim for difference in cost of steel products. On 12.04.2006 the respondent No.1 informed the petitioner that the issue of removal of electrical wire (high tension wire) has been taken with the department concerned and calls upon him to start the work of foundation, column, beam, ramp etc. on the basis of the available drawing. The respondent No.1 had also stated that there is no provision in the agreement for payment of increase and

decrease of any items. The petitioner again in his communication dated 26.04.2006 requested for the removal of electrical poll and handing over of the complete set of the drawings. He had also brought to the notice of the respondent No.1, the aspect of his labour sitting idle. Ultimately on 29.04.2006, the petitioner on the ground that the working drawings had not been given to him till that date, requested for closure of the agreement. On 16.05.2006, the respondent issued a show cause notice calling upon the petitioner to explain why the work could not be started and the earnest money and performance guarantee be not forfeited after the closure of the agreement. It appears that vide letter dated 30.05.2006 the respondent No.1 had terminated the contract and forfeited the earnest money and performance guarantee as was given by the petitioner. Suffice to state that even in the earlier communication before 30.05.2006 the petitioner had sought for the refund of performance guarantee and earnest money. In fact even in a communication subsequent to the communication dated 30.05.2006 of the respondent No.1 i.e. 06.06.2006 the petitioner requested for the refund of earnest money and the amount of performance guarantee with interest. In response to this letter of the petitioner, the respondent No.1 reiterated its stand of forfeiting the earnest money as well as the amount of the performance guarantee.

3. A legal notice was got issued by the petitioner on 20.06.2006 , wherein the petitioner apart from the request for refund of the earnest money and performance guarantee makes a claim for loss of business @ 15% and in the alternative

requested for appointment of Arbitrator. A similar notice was also got issued by the petitioner on 04.07.2006 and 15.07.2006 wherein the petitioner for the first time claimed legal expenses/cost of arbitration proceedings amounting to Rs.1,25,000/-.

4. I note from the record that the matter was referred to the arbitration of Mr.Diwarkar Garg, Ministry of Urban Development, Delhi. The following were the claims made by the petitioner before the Arbitrator.

<i>Claim No.</i>	<i>Particular</i>	<i>Amount</i>
1.	<i>Amount of Performance Guarantee</i>	<i>Rs.8,94,823/-</i>
2.	<i>Amount of Earnest Money</i>	<i>Rs.3,08,015/-</i>
3.	<i>Loss of Business @ 15%</i>	<i>Rs.26,84,467/-</i>
4.	<i>Interest @ 8% from 29/4/06 till 29/7/06</i>	<i>Rs.38,87,305/-</i>
5.	<i>Cost of arbitration proceeding inclusive of arbitrator fees, Counsel fees and other expenses</i>	<i>Rs.1,25,000/-</i>
6.	<i>Further compound Interest @ 18% from 30-07-06 till pende-lit and further till the date of payment of total amount to the claimant</i>	

5. Learned Arbitrator had allowed/rejected the claims in the following manner:-

“1.3.2 Finding and award on claim No.1 and claim No.2

As the forfeiture of E.M. & P.G. has already been held illegal under para 1.3.1 as such I award Rs.3,08,015/- and Rs.8,94,823/- against claim No.1 and claim No.2 respectively to the claimants.

1.3.3 Finding and award on additional claim No.1 (loss of business) = (Rs.2684467)

As the claimants had invoked clause 3(A) (C-13 dt. 29-4/06) for opting out of the contract and again referred 3(a) vide letter dt. 23/5/06 (C-17) i.e. reply of show cause notice of respondent dt. 16/5/06 (C-15). Hence, as per that clause they are not entitled for any loss of business or profit as such I award Nil amount against this claim.

1.3.4 Finding of arbitrator and award on Additional claim No.2 (Cost of arbitration proceedings Rs.1,25,000/-)

As the respondents have forced the claimant to seek for arbitration in spite of their own failure of fulfilling their own primary obligation of making available the drawing on site to start the work at the due date, hence, I conclude that claimants are entitled for cost. The claimants had not given documentary proofs to support the quantum of claim, however keeping in view of over all circumstances, I consider Rs.10,000/- as reasonable compensation for cost of proceedings as such I award Rs.10,000/- to claimant against this claim.

1.3.5 Finding of arbitrator and award on claim No.3; Interest @ 18%

The claimant had requested to close the agreement under clause 3A and return of EM & PG by their letter dt. 29/4/06. But as the department did not exceed to his request and failed to return the EM & PG, the claimant 18% interest on his deposit vide letter dt. 16/5/06 (C-16) demand of interest was further repeated in their letter dt. 23/5/06 (C-17), keeping in view of over all circumstances I conclude that interest at the rate of 10% per annum is reasonable interest and I award 10% per annum simple interest on Rs.12,02,838/- awarded under claim No.1 and claim No.2 above w.e.f. 16/5/06 till date of payment.

1.4 NOW, THEREFORE, on consideration of claims of the claimants and my findings above I do hereby make this award that the respondents do pay a sum of Rs.12,12,838/- (Rupees Twelve lacs twelve thousand eight hundred and thirty eight only) and interest @ 10% per annum on Rs.12,02,838/- w.e.f. 16/5/06 till date of payment in favour of claimants in full and final settlement of all the claims.”

6. As stated above, the challenge to the award is limited only to rejection of claim No.3 which is loss of business @ 15% and which has been dealt by the learned Arbitrator at page 49 under para No.1.3.3, which has been already reproduced above.

7. On perusal of the finding given by the learned Arbitrator, it is noted that the same has been rejected on the ground that in terms of clause 3(A) which was invoked by the petitioner himself for opting out of the contract, which stand was

reiterated by the petitioner in his letter dated 23.05.2006 and reply to the show cause notice dated 16.05.2006 did not stipulate grant of loss of profit.

8. Learned counsel for the petitioner would submit that the denial of loss of profit by the learned Arbitrator is totally erroneous without any basis when the learned Arbitrator himself in his award has held that the respondent No.1 has failed to adhere to the terms of the agreement and had in fact held that it had breached the agreement by not fulfilling its obligation of handing over the drawings and site of work on or before the date of start. He pointed out that the finding of the learned Arbitrator, wherein he concluded that the petitioner even without invoking clause 3(A) could have opted out of the agreement under Section 73 and 75 of the Indian Contract Act, 1872. Learned counsel for the petitioner relied upon the following judgments in support of his contentions:-

(a) Delhi State Industrial & Infrastructure Development Corporation Ltd. vs. Rama Construction Company 2014 (3) Arb. LR 116 (Delhi) DB

(b) DDA vs. Jagat Ram Trehan & Sons 187 (2012) DLT 305 (DB)

(c) Dwarka Das vs. State of Madhya Pradesh & Anr. AIR 1999 SC 1031

9. No-one is present for the respondent No.1.

10. Having heard the learned counsel for the petitioner, the only issue arises for consideration is whether the learned Arbitrator was justified in rejecting the claim of the petitioner for loss of profit of Rs.26,84,467/-. It is an accepted position of the contract that clause 3(A) stipulated as under:-

“Clause 3A: In case the work cannot be started due to reasons not within the control of the contractor within 1/8th of the stipulated time for completion of work, either party may close the contract in such eventuality, the Earnest Money Deposit and the Performance Guarantee of the contractor shall be refunded, but no payment on account of interest, loss of profit or damages etc. shall be payable at all.”

11. It is also an accepted position that the petitioner had called upon the respondent No. 1 to close the agreement keeping in view the aforesaid provision. Even in reply to the show cause notice dated 16.05.2006, it was the case of the petitioner that the agreement should be closed by invoking clause 3(A) and for returning the earnest money and performance guarantee. No doubt, in the reply the petitioner had made a claim for loss of business at 15%, if meaningfully read, the learned Arbitrator rejected the said claim of the petitioner by holding that the petitioner had invoked clause 3(A) in his communication dated 29.04.2006 and 23.05.2006 for close of the agreement in terms of clause 3(A), which did not provide for grant of loss of profit. In other words, the learned Arbitrator was primarily influenced by the fact that since, it was the case of the petitioner, that

the agreement needs to be closed, he was entitled, to the benefits which he would have got it on closure of the agreement like refund of earnest money and performance guarantee with interest and nothing more, which benefits have been granted by the Arbitrator.

12. On a pointed query to the learned counsel for the petitioner, had the agreement been closed by the respondent in terms of clause 3(A), whether the petitioner would have been entitled to the loss of profit @ 15%, the answer of the counsel was in the negative. He would qualify his statement by stating that since the agreement was not closed in terms of clause 3(A) but terminated by the respondent, the petitioner would be entitled to the loss of profit. Even though, the learned counsel for the petitioner may be right in contending so, but I am unable to accept the said submission of the learned counsel for the petitioner, keeping in view the reasoning and intent of the learned Arbitrator, in rejecting the said claim.

13. Further I note, the learned Arbitrator has granted Rs.10,000/- as cost of proceedings and awarded interest @ 10% p.a on Rs.12,02,838/- w.e.f. 16.05.2006 i.e. the date of issuance of show cause notice till the date of payment in favour of the petitioner in full and final settlement of all the claims. Surely, the grant of the benefit of interest and cost is a mitigating factor to compensate the loss, if any.

14. Coming to the judgments relied upon by the learned counsel for the petitioner, insofar as the judgment of this Court in the case of *Delhi State*

Industrial & Infrastructure Development Corporation Ltd. is concerned, the Division Bench was interpreting the scope of appeal under Section 37 of the Act. In the said case the challenge to the award was confined to that part of the award whereby the claim of the respondent for Rs.1,22,00,000 towards loss of profit at 10% of the unexecuted amount of the contract was allowed. The ground for challenge was, the claim for loss of profit could not have been allowed without the respondent proving any loss suffered and which had not been done. The learned Single Judge rejected the challenge by holding that the finding returned by the Arbitral Tribunal is a finding of fact.

The Division Bench after referring to the scope of appeal under Section 37 and also scope of Section 34 of the Act did not interfere with the order of the learned Single Judge. In para 9, of the judgment, the Division Bench held as under:-

9. We may further add that the parties, by agreeing to be bound by the arbitral award and by declaring it to be final, agree to be bound also by a wrong interpretation or an erroneous application of law by the Arbitral Tribunal and once the parties have so agreed, they cannot apply for setting aside of the arbitral award on the said ground. Even under the 1940 Act where the scope of interference with the award was much more, the Apex Court in Tarapore and Co. Vs. Cochin Shipyard Ltd., Cochin (1984) 2 SCC 680 and U.P. Hotels Vs. U.P. State Electricity Board, (1989) 1 SCC

359 held that the arbitrator's decision on a question of law is also binding even if erroneous. Similarly, in N. Chellappan Vs. Secretary, Kerala State Electricity Board (1975) 1 SCC 289 it was held that even if the umpire committed an error of law in granting amount, it cannot be said to be a ground for challenging the validity of the award; the mistake may be a mistake of fact or of law.

Insofar as the case in hand is concerned, it is not disputed that the learned Arbitrator had rejected the claim of the petitioner for loss of profit by taking a particular view including the communications and stand of the petitioner itself. The observation of the Division Bench in para 9, would be applicable in this case also. I do not think this case would be of any help.

15. Similarly the ratio of *Jagat Ram Trehan*, wherein the Division Bench of this Court relied upon the judgment of this Court in *DDA vs. J.S. Chaudhary* RFA (OS) 55/2011 decided on 30.11.2011, wherein a distinction has been carved out between the loss of contractor's profit as a head of damages in a terminated contract and a claim which the contractor may be able to establish in cases where the owner's breach can be shown to have had the effect of delay in completion by the contractor. The Division Bench applying the Hudson's formula which stipulates maximum 15% as damages in case of a delayed contract caused due to owner's breach including loss of profits contribution to fixed overheads, increase in prime costs which includes components of materials, plant, labour and salaries and sub

contracts and increase in off site and on site overheads caused due to delay in performance of contract. It is not the case of the petitioner that he had executed the contract which was prolonged due to the delay attributable to the petitioner. Rather it is a case of termination or close of contract. I am of the view that the said judgment would be of no help to the petitioner, in the facts of the case, especially in view of the reasoning of the learned Arbitrator.

16. Insofar as the reliance placed by the petitioner on the judgment of the Supreme Court in *Dwarka Das* is concerned, the claim for damages which was initially disallowed was held to be entitled to by the party where the government is proved to have committed breach by improperly rescinding the contract and for estimating the amount of damages the Court should make a broad evaluation instead of going into minor details. In the said judgment, the Supreme Court relied upon its earlier judgment where the party entrusting the work committed breach of contract, it was held that the contractor is entitled to claim damages for loss of profit. Keeping in view the facts of the case, specially the award of the Arbitrator, I am of the view that the judgment would be of no help to the petitioner. Additionally, I note, the Arbitrators in the first two cases and the Trial Court in the last case, dealt above, had accepted, the plea of the arbitrator for the grant of loss of profit/damages on certain reasoning. It is this conclusion which has been accepted and not disturbed by the higher Courts. That is not the case here. The Tribunal has rejected the claim.

17. The position of law insofar as the scope of Section 34 of Arbitration & Conciliation Act is quite well settled. This Court in the case of ***State Trading Corporation of India vs. Toepfer International Asia Pte. Ltd.*** 2014 (3) Arb. LR 105 (Delhi) (DB), wherein at pages 112-115, it has been held as under:-

"6.A Section 34 proceeding, which in essence is the remedy of annulment, cannot be used by one party to convert the same into a remedy of appeal. In our view, mere erroneous/wrong finding of fact by the Arbitral Tribunal or even an erroneous interpretation of documents/evidence, is non-interferable under Section 34 and if such interference is done by the Court, the same will set at naught the whole purpose of amendment of the Arbitration Act.

7. Arbitration is intended to be a faster and less expensive alternative to the courts. If this is one's motivation and expectation, then the finality of the arbitral award is very important. The remedy provided in Section 34 against an arbitral award is in no sense an appeal. The legislative intent in Section 34 was to make the result of the annulment procedure prescribed therein potentially different from that in an appeal. In appeal, the decision under review not only may be confirmed, but may also be modified. In annulment, on the other hand, the decision under review may either be invalidated in whole or in part or be left to stand if the plea for annulment is rejected. Annulment operates to negate a decision, in whole or in part, thereby depriving the portion negated of legal force and returning the parties, as to that portion, to their original

litigating positions. Annulment can void, while appeal can modify. Section 34 is found to provide for annulment only on the grounds affecting legitimacy of the process of decision as distinct from substantive correctness of the contents of the decision. A remedy of appeal focuses upon both legitimacy of the process of decision and the substantive correctness of the decision. Annulment, in the case of arbitration focuses not on the correctness of decision but rather more narrowly considers whether, regardless of errors in application of law or determination of facts, the decision resulted from a legitimate process.

8. In the case of arbitration, the parties through their agreement create an entirely different situation because regardless of how complex or simple a dispute resolution mechanism they create, they almost always agree that the resultant award will be final and binding upon them. In other words, regardless of whether there are errors of application of law or ascertainment of fact, the parties agree that the award will be regarded as substantively correct. Yet, although the content of the award is thus final, parties may still challenge the legitimacy of the decision-making process leading to the award. In essence, parties are always free to argue that they are not bound by a given "award" because what was labeled an award is the result of an illegitimate process of decision.

9. This is the core of the notion of annulment in arbitration. In a sense, annulment is all that doctrinally survives the parties' agreement to regard the award as final and binding. Given the agreement of the parties, annulment requires a challenge to the

legitimacy of the process of decision, rather than the substantive correctness of the award.

11.A perusal of the various grounds enunciated in Section 34 will show that the same are procedural in nature i.e. concerning legitimacy of the process of decision....

17. The Supreme Court in Rashtriya Ispat Nigam Ltd. Vs. Dewan Chand Ram Saran (2012) 5 SCC 306 refused to set aside an arbitral award, under the 1996 Act on the ground that the view taken by the Arbitral Tribunal was against the terms of the contract and held that it could not be said that the Arbitral Tribunal had travelled outside its jurisdiction and the Court could not substitute its view in place of the interpretation accepted by the Arbitral Tribunal. It was reiterated that the Arbitral Tribunal is legitimately entitled to take the view which it holds to be correct one after considering the material before it and after interpreting the provisions of the Agreement and if the Arbitral Tribunal does so, its decision has to be accepted as final and binding. Reliance in this regard was placed on Sumitomo Heavy Industries Ltd. Vs. ONGC Ltd. (2010) 11 SCC 296 and on Kwaliti MFG. Corporation Vs. Central Warehousing Corporation (2009) 5 SCC 142. Similarly, in [P.R. Shah, Shares & Stock Broker \(P\) Ltd. V. B.H.H. Securities \(P\) Ltd.](#) (2012) 1 SCC 594 it was held that a Court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating evidence and an award can be challenged only under the grounds mentioned in Section 34(2) and in the absence of any such ground it is not possible to reexamine the facts to find out whether a different decision can be arrived at.

A Division Bench of this Court also recently in National Highways Authority of India Vs. M/s. Lanco Infratech Ltd. MANU/DE/0609/2014 held that an interpretation placed on the contract is a matter within the jurisdiction of the Arbitral Tribunal and even if an error exists, this is an error of fact within jurisdiction, which cannot be reappreciated by the Court under Section 34 of the Act. The Supreme Court in Steel Authority of India Ltd. Vs. Gupta Brother Steel Tubes Ltd. (2009) 10 SCC 63 even while dealing with a challenge to an arbitral award under the 1940 Act reiterated that an error by the Arbitrator relating to interpretation of contract is an error within his jurisdiction and is not an error on the face of the award and is not amenable to correction by the Courts. It was further held that the legal position is no more res integra that the Arbitrator having been made the final Arbiter of resolution of dispute between the parties, the award is not open to challenge on the ground that Arbitrator has reached at a wrong conclusion."

18. I do not see any illegality in the award of the learned Arbitrator, whereby the claim of the petitioner for loss of profit was rejected. The present petition is dismissed with no order as to costs.

(V.KAMESWAR RAO)
JUDGE

JANUARY19, 2015/km