

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

Date of decision: January 20, 2015

+ **OMP 98/2015**

M/S PARMANAND ADVANI

..... Petitioner

Through: Mr.Raman Kapur, Sr. Advocate
with Mr.Dhiraj Sachdeva, Adv.

versus

RAIL VIKAS NIGAM LTD.

..... Respondent

Through: Mr.Udit Seth, Advocate

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J. (Oral)

IA No. 1282/2015 (u/S 151 CPC for condonation of delay in refilling the petition)

In view of the reasons mentioned in the application, the delay in refilling the petition is condoned.

IA stands disposed of.

OMP 98/2015

This petition under Section 34 of the Arbitration & Conciliation Act, 1996 ('Act' for short) lay a challenge to the award dated September 10, 2014 of the Arbitral Tribunal to the extent the Arbitral Tribunal has not granted the entire amount claimed under Claim No.1 and rejection of

Claim Nos.2,3,4 & 6.

2. The brief facts are, the respondent had invited tenders for the work of gauge conversion of Garhi Harsaru- Farukh Nagar Meter Gauge, Railway Line to Broad Gauge Railway Line including civil works, roadbed, p-way works and extension of down loop lines at Gurgaon. Pursuant to the award of the work to the petitioner an agreement was signed between the parties on September 10, 2008. The stipulated date of completion was December 17, 2008 and the cost of work was Rs.7,00,92,715/-. It is the case of the petitioner that it made all arrangements but due to acts of default and non-fulfilment of contractual obligations on the part of the respondent alone, the work could be completed only on June 15, 2011. According to the petitioner, despite various letters to the respondent for clearing its bills and all the pending claims, the respondent released only an amount of Rs.59,97,304/- on November 09, 2011.

3. The petitioner invoked the arbitration clause by requesting the Managing Director of the respondent company to appoint an arbitrator. The Arbitral Tribunal was constituted which entered reference on January 31, 2013. The petitioner herein had in all made the following six claims before the Arbitral Tribunal:-

(i) Financial Losses due to delay in commencement of project –

Rs.27,18,000/-

(ii) Cost of Cement not paid – Rs.30,08,458/-

(iii) Business Loss – Rs.45,00,000/-

(iv) Maintenance Charges for the track – Rs.11,73,986/-

(v) Interest @ 18% p.a.

(vi) Claim for cost/expenses involved – Rs.3,00,000/-

4. It may be stated here that the petitioner had made an additional claim of Rs. 89,707/- plus PVC plus interest for payments, which was allowed.

5. The aforesaid claims were allowed to the extent that against claim No.1 an amount of Rs.6,58,000/- has been awarded to the petitioner herein. Claim Nos.2, 3, 4, 6 were rejected. Against claim No.5, the Arbitral Tribunal granted interest @ 10% on Rs.7,47,707/- from November 09, 2011 (date of final bill) till date of award, which works out to Rs.2,12,225,87/-, which has been rounded off as Rs.2,12,226/-. In the eventuality, the aforesaid amount was not to be paid to the petitioner within 60 days, the respondent was directed to pay interest @ 10% p.a. on Rs.9,59,933/-.

6. Against Claim No.1, it was the case of the petitioner that the delay in commencement of the work by 18 months was on account of the respondent. The claim made before the Arbitral Tribunal including the

rent of office and staff quarter at Rs.15,000/- p.m, salary of Site Incharge at Rs.15,000/- p.m., salary of 2 staff at Rs.8,000/- each p.m, rent of machinery i.e. trucks and JCB at Rs.80,000/- p.m and expenses on food and conveyance at Rs.10,000/- & Rs.15,000/- p.m. During the arbitral proceedings, it was clarified by the petitioner that by commencement it really meant the completion of the project.

7. The Arbitral Tribunal after considering the respective stand of the parties was of the view that there has been an abnormal delay in completing the work partially due to the petitioner's failure and partially due to the respondent's failure. The Tribunal concluded that the facts on record reveal that the delay in organizing CRS inspection which determines the completion of work as per the contract conditions was on the respondent as the CRS papers have been submitted by the petitioner on September 08, 2009 and the inspection was carried out only in March, 2011. The Tribunal quantified the period as 15 months by excluding one month which is the normal time taken for doing such inspection. It also noted, additional major work was awarded to the petitioner on July 28, 2010. By taking the additional time for completion of the additional work of 4 months, the delay was reduced to 11 months. It is for these 11 months, the Arbitral Tribunal has granted the pay of one supervisor, one Chowkidar, one staff and the rental of the office for a period of 11

months. In addition, it had granted the rental for JCB and one tractor for 3 months during monsoon period of 2010.

8. The challenge in this petition for denying the entire amount claimed by the petitioner is primarily that the Tribunal could not have reduced the period of delay from 18 months to 11 months, and the rental period of the JCB and one tractor to 3 months and overlook the claim towards food and conveyance during that period. This Court finds the reduction of period from 18 months to 11 months excluding the normal period require for inspection and the completion time for additional work of 4 months is justified. It is not the case of the petitioner in the petition that the JCB and one tractor were used or required to be used for the delayed period. Rather it is the case of the petitioner that it had completed the work in the year 2009 itself. Assuming that even for the additional work the JCB and tractors were required to be used, the same would be not be for complete period and/or beyond 4 months. In this case since the Arbitral Tribunal has granted the rental for JCB and one tractor at Rs.80,000/- p.m, for 3 months, I find no infirmity on the award of Rs.6,58,000/- by the Tribunal against claim No.1.

9. Insofar as claim No.2 is concerned, it was the case of the petitioner that the cost of the cement which was used in construction more specifically in execution of item Nos.2,3, and 4 of schedule 3, civil

engineering works (non schedule items) of the BOQ as per rate provided in item No.10 of the same schedule. Item Nos.2 ,3 & 4 are reproduced below:-

“Item 2- Providing and laying plain cement concrete M-10/15 (granted stone aggregate of 40 mm nominal size) in levelling course in foundations of bridge, floors, face wall, wing wall, return wall, sump etc. including placement, vibrating, all tool & plants, equipments, all leads, lifts, crossings of track and the like with all materials and labour complete as per drawings and technical specification as directed by the Engineer.

Item 3- Providing and laying Design Mix Cement Concrete M-25/30/35 grade (cast-in-situ) as per IRS concrete bridge code using 20 mm graded crushed stone aggregate and coarse sand of approved quality in RCC box, bed blocks, capping beam & copings, sump, P/F wall, coping etc., including mechanically mixing, vibrating, curing, centering shuttering including strutting & propping, removal of form work, tool & plants, equipment machinery, all leads, lifts, crossing of track and the like with all materials and labour but excluding the cost of reinforcement steel complete as per drawing and technical specification as directed by the engineer. Reinforcement steel will be paid extra under relevant items.

Item 4- Providing and laying Design Mix Cement Concrete M-25/30/35 grade (cast-in-situ) as per IRS concrete bridge code using 40 mm graded crushed stone aggregate and coarse sand of approved quality in pier, abutment, wing wall, return wall, face walls etc. including mechanically mixing, vibrating, curing, centering shuttering including strutting & propping, removal of form work, tool & plants, equipment machinery, all leads, lifts, crossing of track and the like with all materials and labour but excluding the cost of reinforcement steel complete as per drawing and technical specification as directed by the engineer. This will also include the cost of provision of PVC pipes in weep holes as per drawing steel wire will be paid extra under relevant items.”

10. The learned Arbitrator was of the view that it was clearly mentioned that the work shall include all material and labour complete as per drawing (item No.2) and including all material and labour but excluding the cost of reinforcement, steel complete as per drawing for item Nos.3 & 4. He was also of the view that in item Nos.3 & 4 which are for RCC, the cost of reinforcement steel is excluded but not that of cement. According to him, had the cost of cement been excluded it would have specified so as has been done for the reinforcement steel.

The learned Arbitrator rejected the stand of the claimant that at the time of tendering it was verbally assured that the cement would be paid separately under item No.10. Learned Arbitrator was also of the view that under item No.10, the supply of cement was meant for SOR items under schedule 2, wherein the cement was not included in the price and it has to be supplied by the department.

11. From the finding given by the learned Arbitrator, it is clear that for items under 2, 3 & 4, the work included all material and labour excluding reinforcement Steel (for Item 3 & 4) . The petitioner could not have made a claim for the cost of cement on the basis of item No.10. The supply of cement under the said item was meant for SOR items under a different schedule and the stipulation therein was clear that the cement was to be supplied by the department. I note, there is no effective challenge in the petition to the rejection of the said claim. I hold that the learned Arbitrator was justified in rejecting the said claim.

12. Insofar as claim No.3 is concerned, the Arbitrator in the impugned award has held as under:-

“This is a claim based on the argument that if the contract was completed in time, the contractor could have earned more profit in the extended period for doing other works. It is noted that the deployment of men and machinery on this work as claimed by the claimant

himself was very scanty. His business has not suffered due to engagement of some hired men and machinery on this work which were basically for Watch & Ward purpose and attending for emergencies and for which he had been suitably compensated against claim No.1. Thus this claim is not substantiated, hence rejected.

13. The finding of the learned Arbitrator is a finding of fact. The challenge in the petition for rejection of the claim is very vague. Neither material particulars nor evidence has been placed to justify the loss of business because of the delay that has occurred. From the reasoning given by the Arbitrator which is reproduced above, the petitioner has been suitably compensated against claim No.1. Even I find that the claim No.1 which has been partially allowed by the learned Arbitrator was the financial losses suffered by the petitioner due to delay in completion of the project. That being so, the rejection of this claim by the learned Arbitrator is justified.

14. Insofar as claim No.4 is concerned, it was the petitioner's case that the respondent was required to inspect the track within one month, having not done within one month but was inspected in March, 2011, the maintenance of the track during the interregnum need to be compensated. The learned Arbitrator has given the following reasoning for rejecting the claim:-

“The claimant has built up his claim on the premise that after engine rolling of the section in Oct-2009 till CRS’s authorization on 07-03-11, the track was being used for movement of trains like DMT’s, rail/sleepers rakes etc. hence the maintenance was needed. But he has not produced any records to substantiate that he created some organization or hired some sub-contractor/agency for maintenance of track. Even otherwise for a concrete sleeper track having packed with On-Track Tampers initially and having no or scanty traffic movement, generally no maintenance is needed in the first year. There may be some need based attention to rain cuts etc. here and there in the monsoon period, cost of which is appropriately covered in the Claim 1. In the light of clause 8.2 defining the completion of the work i.e. authorization with CRS read with item 18 schedule 4 wherein the item states that the maintenance from completion to handing over, this claim is not justified as the section stood handed over to open line immediately after CRS sanction.”

15. Again the aforesaid conclusion of the learned Arbitrator is a finding of fact. It appears that the petitioner had not produced any evidence to substantiate the claim. The reasoning of the learned Arbitrator also is that there was no or scanty traffic movement for which no maintenance was required for one year. In any case, it is the conclusion of the learned Arbitrator that the obligation was that of the

petitioner in terms of Clause 8.2 read with item No.18 schedule 4. The ground (d) of the petition does not raise a challenge to the said finding of the learned Arbitrator. In the absence of any evidence being placed on record to show that expenditure was actually incurred for the maintenance the rejection is justified.

16. Insofar as rejection of claim No.6 for grant of cost and litigation expenses is concerned, a reliance was placed on Section 20.3(viii) of the GCC which inter-alia stipulated the expenses of Conciliator/Arbitrator shall be as per scales fixed by the employer from time to time and shall be shared equally by the employer and the contractor. I seen no infirmity in such a conclusion.

17. Suffice to state that a Division Bench of this Court in its latest pronouncement in the case of *State Trading Corporation of India vs. Toepfer International Asia Pte. Ltd.* 2014 (3) Arb. LR 105 (Delhi) (DB), has by referring to various judgments of this Court and the Supreme Court has laid down the contours of judicial interference against an arbitration award under Section 34 of the Act. I quote for benefit the following paras from the judgment:-

"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.

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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....

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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 merit in the petition. The same is dismissed with

no order as to costs.

(V.KAMESWAR RAO)
JUDGE

JANUARY 20, 2015
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