

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

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Judgment Reserved on: 24th March, 2015
Judgment Delivered on: 15th April, 2015

+ **FAO(OS) 273/2014**

RAKESH KUMAR AND COMPANY

.....Appellant

versus

UNION OF INDIA THROUGH THE DY. CHIEF ENGINEER.

....Respondent

Advocates who appeared in this case:

For the Petitioner: Mr Sudhir Nandrajog, Sr Advocate with Mr S.W. Haider, Advocate.

For the Respondents: Mr Jagjit Singh, Mr Shivanshu Bajpai and Ms Nisha, Advocates

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J

1. This appeal under Section 37 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'Act') impugns order dated 05.03.2014 passed under Section 34 of the Act whereby the learned Single Judge has set aside the award with regard to Claims No.1 and 3(b) and has remitted the same to the Arbitral Tribunal. The award

with regard to the other claims has been upheld. The respondents have not filed any appeal or cross objections impugning the dismissal of the objections with regard to the other claims.

2. The appellant was awarded the contract for construction of RCC/MCC of Sub-structure on well foundation/open foundation along with the miscellaneous protection works of various bridges between Madhopur Punjab (MDPB) Budhi Station of Ferozepur Division in connection with doubling of JUC-PTK-JAT Section.

3. The Claim No.1 was in respect of the work involving sinking of wells. The dispute, as raised before the Arbitral Tribunal, was whether the said work was covered by NS Item No.6 or NS Item No.7 of the BOQ (Bill of Quantities). The Arbitral Tribunal has held that the work carried out by the appellant was covered under NS Item No.6 and not under NS Item No.7 as contended by the respondents. The scope of work under NS-6 and NS-7 was different and the rates for NS-7 were lower than the rates for NS-6. The appellant had claimed the rates for work under NS-6 and the respondent had sanctioned the same under NS-7.

4. The three member Arbitral Tribunal comprising technical persons of the concerned field, after considering the material on record has returned a finding that the work carried out by the appellant was covered under NS-6 and not under NS-7 and, accordingly, has

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awarded the claim of the appellant for payment in terms of NS-6. Claim No.3(b) pertained to deductions made by the respondent from the final bill. The Arbitral Tribunal, after considering the Wholesale Price Index, has held that the recoveries made by the respondent were outside the scope of the agreement and thus has awarded the claim of the appellant.

5. The learned Single Judge by the impugned order held that there is no application of mind by the Arbitral Tribunal to construe the BOQ items in question. The learned Single Judge held that the award does not show that while deciding Claim No. 1 the Arbitral Tribunal even looked at or analysed the language used in these BOQ items. It is further held that the award does not show that the Arbitral Tribunal applied its mind to the meaning and content of the said BOQ items and there was no interpretation contained in the award and merely on account of use of chiselling equipments for cutting edges of boulders, the claim has been allowed. The learned Single Judge held that the award of the Arbitral Tribunal on Claim No.1 suffers from non-application of mind to the relevant contractual terms. With regard to Claim No. 3(b), the learned Single Judge held that though the Arbitral Tribunal has observed that price variation would be applicable only beyond 5%, it does not state whether the price variation in the present case was within 5% or beyond 5%. The learned Single Judge held that the award is cryptic on this claim and has thus set aside the same.

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6. The learned counsel for the appellant contended that the Arbitral Tribunal comprised of technical persons, who are well aware with the method and technology adopted in the kind of work that was carried out by the appellant. He further contended that since the work was to be executed in sensitive areas of Jammu & Kashmir blasting was not permitted and as such the appellant had to use alternative more expensive methods for execution of the work and the same was covered under NS-6 and not under NS-7, which only covered open chiselling. He contended that NS-6 did not involve only blasting method but involved other methods as well including open grabbing, chiselling or any other established method. He further contended that the Arbitral Tribunal had examined the material placed by the parties on record and after due consideration of the same had awarded the Claim No.1. It is also contended that it is not necessary for the Arbitral Tribunal to return a detailed and elaborate finding on the issues. It is sufficient if the Arbitral Tribunal has considered the material on record and returned a finding.

7. With regard to the Claim No. 3(b), it is submitted that the Arbitral Tribunal had returned a finding of fact that the respondent had incorrectly deducted the amounts from the bill of the appellant and as such the Arbitral Tribunal had held the appellant entitled to the same. It is contended that the Arbitral Tribunal was not required to return a detailed and elaborate finding on the said claim.

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8. Learned counsel for the respondent, on the other hand, contended that NS-6 was applicable only in cases where the contractor had carried out the work by blasting and as blasting was not carried out it was NS-7 and not NS-6 that would be applicable. He further contended that the Arbitral Tribunal has not given a reasoned award and as such the learned Single Judge was right in remanding the same to the Arbitral Tribunal. With regard to Claim No. 3(b), it is contended that the Arbitral Tribunal has not recorded a finding that the price variation was more than 5%. It is also contended that the award is cryptic and non-reasoned.

9. To resolve the controversy, it would be appropriate to first examine the scope of judicial intervention permissible in exercise of powers under section 34 of the Act.

10. The Supreme Court in the case of **McDermott International Inc. v. Burn Standard Co. Ltd. and Ors:** (2006) 11 SCC 181 held as under:

“The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the

court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.”

11. Where the Arbitrator has assessed the material and evidence placed before him in detail, the court while considering the objections under Section 34 of the said Act does not sit as a court of appeal and is not expected to re-appreciate the entire evidence and reassess the case of the parties. The jurisdiction under section 34 is not appellate in nature and an award passed by an Arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the court to interfere with the award merely because in the opinion of the court, another view is possible. The duty of the court in these circumstances is to see whether the view taken by the Arbitrator is a plausible view on the facts, pleadings and evidence before the Arbitrator. Even if on the assessment of material, the court while considering the objections under section 34 is of the view that there are two views possible and the Arbitral Tribunal has taken one of the possible views which could have been taken on the material before it, the court would be reluctant to interfere. The court is not to substitute its view with the view of the Arbitrator if the view taken by the Arbitrator is reasonable and plausible.¹

¹ *Jhang Cooperative Group Housing Society v. P.T Munshi Ram & Associates Private limited*: 202(2013) DLT 218.

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12. A Division Bench of this Court in National High Authority v. Italian Thai Development Public Company Limited: 2014 (1) Arb.LR 41 (Delhi) (DB) held as under:

“We do not find any error in the reasoning adopted by the learned single Judge or the conclusion arrived by him. The findings of the Tribunal fall within the realm of pure findings of fact. There is nothing on record to establish that the findings were of such a nature as would move the conscience of the court or that there was any error of fact which would result in a monumental miscarriage of justice. We may refer to the decision of a Division Bench of this court in the case of Food Corporation of India v. Shanti Cereals Pvt. Ltd., 2010 (3) ARB. LR 296 (Del.) (DB). In the said decision the Division Bench of this court, in the context of examination of factual pleas raised before the court, observed as under:-

“7. Further, the argument of learned senior counsel for the appellant that the rice supplied by FCI to the respondent was not damaged and, in fact, was of a fine quality, cannot be sustained by us. As has been consistently held by this court, as well as the Hon'ble Supreme Court, the forum to raise factual pleas and contentions in an arbitration matter is only the arbitral tribunal. It is against the propriety of the legal regime, as well as the mandate of law set out in Section 34 of the Arbitration and Conciliation Act, 1996 that the courts in objection (and more so in appeal under Section 37) should entertain the arguments that are purely factual in nature. There is no gainsaying that the arbitral tribunal is the master of the factual arena and has the right to even go

wrong while deciding the factual issues, unless there is something manifest from the face of the award that is so grave as to move the conscience of the court that the error would result in a monumental miscarriage of justice.”

(underlining added)

13. This Court in **National Highways Authority of India** (*supra*) has laid down that the Arbitral Tribunal is the master of the factual arena and has the right to even go wrong while deciding the factual issues, unless there is something manifest from the face of the award that is so grave as to move the conscience of the court that the error would result in a monumental miscarriage of justice. The court would not, in objections under section 34 and more so in an appeal under section 37, entertain arguments that are purely factual in nature.

14. Further, in **Steel Authority of India v. Gupta Brothers Steel Tubes Limited: 2009 10 SCC 63**, the Supreme Court has laid down that an error relatable to interpretations 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. The Supreme Court has further laid down that the Arbitrator having been made the final arbiter of resolution of disputes between the parties, the award is not open to challenge on the ground that the Arbitrator has reached a wrong conclusion. The courts do not

interfere with the conclusion of the Arbitrator even with regard to the construction of contract, if it is a plausible view of the matter.

15. The scope of interference under Section 34 is very narrow. The Arbitral Tribunal is the master of the factual arena and has the right to even go wrong while deciding the factual issues. The Arbitral Tribunal in the present case has returned a finding that the work executed by the appellant was covered in NS-6. The contention of the learned counsel for the respondent that NS-6 was applicable only in case of blasting does not appear to be a correct interpretation. NS-6 is not restricted to blasting and other methods are also included in NS-6. Be that as it may, the Arbitral Tribunal comprising of experts in the field, have returned a finding that the work executed by the appellant was covered under NS-6, the same being a plausible interpretation on the material placed before the Arbitral Tribunal, the learned Single Judge, in our view, has clearly erred in interfering with the same. The learned Single Judge has merely returned a finding that the award does not show that while deciding the claim, the Arbitral Tribunal looked at or analysed the language used in the BOQ.

16. Merely, because the award does not contain the deliberations of the Arbitral Tribunal in great detail, it cannot *per se* be held that there is no application of mind. There is no format of an award prescribed. The Arbitral Tribunal is not expected to deliver an award like a judgment of court. All that is required is that the Arbitral Tribunal

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should have considered the material and returned a finding with brief reasoning. The Arbitral Tribunal in the present case, comprised of technical members, who were experts in the field of construction and not persons with legal or judicial backgrounds. To expect technical members to deliver an award in the form of a judgment would be contrary to the very principles of arbitration. The Arbitral Tribunal comprising of experts are not expected to deliver a detailed reasoned judgment. When technical members examine technical clauses and work executed, they are not expected to explain in detail in the award as to on what basis they have returned a finding that the work executed falls under one clause or the other. If the technical members have examined the scope of the work contained in conflicting clauses and the work actually executed, it would be sufficient for the technical members to opine that the work falls under one clause or the other. They are not expected to explain in great detail, the basis of their formation of such an opinion.

17. In the present case, the Arbitral Tribunal after examining the scope of work executed and the BOQ items has opined that the same falls in NS-6 and not NS-7. In our view, the mere fact that a detailed reasoning is not given as to why the Tribunal is of the view that the work falls under NS-6 and not NS-7 would not render the award liable to be set aside on the ground of non-application of mind to the

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relevant contractual terms. In our view, the learned Single Judge has clearly erred in setting aside the award on Claim No.1 on this count.

18. With regard to the Claim No. 3(b), the Arbitral Tribunal has noticed in the award that price variation was payable only if the price variation was beyond 5%. The Arbitral Tribunal has returned a finding after noting the said clause that the respondent have not followed the above stipulation. The Arbitral Tribunal has returned the finding after examining the Whole Sale Price Index produced by the appellant and after examination of the same has returned a finding that the recovery made by the respondent were outside the scope of the contract. Once the Arbitral Tribunal has kept in view that the price variation was payable only if the variation was beyond 5% and after examining the evidence produced held that the deductions made by the respondent was not justified, the setting aside of the award, merely on the ground that the award does not state whether the price variation was within 5% or beyond 5% is clearly erroneous. The fact that the Arbitral Tribunal has noticed that the price variation was only payable where the variation was beyond 5% and has then held that the respondent has not complied with the said stipulation, would be sufficient compliance with the contractual clause. Even otherwise, the same is a finding of fact returned by the Arbitral Tribunal which finding of fact is not liable to be interfered with in exercise of powers

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under section 34 of the Act. The Arbitral Tribunal is the master of the facts and is entitled to even commit errors of fact.

19. In our view, there is nothing manifest from the face of the award that is so grave as to move the conscience of the Court or that has resulted in monumental miscarriage of the justice. We are of the view that the learned Single Judge also erred in interfering in Claim No. 3(b) of the award and in remanding the same to the Arbitral Tribunal.

20. We are thus of the view that the impugned order dated 05.03.2014 is not sustainable to the above extent. The impugned order with regard to Claim No. 1 & 3(b) is, accordingly, set aside. The objections filed by the respondent to Claim No. 1 and 3(b) are, accordingly, dismissed. The parties are left to bear their own costs.

SANJEEV SACHDEVA, J.

APRIL 15, 2015
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BADAR DURREZ AHMED, J.