

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

Judgment reserved on February 09, 2015

Judgment delivered on February 18, 2015

+ **O.M.P. 294/2006**

M/S TRG INDUSTRIES PVT. LTD

..... Petitioner

Through: Mr.Vivekanand, Advocate

versus

M/S N.H.P.C LTD

..... Respondent

Through: Mr.V.P.Dewan, Advocate with
Mr.Sanjay Dewan, Adv.

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

The challenge in this petition is to the Award dated March 24, 2006, whereby the learned Arbitrator has dismissed the claims made by the petitioner herein.

Facts

2. On January 20, 1985 a notice inviting tender for the work of construction of Garrage Head Regulator and other appurtenant works for Tanakpur Hydroelectric Project situated in the state of Uttar Pradesh (now Uttranchal) was issued by the respondent corporation. The petitioner submitted its tender on April 22, 1985 which was accepted and a letter of intent (LOI) was issued on October 15, 1985 followed by letter

of award dated December 26, 1985. A formal agreement was executed between the parties on February 05, 1986. The terms of contract stipulated that the petitioner was to commence the works within 30 days after issuance of letter of award. Any failure on the part of the petitioner would have also led to cancellation of project and forfeiture of money. Clause 13 of the Contract stipulated for grant of mobilization advance upto a maximum limit of 5% of the contract value, which was interest bearing recoverable advance. The Contract also provided for interest bearing recoverable advance upto maximum of 10% for construction plants and equipments.

3. The petitioner in total obtained an amount of Rs.1,77,61,764/- from the respondent pursuant to this clause in the Contract.

4. It was the case of the petitioner before the learned Arbitrator that immediately after the issuance of letter of award, a site office was set up on November 15, 1985 and with a right earnest to commence the work mobilized its resources, machinery and plant from different work sites within and outside the State, major part of which came from its work of Hydroelectric Project, Salal, J&K.

5. The case of the petitioner was also that despite insisting upon the officer of the respondent of their obligation to make available site so as to enable it to set up crushing plant, offices, stores, mechanical work shop,

labour huts, staff quarters etc., the respondent failed to provide the site for the purpose. Only a small fraction was provided. In the absence of the site and the respondent not getting clearance of various authorities, the work was seriously hampered and could be commenced only in late November, 1986 when an area of 96 hectares was handed over to the petitioner by the respondent.

6. It was its case that for the period during which the labour and machinery remained idle due to non-availability of site and also for the damages suffered by it, the petitioner raised disputes as per the terms of the agreement between the parties. A reference was made and the respondent appointed a learned Arbitrator, who was to make an award on the following issues:-

(i) Waiver of interest till November 15, 1986 on mobilization, machinery and equipment advance.

(ii) Idle charges of machinery and manpower from November 15, 1985 to November 15, 1986.

7. The first Arbitrator could not conclude the arbitration proceedings due to his untimely death. The vacancy was filled by a new Arbitrator, who made an award dated January 31, 1995 and the same was filed in this Court for making Rule of the Court.

8. It is noted that both the parties were aggrieved by the Award and

filed their respective objections under Sections 30 & 33 of the Indian Arbitration Act, 1940. When the objections came up for hearing before the learned Single Judge on December 20, 2000, the learned Single judge after noting that both the parties are aggrieved by the Award and none of them has prayed for making the award Rule of the Court, was of the view that the best course was to set aside the award and to make appointment of another Arbitrator to resolve the disputes raised by the parties.

9. Mr. Justice, N.C. Kochhar (Retired) was appointed as a Sole Arbitrator, who entered reference.

10. When the proceedings were at the arguments stage, Justice Kochhar unfortunately expired, which resulted filing of an application under Section 15 of the Arbitration & Conciliation Act, 1996, pursuant thereto Justice Devindra Gupta, retired Chief Justice of the Andhra Pradesh High Court was appointed as a new Arbitrator. An issue arose whether the Indian Arbitration Act, 1940 or the new Act of 1996 would govern the proceedings. It was decided and held that the 1996 Act would apply to the proceedings.

11. It may be relevant to state here that a supplemental agreement was executed between the parties on March 17, 1987. It was the case of the respondent herein that the said agreement was executed on the request made by the petitioner herein vide its letter dated July 19, 1986, which

request was accepted and a modified letter of award dated November 18, 1986 was issued which was accepted by the petitioner resulting in the execution of the supplemental agreement as referred above. It was the case of the respondent that the supplemental agreement reviewed and modified the scope of work including the time for completion of work and thus there was novation of contract. Because of novation of the agreement, the petitioner is not entitled to the claims.

12. The learned Arbitrator agreed with the respondent and rejected the claims by holding, there was a novation of contract; no claim for compensation was made by the petitioner before the execution of supplemental agreement; nothing prevented the petitioner to claim damages from the respondent when it executed the supplemental agreement.

13. Learned counsel appearing for the petitioner would submit that the learned Arbitrator has erred in coming to a conclusion, there was a novation of contract while rejecting the claims of the petitioner. He has taken me through the letter dated October 15, 1985, wherein it was stipulated, the Engineer Incharge would be within its right to take out the work or any part thereof from the contractor and may get it done through other contractor engaged for other part of the barrage or through any other agency at the risk and cost of the contractor. The contractor in the

eventuality mentioned, shall not be entitled to claim revision of rates due to deviation or any compensation whatsoever from the corporation. He would also refer to para No.2 of the said letter, wherein it was stipulated that in case the progress of work of other contractor engaged in construction of the balance part of the barrage lags behind the schedule, the Engineer Incharge shall be entitled to entrust the work or part of work of other contractor to the contractor engaged for this contract package. He would also refer to Clause 14.1 of the Contract to show that the contractor was to commence the work within 30 days after the issuance of letter of award and shall proceed with the same with expedition and without any delay. According to him, the petitioner had mobilized the resources and machinery and staff, regrettably the respondent had not given the site as was required to be given so as to enable the petitioner to install the machinery etc. He has also drawn my attention to the letter dated December 26, 1985 to contend that the letter of award itself suggested change of scope of work which would also be applicable on the quantities specified in modified schedule A. It is his submission, when the letter of award itself suggested such a procedure the change effected could not have been construed as a novation of contract. He would highlight the reasoning given in the agreement for revising the scope of work, i.e., *“to minimise the interference of the works with other*

contractor's work” and not any request of the petitioner. He would also draw my attention to a stipulation to the agreement that a supplemental agreement was in any way effect or to modify the provisions of original agreement. The terms and conditions of the original agreement were to remain binding upon the parties. He had also drawn my attention to clause 18 of the contract to contend that any deviation in original specifications and drawings shall form the original part of the contract as if originally provided for and the contractor was required to carry out the same on the same conditions in all respects on which he agreed to do the same under the contract. He would also refer to clause 39.2 of the contract to contend, the time was not the essence where the delay had occurred due to increase in the quantity of work to be done under the contract as per clause 18.

14. He would also state that the learned Arbitrator had erred in rejecting the claims by overlooking the documents and conduct of the parties before the execution of the supplemental agreement dated March 17, 1987 for the reason that supplemental agreement itself recites the reasons and background under which it came to be executed. He would state in terms of the supplemental agreement consolidation of the items of the works awarded to other parties and agencies took place. He would also state that the learned Arbitrator has failed to consider that it is the

respondent who was responsible for delay in handing over the possession of the site and which aspect had bearing on the claims made by the petitioner. He would state that as per the provisions of the supplemental agreement the provisions of the original agreement remained binding and as such the invocation of Section 55 of the Contract Act was not justified. He would state that change in the scope of work, quantities, completion date is not on account of a fresh contract but by virtue of letter of award dated December 26, 1985. He would state that there was no requirement to serve notice to claim damages. He would rely upon the following judgments in support of his contention:-

- i. *ONGC v. Saw Pipes Limited*, 2003 (2) ALR 5 SC
- ii. *Narmada Enterprises v. State of MP*, 2003 (2) ALR 420 (MP)
- iii. *McDermott International Inc. V. Burns Standing Co. Ltd. & Ors.*, 2006 (2) ALR 498 (SC)
- iv. *Hind Constructions v. State of Maharashtra*, AIR 1979 SC 720

15. On the other hand, Mr.V.P. Dewan, learned counsel for the respondent, would support the conclusion of the learned Arbitrator in dismissing the claims. He would state that the supplemental agreement was entered at the request of the petitioner vide letter dated July 19, 1986 which has been noted by the learned Arbitrator and in view thereof, the objections filed by the petitioner to the award are liable to be dismissed.

He would state, as pointed out by the learned Arbitrator, at no point of time before the execution of the supplemental agreement, the petitioner had reserved its right to claim damages in the nature claimed by the petitioner before the learned Arbitrator. He would also state that new dates for starting and completion were fixed. Any claim like interest charges and idle charges for the period before supplemental agreement were “excepted matters” and could not have been claimed. He would state that the learned Arbitrator was right in dismissing the claims more particularly on the ground of waiver. The claims were afterthought and were rightly rejected by the learned Arbitrator. He would rely upon the following judgments in support of his contention:

- i. *Puri Constructions (P) Ltd. v. UOI*, AIR 1989 SC 777.
- ii. *SAIL v. Gupta Brothers Steels Ltd.*, (2009) 10 SCC 63.
- iii. *Bhagwati Oxygen Ltd. v. Hindustan Copper Ltd.*, 6 SCC 462.
- iv. *Marked Vanaspati & Allied Industries v. Union of India*, (2007) 7 SCC 697.
- v. *State of Rajasthan v. Puri Constructions Ltd.*, (1994) 6 SCC 485.
- vi. *Sumita Conductors Ltd. v. Euro Alloys Ltd.*, (2001) 7 SCC.
- vii. *Sumitomo Heavy Industries Ltd. v. Oil and Natural Gas Corporation Ltd.*, (2010) 11 SCC 296.
- viii. *McDermott International Inc. V. Burn Standard Co. Ltd. & Others*, 2006 (2) Arb. LR.

16. Having considered the rival submissions made by the parties, the only issue which arises for consideration is whether the learned Arbitrator has rightly dismissed the claims of the petitioner. The admitted facts are, pursuant to letter of award dated December 26, 1985, contract dated February 05, 1986 was executed. The Site which was to be given to the petitioner by the respondent was not handed over. The respondent had paid 5% and 10% of the contract amount as mobilization advance to the petitioner. The said amount was to the tune of Rs.1,77,61,764/-. The mobilization advance was to be recovered from the petitioner's bills in monthly instalments. The interest was to be calculated on the outstanding amount of the principal at the close of each month.

17. There has been correspondence between the parties. The claim of the petitioner was primarily for waiver of interest on the mobilization advance. A letter of award dated November 18, 1986 was issued modifying the scope of work, material, prices, period of execution of the work. Pursuant thereto a new contract was executed between the parties on March 17, 1987. It was inter-alia stipulated in the contract, except as provided in the new contract, in any way, effect/modify the provisions of the original agreement. On novation, the learned Arbitrator reasoning

was inter-alia the following:-

(a) The agreement stood materially altered and substituted by scope of work as mentioned in the revised letter of award.

(b) The new schedule of quantities and price came into existence.

(c) The new completion date came into existence.

(d) Schedule B, C & E annexed to the agreement also stood completely substituted by new Schedules. 'B' being Schedule of Material to be issued to the contractor, 'C' is the construction/completion schedule of work and compensation for delay. 'E' is the construction schedule of work in Bar Chart.

The learned Arbitrator also records the petitioner's case that after execution of the supplemental agreement the petitioner was obliged to adhere to the new and modified scope of work and execute only that work which was mentioned in the supplemental agreement. The learned Arbitrator after noting the above was of the view that contract becomes voidable provided the matter in issue can be brought within the ambit of first para of Section 55 and it is only in that event that the promisee would be entitled to claim damages and not otherwise. No such notice was given by the petitioner.

18. I note from the impugned award, the petitioner pleading time was not the essence of the contract and the respondent pleading otherwise. No

doubt, that the contract stipulated that time was the essence of the contract but at the same time there is provision for extension of time. The position of law as exists, it is clear that when a stipulation exists in the contract for extension of time in concluding the work time was not the essence of the contract. Reference in this regard can be made to the judgment as relied upon by the learned counsel for the petitioner, in *McDermott International Inc. (supra)* and *Hind Construction (supra)*.

19. But, the other reasoning given by the learned Arbitrator is also relevant. The learned Arbitrator has also rejected the claim on the conduct of the petitioner in not raising the claim at the appropriate time. It was his conclusion that no claim for compensation due to machinery and staff remaining idle was made before or at the time when the supplemental agreement was executed. It was his conclusion that the claim for the first time laid after the supplemental agreement was executed. He has also held that the supplemental agreement was not executed subject to the petitioner's right to claim any compensation based upon alleged breach on the part of the respondent of the terms of the earlier agreement. According to him, if there was a delay in handing over the site at the most the petitioner would be entitled to extension of time for completion of the terms and no to any compensation. Even if the machinery and staff remained idle nothing prevented the petitioner

from reserving its right to claim compensation from the respondent when the petitioner decided to execute the modified work in terms of the supplemental agreement. The learned Arbitrator has given a finding without any objection and voluntarily the petitioner agreed to execute the modified work in terms of the agreement which nowhere provided for any compensation for one year delay which has occurred till then. Therefore, the petitioner is estopped from claiming any compensation. The learned Arbitrator has also invoked the doctrine of waiver to unsuit the petitioner. The learned arbitrator has by relying upon the judgment of the supreme court in *Saw Pipes Limited case (supra)* has held that the Arbitral Tribunal is required to decide the dispute in accordance with the terms of the contract. If the award is in violation of the contract or against the provisions of the Act, then the same is patently illegal. It is noted by the learned Arbitrator that it was the petitioner who made a request for mobilization advance fully understanding that it was liable to pay interest on such advance. The petitioner could have avoided obtaining advance but he did utilise the advance received in terms of the contract and it was bound to pay interest thereon. The learned Arbitrator held that if the petitioner could not utilise the machinery, nothing prevented the petitioner from removing the machinery from the site. From the above it is clear that the learned Arbitrator has denied the

claims looking at the conduct of the petitioner through the correspondence interpreting the provisions of the contract by holding that the contract envisaged payment of interest on the advance with no stipulation for waiver of interest coupled with the fact that the petitioner would have avoided receiving mobilization advance or could have removed the machinery from the site and used it elsewhere. The said view of the learned Arbitrator is a correct view looking at the conduct and the provisions of the contract. It cannot be the case of the petitioner that such a view is perverse. At the most it can be argued that what has been concluded is not the only view. The petitioner may be correct in saying so but that cannot be a ground to set aside the award. The challenge to the award substantively is on the ground that the same is in conflict with the public policy, as find mention in Section 34 of the Arbitration and Conciliation Act. The public policy has been defined by the Supreme Court in *Saw Pipes (supra)* wherein the Supreme Court inter alia held that the phrase public policy of India used in Section 34 in context is required to be given a wider meaning. It can be stated the concept of public policy connotes some matters which concerns public good and public interest. If the award is on the face of it patently in violation of statutory provisions cannot be said to be in public interest as such an award is likely to adversely affect the administration of justice.

The Supreme Court in *Saw Pipes Ltd. (supra)* has held that 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 or (d) in addition if it is patently illegal.

20. The illegality must go to the root of the matter and if the illegality is of trivial nature, it cannot be held that the award is against public policy. Award could also be set aside if it is so unfair and unreasonable then it shocks the conscience of the Court, such award is opposed public policy and is required to be adjudged void.

21. The legal position was crystallized in the latest decision in *Steel Authority Ltd. v. Gupta Brothers Steel Tubes Ltd.*, 2009 (10) SCC 63.

“18. It is not necessary to multiply the references. Suffice it to say that the legal position that emerges from the decision of this Court can be summarised thus:

- (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.*
- (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 and such*

error is not an error on the fact of the award.

- (iii) If a specific question of law is submitted to an 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 provisions of law or against the terms of contract would be patently illegal.*
- (v) When the parties have deliberately specified the amount of compensation in express terms, the party who has suffered by such breach can only claim the sums specified in the contract and not in excess thereof. In other words 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, court should not interfere with the award.*
- (vii) It is not permissible to a court to examine the correctness of the findings of an arbitrator as if it was sitting in appeal over his findings.*

22. This Court in *National Highways Authority of India v. Unitech-NCC Joint Venture* reported in 2011 (Suppl. 1) Arb. LR 94 (Delhi) (DB) while dealing with the scope of interference by the Court where the

Arbitrator had given its finding on the interpretation of the terms of the contract after relying on various case laws has observed as under:-

“7. It is obvious that the interpretation of the Contract forms the fulcrum of the dispute between the two adversaries before us. As already mentioned, the power to interpret the Contract was reposed in the „Engineers“ as per Clause 5.2.1. of the Contract. The Engineers, on a thorough and lucid examination of the contract, have concluded that escalation was contractually payable on the Contract itself as well as on any variation thereto. Even under the regime of the repealed Arbitration Act, 1940, their Lordships have opined in the celebrated Judgment of Sudarsan Trading Company –vs- Government of Kerala, (1989) 2 SCC 38 that –“Once there is no dispute as to the contract, what is the interpretation of that contract, is a matter for the arbitrator on which the court cannot substitute its decision”. The continuity of this opinion is manifest from a reading of H.P. State Electricity Board –vs- R.J. Shah, (1999) 4 SCC 214 inasmuch the Court reiterated the position that – “when the arbitrator is required to construe a contract then merely because another view may be possible the court would not have justified in construing the contract in a different manner and then to set aside the award by observing that the arbitrator has acceded the jurisdiction in making the award”. Numaligarh Refinery Limited –vs- Daelim Industrial Company Limited, (2007) 8 SCC 466 records

that with regard to the interpretation of a contract, the decision of the Arbitrator should not be interfered with by the Court. After advertng to Tarapore & Company –vs- Cochin Shipyard Limited, (1984) 2 SCC 680, their Lordships recorded that there can be no quarrel with the proposition that – “if a question of law is specifically referred to by the parties to the arbitrator for decision, award of the arbitrator would be binding on the parties and court will have no jurisdiction to interfere with the award even on ground of error of law apparent on the face of award”. Very recently, in McDermott International Inc. –vs- Burn Standard Co. Ltd., (2006) 11 SCC 181 after perusal of a plethora of precedents, their Lordships have enunciated this aspect of the law in the following manner:-

112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a

contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. (See Pure Helium India (P) Ltd. v. ONGC, AIR 2003 SC 4519 and D.D. Sharma v. Union of Indi, (2004) 5 SCC 325.)

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.

114. The above principles have been reiterated in Chairman and MD, NTPC Ltd. v. Reshmi Constructions, Builders & Contractors, AIR 2004 SC 1330, Union of India v. Banwari Lal & Sons (P) Ltd, AIR 2004 SC 1983, Continental Construction Ltd. v. State of U.P., (2003) 8 SCC 4 and State of U.P. v. Allied Constructions, (2003) 7 SCC 396.

8. In the case before us, the Arbitral Tribunal has unequivocally upheld the interpretation of the contract expressed by the „Engineers” who have been contractually empowered by the parties to impart meaning to the sundry clauses of the subject Agreement.

9. It would be perilous and constitutionally unjustifiable to ignore and lose sight of Parliament’s endeavour to curtail curial interference in arbitration awards. Section 34 of

A&C Act does not contemplate the existence of errors on the face of the Award, which the Supreme Court has clarified to be beyond judicial interference. The learned Single Judge has, in the impugned Order, rendered a threadbare consideration of the terms of the Contract and his conscience has not been provoked in the least bit. The learned Single Judge has failed to find any infraction of the public policy of India. However much we stretch our thinking, we cannot conceive of a construction of the contract contrary to that carried out by the Competent Authority and more particularly by the learned Single Judge. Interference by us will be justified if the views of the learned Single Judge can be perceived as a perversity.”

23. From the above findings of this Court it is clear that the award can be set aside in terms of Section 34(2) of the Act. The courts have no jurisdiction for setting aside the award on any other grounds other than those specified in the Section. The courts are not supposed to sit in appeal reappreciate the evidence as an appellate court. This observation has been made by the Supreme Court in its recent judgment in the case of *P.R. Shah, Shares and Stock Brokers Pvt. Ltd. v. B.H.H. Securities Pvt. Ltd. and others*, 2012 (1) SCC 594.

24. Also in the case of *Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd.*, 2007 (8) SCC 466 wherein it was held that the interpretation

given by the Arbitral Tribunal to the contract is a plausible interpretation, the Court should not interfere even if a different interpretation is plausible. It is the consistent view of the Supreme Court that award is a well reasoned based on substantive law and within the four corners of the terms of the contract, there is no patent illegality on the face of it. The award cannot be set aside only because a party feels that the award is unfair or unreasonable unless the unfairness and the unreasonableness shocked the conscience of the Court (ref. *J.G. Engineers Pvt. Ltd. v. Union of India and Another*, 2011 (5) SCC 758.)

25. Nothing has been shown to me, in that regard. Even in *McDermott International Inc. (supra)* it has been held that unless the illegality is of such nature that it is not only patent but goes to the very root of the matter it can be said that that the award is against the public policy. In other words if the illegality is not patent or does not go to the very root of the matter but a frivolous or trivial illegality such an award is not against public policy. In a recent judgment Supreme Court in the case of *Navodaya Mass Entertainment Ltd. v. M/s. J.M. Combines*, Civil Appeal No.7128-7129 of 2011 decided on August 26, 2014, has held that once the arbitrator has applied his mind to the matter before him, the Court cannot re-appreciate the matter as if it were an appeal and even if two views are possible the view taken by the Arbitrator would prevail.

26. For the foregoing reasons I do not think that grounds exists for this Court to interfere with the impugned award. The petition is dismissed. No costs.

(V.KAMESWAR RAO)
JUDGE

FEBRUARY 18, 2015
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