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

\+ FAO(OS) 586/2012 & CM No. 20339/2012

ROYAL FORGINGS PVT. LTD. ..... Appellant

Through: Mr. Shiv Khorana, Advocate alongwith Mr. Akhilseh Kr. Mishra, Advocate for the petitioner.

versus

INDIAN RAILWAY CONSTRUCTION CO. (IRCON) & ANR ..... Respondents

Through: Mr. Chandan Kumar, Advocate for the respondent.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA

O R D E R

% **30.11.2015**

The appellant is aggrieved by the judgment and order of a learned Single Judge delivered on 31.05.2012 allowing the respondent's (hereinafter referred to as "IRCON"), petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act"). The impugned order set aside the Arbitral Tribunal's Award of 30.06.2006 whereby the appellant's claim had been partly allowed.

The brief facts are that the IRCON had issued work orders to the appellant for manufacture of one lac each of wooden sleepers. Later, on 06.05.2003, the IRCON required manufacture of an additional quantity of 50,000 wooden sleepers. This was accepted by the appellant on 07.05.2003. The dispute which arose pertained to the last batch of additional 50,000 units. It is conceded that time agreed upon originally- for the performance of the Contract i.e. supply of the 50,000 wooden sleepers was on or by 05.07.2003. This did not happen. The appellant invoked the arbitration clause contending that even though the articles had been manufactured, the requisite clearances were not forthcoming and that it was entitled to claim loss of profits as damages. IRCON, on the other hand, contended that the goods agreed upon had never been manufactured and consequently the question of payment of damages did not arise.

The Arbitral Tribunal, after considering the records, framed 8 issues – one of which was whether IRCON had required the appellants on 01.08.2003 to not dispatch the material till further advice to them. The other principal issue framed was as to the placement of order since apparently IRCON had even contested that the order of an additional 50,000/- wooden sleepers was placed, contending that it was not a completed order.

The Arbitral Tribunal noted the contentions of the parties. The main controversy as to whether the articles i.e. the wooden sleepers had been in fact manufactured for the appellant to claim any damages was an important question on which evidence and correspondences were considered. The arbitrator concluded –both on the basis of the verification report (process completed during the proceedings) and the other correspondences on the record that the goods were available but that the IRCON had not taken delivery. The relevant discussion in this regard is at para 6.4.2, 6.4.3, 6.4.4 and 6.4.5. On the basis of this reasoning, the arbitrator directed payment of Rs. 33,58,361/- towards damages and interest w.e.f. 15.07.2003. The arbitrator also allowed the claim, to the extent of Rs. 19,000/- towards storage etc. Rs. 3,39,590/- towards loss of export benefit. In addition, the respondent/IRCON had agreed to release the revision of the retention money-duly recorded in the award i.e. Rs. 3,50,000/-.

The main crux of IRCON's grievance before the learned Single Judge in Section 34 proceedings was that the arbitral tribunal had rendered inconsistent findings. It was stated that the appellant was found to be at fault despite which the arbitrator held IRCON to be in breach of Contract. It was also submitted that the arbitrator went beyond its mandate and proceeded to favour the appellant; it was further submitted that the findings rendered were contrary to the record since there was nothing to show that the articles, in fact, were manufactured by the appellant. All these submissions were in effect accepted by learned Single Judge who faulted the Tribunal for what he termed as relying solely upon the letter dated 01.08.2003.

It is contended by Mr. Khurana, learned counsel for the appellant, that the impugned order cannot be sustained since the learned Single Judge has entered into an arena of fact appreciation-and has rendered a purely fact based finding. Counsel submitted that there was material before the Arbitral Tribunal to conclude that in fact the goods had been manufactured-quite apart from the verification report placed on the arbitral record during the proceedings. Learned counsel relied upon the correspondence between the parties, in this regard, especially the letter dated 01.08.2003 which IRCON itself had placed on record, in support of its petition under Section 34. It was submitted that the letter of 01.08.2003 was an acknowledgment of the facts that the goods could not be utilised by IRCON at that time i.e. even after the time fixed for performance of the Contract (05.07.2003). Submitting that the Court under Section 34 should refrain from fact appreciation given the limited jurisdiction that Courts exercise pursuant to the judgment of the Supreme Court in ***Oil and Natural Gas Ltd vs Saw Pipes Ltd,*** *(2003) 5 SCC 705*. It was submitted that the impugned order is liable to be set aside.

Mr. Chandan Kumar, learned counsel for IRCON urged that this Court should refrain from interfering with the impugned judgment. He relied upon ***Oil and Natural Gas Corporation Limited Vs Western Geco International Ltd*** (2014) 9 SCC 263 and submitted that where the decision rendered in arbitral proceedings is founded on reasoning which no reasonable man can subscribe to given the materials he is confronted with, the Court would be acting within its jurisdiction while interfering with the award. Learned counsel submitted that mere issuance of the letter dated 01.08.2003 did not absolve the appellant from the duty of showing or proving that contracted goods were in fact ready as on the date agreed by the parties i.e. 05.07.2003. In these circumstances, the award of damages and other amounts by the Tribunal were not justified.

This Court has duly considered the submissions of the parties. It is well established that the scope of interference by the Court under Section 34 is extremely narrow; only four heads had been permitted by the judgment in *Saw Pipes (supra).* These are -1) patent illegality; 2) the Arbitrator exceeding the terms of the Contract vis-a-vis the findings; 3) the betrayal of a completely injudicious approach in conducting the proceedings contrary to law; 4) the findings being so unreasonable that no reasonable man-in the given circumstances and facts can subscribe to them.

It is the last head which the IRCON invokes with the support of *Western Geco International Limited (supra)* to sustain the impugned order.

In this case, we notice that the Arbitrator issued an award which is an elaborate in its reasoning. The discussion with regard to whether the articles had been in fact manufactured or not apparently never arose since no controversy existed with contemporaneously at that time i.e. by end of June 2003 or even on 05.07.2003. The letter of 01.08.2003 in that IRCON keeps that background in mind and is relevant as it is the first available opportunity for IRCON to have decided either favourable or adversely vis-a-vis the appellant's performance of the Contract. Not only did it not allege that the appellant had not manufactured the agreed articles; it went further to say that the appellant should hold the delivery since it had not obtained import permit. In fact, the letter dated 12.06.2003 which was placed on record of the learned Single Judge alongwith the petition under Section 34 also says as much. Further, it is only for the first time that on 29.11.2005 in reply to the appellant's claim that IRCON first contested the demands and denied that the claimant had dispatched part of the consignments and that rest of it was ready (para 5 of the reply). Given these materials, the Court is of the opinion that the letter of 01.08.2003 in that sense was crucial; it also refers to a previous letter dated 18.06.2003 (quite apart from earlier letter of 12.06.2003).

Having regard to all these, it is clear that arbitral tribunal could not be faulted in concluding that the respondent/IRCON was at fault in the given circumstances and that the appellant was entitled to succeed in its claims.

The award to the extent it had granted other amounts too had been interfered with by the learned Single Judge. The findings with respect to Rs. 19,000, for cost of transportation has been characterised as being based on surmises and conjectures. As a matter of fact, the materials on record in the form of bills (the part of the arbitral record as C-19 series of receipts etc) established that some documents were placed on record which led the arbitrator to grant Rs. 19,0000/- out of a claim for a larger sum. The award on Claim No.4 was set aside on the ground that it was based upon loss of export benefit and since the award on Claim No.1 was not upheld, the same is also set aside. No independent reasoning is forthcoming.

For the above reasons, this Court is of the opinion that the impugned order cannot be sustained and the same is hereby set aside. The Award is hereby restored. The appeal is allowed in the above terms.

S. RAVINDRA BHAT, J

DEEPA SHARMA, J

NOVEMBER 30, 2015
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