

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

% **Order delivered on: 19th September, 2016**

+ **Arb. A. (COMM.) No.28/2016, I.A. Nos.10127/2016
& 10129/2016**

M/S CHANDOK MACHINERIES Appellant
Through Mr.Avi Singh, Adv. with
Mr.Jaskaran Sibia, Adv.

versus

S.N. SUNDERSON & CO. Respondent
Through Mr.Jayant K. Mehta, Adv. with
Mr.Pulkit Agarwal & Ms.Suveni
Bhagat, Adv.

**CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH**

MANMOHAN SINGH, J. (ORAL)

1. The respondent on 15th December, 2014 terminated the MOUs dated 1st September, 2014 due to stopping of work by the appellant who thereafter filed the petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') before the District Court at Katni (MP). The said petition was dismissed by the Court by order dated 13th January, 2015 for want of territorial jurisdiction. The termination was accepted by the appellant in December, 2014 itself.

2. The appellant thereafter filed another petition under Section 9 of the Act before this Court, wherein on 21st January, 2015, this Court passed an order with the consent of the parties.

3. The order dated 21st January, 2015 has been reproduced herein below:-

"Learned counsel for the petitioner states that without prejudice to his rights and contentions to agitate before the Arbitral Tribunal, he would not press in these proceedings the relief challenging the letter dated 15.12.2014 whereby the MOU between the parties was terminated. He further states that the material which has been extracted by the petitioner, both crushed and uncrushed be quantified/measured. He also states that the machine(s) belonging to the petitioner which are lying at the site be allowed to be removed in 3 months time.

Mr.Sandeep Sethi, learned senior counsel appearing for the respondent is agreeable to the proposal with regard to quantifying/measurement of the material. He states, let a representative of the petitioner be present at the site or where the material is loaded in the railway wagon(s)/ truck(s) to ensure the measurement of the material is done to petitioner's satisfaction.

Mr. Sethi states, advance notice of 24 hours before loading shall be given to the petitioner. The statement of Mr.Sethi is taken on record.

In so far as the removal of machines by the petitioner is concerned, Mr.Sethi objects to the grant of 3 months. Learned counsel for the petitioner states that even though three months would be required to remove the same, he would be satisfied if at least one month's time is given. In the eventuality the machines could not be removed within a period of one month despite efforts, liberty is granted to petitioner to move an appropriate application before the Tribunal.

Learned counsel for the parties state that they will cooperate with each other in quantifying/measuring the material, as well as removing the machines.

The petition is disposed of in terms of above. It goes without saying, disputes, if any, be raised before the Arbitral Tribunal including challenging the letter dated 15.12.2014. The accompanying application has become infructuous.

Copy of the order be given dasti to both the parties.”

4. It is the case of the respondent that the appellant had pleaded that it had worked on the mines and the agreed method of invoicing for such work was to weigh the material (crushed or uncrushed limestone) at the time of its dispatch, therefore, the respondent agreed to communicate the dispatches to the appellant and to allow its representative to be present at such times. The appellant undertook to remove its men and machinery from the mines. However, the appellant did not take any plea for videography or appointment of Local Commissioner in that petition who neither removed its men nor its machinery from the mines. Its main intention was to disturb the operations. The respondent had overpaid the appellant and the latter was to refund excess payments to the former. But the appellant is seeking to avoid this and abusing the process of law by filing frivolous, misconceived and false pleadings.

5. The respondent after repossessing its mines from the appellant started conducting mining operations at the sites including excavation and crushing. The said aspect is admitted by the appellant itself in its pleadings before the Arbitral Tribunal and this Court. The records, as required by law, with respect to material worked upon the respondent have been filed with the Statutory Authorities as well as before the Arbitrator.

6. It appears that in terms of the order dated 21st January, 2015, the respondent is, admittedly, sending intimations to the appellant about the material being dispatched by it and requested its representatives to be present at the time of dispatch as per the case of the respondent who also stated that despite of that, the appellant filed a contempt petition before this Court. The respondent also

informed the appellant periodically about the quantities shipped from 21st January, 2015 till December, 2015. The emails run into more than 200 pages and have been filed before Arbitrators as well as in this Court in contempt proceedings.

7. The respondent in May, 2015 approached this Court by filing of petition being Arb. P. No.365/2015 for appointment of the Presiding Arbitrator, since it had to recover excess payment made to the respondent to the tune of more than Rs.3.5 crores.

8. This Court on 27th November, 2015 appointed the Presiding Arbitrator. The first sitting of the Arbitral Tribunal was held on 14th December, 2015.

9. On 31st December, 2015, an application under Section 17 of the Act was filed by the appellant seeking to conduct videography at site in order to have the correct assessment for quantification of material at the site. The reply was filed by the respondent. The appellant on 21st January, 2016 also filed the rejoinder when the arguments were almost concluded by the parties. Another application for additional reliefs was filed by the appellant. In February, 2016, sur-rejoinder and reply to the application was filed by the respondent.

10. The Arbitral Tribunal in the impugned order dismissed the application under Section 17 of the Act filed by the appellant.

11. In paras 33 to 35 of the impugned order, after considering the factual position, the Arbitral Tribunal has come to the conclusion that the relief sought by the appellant is not liable to be granted. The extract of these paras have been reproduced herein below:-

“33. The applicant has taken inconsistent pleas in respect of crushed and uncrushed material at the site which was

excavated by him. The claimant/applicant in the application in paragraph 2 (e) contended that he had completed the work and the material was ready for loading. The respondent despite having orders from the customers didn't ask the claimant/ applicant to load the material. If the claimant had completed the work, it is to be inferred that no uncrushed material remained at the site. However, the applicant also contended that the respondent took possession of the material excavated by the claimant and subsequently crushed and processed the same for loading onto transport. This was done without accounting by the respondent precluding the possibility of measurement or calculation. In the letter dated 18 February, 2015 addressed to the General Manager of the respondent it was alleged that the respondent is crushing the material excavated by the claimant illegally. It has been further alleged in the said letter that the respondent operated the crusher so that the material crushed by the claimant could be mixed with the material crushed by the respondent. It has been further alleged that videographer sent by the claimant was not allowed whereas it was essential to video graph the material in order to protect it. There is a categorical assertion by the claimant that the respondent crushed the material and mixed with the material crushed by the claimant.

34. In view of the categorical admission by the claimant/ applicant that the material excavated by the claimant/ applicant had been taken over by the respondent and it was crushed and processed by the respondent and mixed with the material excavated and crushed by the applicant precluding the possibility of measurement or calculation. In view of this categorical assertion by the claimant, then how by videography or by mechanical observation by the claimant/ applicant or its representative, it can be determined as to how much material was crushed and processed by the claimant and how much was crushed and processed allegedly contrary to the agreement, by the respondent. This is not the case of the claimant that crushing and processing by the claimant resulted in such processed mineral which is different and have distinct properties than the processing and crushing done by the

respondent and by videography, the materials can be segregated. The respondent has also alleged that after taking over the site on 22nd January, 2015 he operated the mines and conducted excavation as well as crushing operations. According to respondent the evidence of the operations carried out by him were submitted to the State authorities. The respondent in the circumstances categorically asserted that neither videography nor the Local Commissioner can ascertain the quantity of limestone excavated or crushed by the claimant. According to respondent the prayer for videography or for the appointment of local Commissioner is an attempt by the claimant to interfere with the running mining operations of the respondent. If the response was not entitled to crush and process the material which was excavated by the claimant after 22nd January, 2015, the claimant should have obtained some interim measure against him not to process and/or crush the material which was excavated by him.

35. In the circumstances the most of the pleas raised by the respondent opposing an interim measure to quantify the material at this stage are only academic and do not require a detailed and conclusive consideration and decision at this stage. If the crushed and uncrushed material is at the site, in order to resolve the disputes between the parties by other detailed evidence and investigation, it will be just and convenient to quantify and measure the crushed and uncrushed material lying at the site despite the pleas raised by the respondent. On the pleas raised by the respondent measurement and quantification even at this stage cannot be denied. The Arbitral Tribunal under section 19 of the Act has the power to determine the admissibility, relevance, materiality and weight of any evidence and is not bound by Code of Civil Procedure or the Indian Evidence Act. In the circumstances, this Tribunal does not accept various pleas raised in extenso by the learned counsel for the respondent at this stage. However, the claimant himself has alleged that the mineral excavated by him and processed by him has been mixed by the respondent with the material excavated and processed by him precluding

the possibility of measurement and calculation, then the applicant/ claimant is not entitled for the relief claimed. If the quantification and measurement cannot be done, whether it should be declined on account of delay and other pleas raised by the respondent will not be material at this stage."

12. It was an admitted case of the appellant itself that the respondent had been working at its mines since January, 2015 and the limestone excavated and crushed by the respondent had been mixed with that excavated and crushed by the appellant. It was also admitted by the appellant in its pleadings that it is done by the respondent intentionally to prevent the qualification.

13. Once that is the position, there was no manner of ascertaining as to what part of the limestone lying at the mines was excavated and crushed by the appellant. No purpose would be served and there was also no question of any videography being allowed and that would create more confusion, as the real position would not come into the knowledge of the Arbitration Tribunal in the said situation.

14. The conclusion of the Arbitral Tribunal is based entirely on the admissions in the pleadings of the appellant itself who is otherwise entitled to raise its claim in this regard, if so advised. There is also a long delay in re-filing the appeal. It appears to the Court that the appellant is delaying the arbitration proceedings, otherwise the appeal could have been filed in the short time after passing of the impugned order.

15. The appellant in the present case has sought one of the reliefs to stay the arbitration proceedings. I have been informed by the learned counsel for the respondent that many applications on one reason or the other have been filed by the appellant. Thus, it would

be appropriate for the appellant to file the statement of claim along with the claim of this issue. The appeal is meritless. The same is accordingly dismissed as also the pending applications.

(MANMOHAN SINGH)
JUDGE

SEPTEMBER 19, 2016

