

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

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O.M.P. No. 400/2007

14th August, 2015

SHRI BALMUKUND SHARMA

..... Petitioner

Through: None.

Versus

CEMENT CORPORATION OF INDIA & ANR.

..... Respondents

Through: Mr. Arvind Kumar Gupta,
Advocate with Mr. Abhishek
Goyal, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This petition under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Act') impugns the Award dated 28.2.2007 by which the Arbitrator dismissed the claim petition for recovery of moneys including damages suffered by the petitioner on account of alleged breach of contract by the respondent.

2. The facts of the case are that the respondent in the year 2002 issued a tender of sale by it of limestone from Pathri Mines of Mandhar

Cement Factory (Chattisgarh). The Work Order was issued on 20/26.8.2002 for supply of 80,000 metric tonnes per annum. The case of the petitioner/claimant was that he was willing to deposit the amount claimed in the Work Order dated 20/26.8.2002 but he was informed by the General Manager of the respondent that the mining lease in favour of the respondent by the State Government had not been renewed i.e in the absence of the mining lease, the respondent could not have sold the limestone to the petitioner/claimant under the Work Order dated 20/26.8.2002. Petitioner/claimant has claimed that on account of breach of contract by the respondent in failing to supply the limestone in terms of the Work Order dated 20/26.8.2002, he suffered losses including of penalty levied by South East Central Railways to which claimant/petitioner had agreed to supply the limestone. Petitioner also claimed amounts towards expenditure incurred by him towards labour, hiring of the machinery etc etc for taking of limestone from the respondent under the subject Work Order. The details of the claims made by the petitioner/claimant before the Arbitrator read as under:-

“a) That due to unilateral breach and frustration of the contract the Claimant could not supply the limestone/ballast to the South East Central Railway, Raipur Division and therefore, the said South East Central Railway deducted a shortfall penalty which was duly confirmed by their letter dated 10.02.2005 and recovered from the

Claimant which is solely attributable to the cancellation/frustration of the contract with the respondent.

An amount of Rs.8,39,550/-

b) Amount paid to the transporter for loading and transporting the limestone from the site as an amount of Rs.4,00,000/- per month for five truck and one loader and advance of Rs.2,00,000/- was paid on that amount.

An amount of Rs.2,00,000/-

c) The amount paid on making tent for the worker near the site

An amount of Rs.59,300/-

d) The amount paid for the tools purchased for extracting and mining the limestone at the site for the worker

An amount of Rs.1,02,635/-

e) Advance paid to the labours

An amount of Rs.84,069/-

(f) Advance paid to the labours which remained idle for three weeks

An amount of Rs.26,398/-

(g) Amount paid for hiring one atlas copco compressor with two drill jackhammers for drilling and mining the limestone which was hired @ Rs.75,000/- per month

An amount of Rs.75,000/-

(h) The Claimant traveled from Raipur to Delhi and had meeting with the Respondent in respect of the said contract.

An amount of Rs.1,17,000/-

(i) Estimated business profit which although is about Rs.38,40,000/-. However, the Claimant is restricting his Claim to the minimum i.e. at 10% of the contract value with the South East Central Railway to whom the Claimant was to supply the limestone. Total contract value was Rs.2,17,40,000/-

An amount of Rs.21,74,000/-

The claimant claimed for the total loss of Rs.36,77,952/- alongwith interest at the commercial rate of 18% per annum from 1st October,

2003 uptill 31st January, 2005. The claimant also claimed interest pendente lite and future interest @ 18% per annum w.e.f. 1st February, 2005 on the above amounts until the date of payment.”

3. The respondent claimed before the Arbitrator that the contract was a conditional contract in view of Clause 7 of Part-II of the Contract/Work Order dated 20/26.8.2002 and which specifically provided that State Government's permission is required for sale of limestone and once no permission is granted for sale of the limestone, contract itself becomes void. Respondent also contended that the contract not only was only a conditionally accepted contract but also the petitioner/claimant himself knew as early as on 6.9.2002 i.e barely about after 10 days of the Work Order dated 20/26.8.2002 being issued that the respondent has not been granted licence to sell the limestone by the State Government, and therefore, the contract itself failed.

4. In terms of the pleadings of the parties, the Arbitrator framed the following issues:-

“1. Whether the issuance of work order by the Respondent was final or concluded contract?

2. Whether the contract entered into between the claimant and respondent is void ab-initio?

3. Whether the arbitration proceedings are liable to be stayed as Respondent has been declared sick and the proceedings are pending before BIFR?
4. Whether at the time of entering into the contract, the Claimant had the knowledge of the fact that mining lease was not granted to the Respondent by the State Government? If so to what effect?
5. Whether the Respondent committed breach of the agreement?
6. Whether the Claimant have suffered any loss on account of breach committed by the Respondent? If so, what amount the Claimant is entitled to recover from the Respondent?
7. Whether the Claimant is entitled to interest, if so at what rate?
8. Relief.”

5. The petitioner/claimant examined one witness being the son and attorney of the petitioner/claimant and the respondent also examined one witness, Sh. V.K. Arora, its employee.

6. Arbitrator in terms of the impugned Award has held that the Contract/Work Order dated 20/26.08.2002 was a conditional contract and this conditional contract failed on account of the respondent not being granted license by the State Government to extract the limestone from Pathri Mines of Mandhar Cement Factory (Chattisgarh). Arbitrator also has held that the petitioner/claimant knew as early as on 6.9.2002 because petitioner/claimant himself in his letter dated 6.9.2002 stated that he had been informed by the General Manager that the mining lease was not

granted, and that otherwise the claimant/petitioner would have deposited the price and the royalty charges for starting the work of mining. Arbitrator also has arrived at a finding of fact that petitioner/claimant therefore himself did not deposit any price or royalty charges because petitioner knew that mining lease was not granted to the respondent by the State Government.

7. So far as the issue of losses is concerned, the Arbitrator has given a finding against the petitioner/claimant that except a self-serving affidavit and filing certain labour registers, no proof was filed of any actual payments having been made to the labour or for machinery or for equipments etc and hence petitioner/claimant has/had failed to prove the losses and which in any case could not be granted because the contract was never capable of being enforced and had become void on account of non-grant of license by the State Government to the respondent.

8. No one has appeared for the petitioner in spite of this case being on the final board of this Court since 29.06.2015 and notice has been displayed since last 1½ month that the arbitration matters in finals will be taken up. The matter has been argued by the counsel for the

respondents for over 45 minutes but still no one appeared for the petitioner.

9. I have gone through the record with the assistance of the counsel for the respondents and I find that in the Award there is no error of law or error of violation of any contractual provision or any perversity for this Court to interfere in exercise of its jurisdiction under Section 34 of the Act. An Award can be interfered only if it is against the law [Section 28(1)(a) of the Act], or the Award is against the contractual terms between the parties [Section 28(3) of the Act] or the same is perverse. This is the ratio of the two Supreme Court judgments in the cases of *Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd., (2003) 5 SCC 705* and *Oil & Natural Gas Corporation Ltd. Vs. Western Geco International Ltd., AIR 2015 SC 363*. Putting it differently once two views are possible, this Court will not interfere if the Arbitration Tribunal arrived at one possible and plausible view.

10. In my opinion, once the petitioner/claimant himself knew as early as on 6.9.2002 that the contract was not capable of being performed, the contract which was a conditional contract as per Clause 7 of Part-II of the Contract/Work Order dated 20/26.8.2002, stood frustrated and became

void. This is a possible and plausible finding arrived at by the Arbitrator. Arbitrator also notes that once the petitioner/claimant himself knew this fact within about 10 days of issuing of the Work Order, petitioner for that reason did not deposit the royalty charges and the price and hence petitioner now therefore cannot claim any alleged losses or damages on account of alleged breach by the respondent. Arbitrator has also arrived at a finding that since no actual proof of payments is shown, petitioner cannot be said to have proved that he suffered any losses on incurring of expenditure.

11. I have gone through the grounds which are urged by the petitioner as per the grounds A to J of the petition and I find that none of the grounds demonstrate that the Award is in any manner illegal or violative of the conditions of the contract or perverse for this Court to interfere. Most of the objections are only general objections of a few lines and objections do not show that the contract did not become void to the knowledge of the petitioner on account of petitioner's knowledge as early as on 6.9.2002 of non-grant of mining licence to the respondent by the State Government. The objections also do not deal with the aspect that

the petitioner failed to file any proof of having incurred expenditure for the claim towards expenditure etc.

12. In view of the above, there is no merit in this petition and the same is therefore dismissed. Parties are left to bear their own costs.

AUGUST 14, 2015
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VALMIKI J. MEHTA, J.