

vai

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.898 OF 2015

Jawaharlal Nehru Port Trust	...Petitioner
V/s.	
Ornate Multi Model Carriers Pvt. Ltd.	...Respondent

Mr.Kevic Setalwad, Senior Counsel with Ms.Usha Singh and Mr.S.A. Bhalwal i/b Vyas & Bhalwal for the Petitioner.

Mr.Rahul Narichania, Senior Counsel with Mr.Prathamesh Kamat i/b M/s.A. Mehta Laljee & Co. for the Respondent.

CORAM : R.D. DHANUKA, J.
DATE : 9TH MARCH, 2016.

P.C. :-

1. By this petition filed under section 34 of the Arbitration & Conciliation Act, 1996 (for short "the said Act"), the petitioner has impugned the arbitral award dated 10th December, 2013 made by the learned arbitrator directing the petitioner (original respondent) to pay a sum of Rs.77,47,991/- to the respondent (original claimant) within eight weeks from the date of receipt of the copy of the award and in the event of the petitioner's failure to make the entire amount within eight weeks from the date of receipt of a copy of the award, to pay interest at the rate of 9% p.a. after expiry of eight weeks till payment.

2. Some of the relevant facts for the purpose of deciding this

petition are as under :

3. The petitioner had invited a tender seeking to hire the services for operation of 58 Tractor Trailers for Transportation of ISO freight containers within the container terminal of the petitioner. The respondent submitted its tender on 23rd June, 2000 and was a successful tenderer. The respondent furnished a bank guarantee towards the security deposit equivalent to Rs.65.00 lacs.

4. The dispute arose between the parties. The respondent had initially made a claim of Rs.1,87,17,444.62 ps. with further interest at the rate of 18% p.a. The respondent thereafter reduced the claim at Rs.1,39,41,644.62 ps.

5. It was the case of the respondent before the learned arbitrator that pursuant to the representation made by the respondent, the petitioner fixed a meeting for discussing the claims made by the respondent. A letter was addressed by the petitioner to the respondent in that regard on 9th October, 2009 informing the respondent about fixation of the preliminary meeting on 16th October, 2009. It was the case of the respondent that a meeting was however, held on 20th October, 2009 of the Committee of the petitioner wherein the respondent was also present. According to the respondent in the said meeting, the respondent withdrew its claim for break down charges of Rs.47,75,800/-. In the said meeting, it was decided that a

sum of Rs.77,47,991/- was payable by the petitioner to the respondent under eight items.

6. The respondent recorded what transpired in the said meeting and prepared the minutes of the said meeting held on 20th October, 2009. The respondent also addressed a letter on 28th October, 2009 to the petitioner expressing their appreciation for understanding amicably by the Committee members in the meeting held on 20th October, 2009 to amicably resolve the long standing dispute. It was mentioned in the said letter that considering the co-operation and keeping the long standing relation in the mind, the respondent was accepting the proposals set up by the Committee members during the said meeting held on 20th October, 2009. The respondent conveyed that the respondent was agreeable to the said proposal.

7. It is not in dispute that during the course of the arbitral proceedings, the respondent herein filed an additional affidavit in lieu of examination in chief before the learned arbitrator enclosing a copy of the said minutes of the meeting signed by the respondent.

8. The learned arbitrator rendered an award on 10th December, 2014 *inter-alia* directing the petitioner herein to pay an amount of Rs.77,47,991/- with interest. The said award is impugned by the petitioner in this petition filed under section 34 of the said Act.

9. Mr.Setalwad, learned senior counsel for the petitioner invited my attention to the minutes of the meeting relied upon by the respondent and also to various observations made by the learned arbitrator. He submits that there was no opportunity given to the petitioner to cross-examine the witness of the respondent who had filed additional affidavit in lieu of examination in chief. My attention is also invited to the minutes of the meeting of the learned arbitrator in support of this submission in support of the submission that the witness of the respondent never remained present and had not offered himself for cross-examination of the petitioner.

10. The next submission of the learned senior counsel is that even according to the said minutes of the meeting, there was no agreement on the part of the respondent insofar as item no.8 i.e. "Residue of real estate dues to be refunded after deducting all amount due to JNPT" which was shown as "nil". He submits that even as per the said minutes of the meeting recorded by the respondent, the respondent had accepted only the amounts offered against item nos.1 to 7 and had expressly indicated reservation in respect of item no.8 by stating that the matter be referred to Estate Department of JNPT for reconciliation. He submits that it was thus clear that there was no conclusive settlement in respect of the entire dispute even in the said minutes of meeting dated 20th October,

2009.

11. Learned senior counsel for the petitioner sought to place reliance on a different minutes of the meeting held on 20th October, 2009 and a copy of the letter dated 27th January, 2014 which are annexed to the arbitration petition. Mr.Narichania, learned senior counsel for the respondent raised strong objection about the petitioner relying upon those two documents as the same were not forming part of record before the learned arbitrator.

12. Mr.Setalwad on instructions fairly concedes that both the documents were not forming part of the record before the learned arbitrator but still sought to rely upon to show that even according to the respondent, there was no conclusive settlement between the parties. It is submitted by the learned senior counsel that since there was no conclusive settlement, the learned arbitrator could not have passed an order accepting the said so called settlement and could not have awarded the entire amount as alleged to have been discussed and decided in the said meeting.

13. Mr.Narichania, learned senior counsel for the respondent (original claimant) supported the findings recorded by the learned arbitrator. He submits that at no point of time the petitioner had asked for any opportunity to cross-examine the witness, who had filed additional affidavit in lieu of examination in chief thereby annexing a

copy of the said minutes of the meeting. He submits that admittedly the petitioner did not file any affidavit controverting the contents of such additional affidavit in lieu of examination in chief filed by the respondent or sought any opportunity to lead further evidence after filing of such additional affidavit in lieu of examination in chief along with minutes of the meeting by the respondent. He submits that since there was no cross-examination of the witness of the respondent on the additional affidavit in lieu of examination in chief including the contents of the minutes of the meeting, the learned arbitrator was justified in accepting the said fact as proved and has allowed only such amount which was discussed and agreed between the parties under item nos.1 to 7.

14. A perusal of the record indicates that there was no dispute that the respondent had filed an additional affidavit in lieu of examination in chief in which the respondent had placed reliance upon the minutes of meeting recorded in the meeting held on 20th October, 2009. The petitioner did not raise any objection before the learned arbitrator when such additional affidavit in lieu of examination in chief along with the minutes of meeting tendered by the respondent. The petitioner also did not seek any opportunity to cross-examine the said person, who had filed an additional affidavit in lieu of examination in chief along with minutes of meeting. The petitioner

also did not lead any additional evidence before the learned arbitrator to controvert the contents of the minutes of meeting dated 20th October, 2009 relied upon by the respondent.

15. A perusal of the minutes of meeting of the learned arbitrator annexed by the petitioner to the affidavit in rejoinder filed before this Court after the date of filing of the additional affidavit of evidence by the respondent clearly indicates that no opportunity was asked by the petitioner to cross-examine the witness nor the said document annexed to the said additional affidavit of evidence was disputed by the petitioner by raising any objection in writing.

16. A perusal of the minutes of meeting would further indicate that both the parties had made oral submissions before the learned arbitrator. The learned arbitrator had initially closed the proceedings for rendering an award on 8th May, 2014. On 18th September, 2014, the learned arbitrator issued a notice to both the parties stating that though he had reserved the matter for passing an award, he required further clarification in the matter and fixed the meeting on 20th September, 2014 and directed the parties to make further submissions in the matter.

17. The learned arbitrator recorded in the minutes of meeting on 28th September, 2014 that he had heard further submissions of the parties and had thereafter closed the proceedings for rendering

an award.

18. A perusal of the record further indicates that though the learned arbitrator had fixed further meeting on 20th September, 2014 for further arguments, the petitioner did not raise any objection even at that stage. No submissions were made by the petitioner that on 8th May, 2014 the submissions could not have been heard by the learned arbitrator unless an opportunity was given to the petitioner to cross-examine the witness of the respondent. Even at that stage, the petitioner did not seek any order to recall the order of closure of the proceedings with a request to give an opportunity to cross-examine the witness of the respondent on the additional affidavit in lieu of examination in chief alongwith annexure thereto filed by the respondent.

19. In my view, in the facts and circumstances of this case, the learned arbitrator was fully justified in considering deposition made in the said additional affidavit in lieu of examination in chief and the document annexed thereto. In my view, there is thus no substance in the submissions made by learned senior counsel for the petitioner that there was no opportunity to cross-examine the witness. In my view, since the deposition made in the additional affidavit in lieu of examination in chief remained un-controverted, the learned arbitrator was right in placing reliance upon the deposition

made in the additional affidavit in lieu of examination in chief and the minutes of meeting dated 20th October, 2009 annexed to the said affidavit.

20. Insofar as the submission of learned senior counsel for the petitioner that even the said minutes of the meeting would not indicate that there was conclusive settlement between the parties is concerned, a perusal of the said minutes of meeting would indicate that the respondent had admittedly agreed the settlement recorded in respect of item nos.1 to 7. Insofar as item no.8 is concerned, in the said minutes of meeting, it was recorded that the nil amount was offered by the petitioner. The respondent had recorded what transpired in the said meeting in a separate letter to that effect. A perusal of the award clearly indicates that the learned arbitrator has not awarded any amount in favour of the respondent in respect of item no.8 and only awarded the claim in respect of item nos.1 to 7 having come to the conclusion that the settlement in respect of those items 1 to 7 was concluded in the said meeting. In my view, there is thus no substance in the submissions made by learned senior counsel for the petitioner that the alleged settlement arrived at in the meeting held on 20th October, 2009 was not a conclusive settlement. The petitioner did not dispute that the petitioner had addressed a letter to the respondent for fixing a date of the meeting and that a

meeting pursuant to such letter was held between the parties.

21. Insofar as an attempt made by the learned senior counsel to place reliance upon the two documents referred to aforesaid, which were not forming part of the record before the learned arbitrator, in my view, Mr.Narichania is right in his objection that the additional documents not forming part of the record before the learned arbitrator cannot be relied upon by the petitioner at this stage under section 34 of the said Act.

22. In my view, the learned arbitrator has rendered an award after considering the documents which were proved before him and has rendered findings of fact. The oral objection raised before the learned arbitrator about the correctness of the minutes of the meeting on 20th October, 2009 was found contrary to the contents of the documents on record and thus the learned arbitrator has rightly rejected the said oral objection raised by the petitioner. In my view, the findings of fact recorded by the learned arbitrator are not perverse and thus cannot be interfered with by this Court under section 34 of the said Act.

23. The arbitration petition is devoid of merits and is accordingly dismissed. No order as to costs.

(R.D. DHANUKA, J.)