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HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment Reserved on: 23/09/2017

Judgment Delivered on : 14/12/2017

Arbitration Appeal No. 14 of 2017

1. South Eastern Coalfields Ltd. Through Managing Director, Regd. Office- SECL Bhawan, Seepat Road, Bilaspur 495006, Chhattisgarh
2. General Manager, Kusmunda, South Eastern Coalfields Ltd., Through Managing Director, Regd. Office, SECL Bhawan, Seepat Road, Bilaspur, 495006, Chhattisgarh.

---- Appellants

Versus

Shri Balaji Metals & Minerals Through Director Mr. Raghav Lakhotia, S/o Late M.P.Lakhotia, Aged about 33 years, Registered Office - 23A Netaji Subhash Road, 3rd Floor, Kolkata 700001

---- Respondent

For Appellants	: Dr. N.K.Shukla, Senior Advocate with Shri Vivek Chopda, Shri Rishabh Garg and Ms. Priya Mishra, Advocates.
For Respondent	: Shri Prashant Jayaswal, Senior Advocate with Shri Ankit Pandey and Shri Apoorva Mishra, Advocates.

Hon'ble Shri Thottathil B. Radhakrishnan, Chief Justice
Hon'ble Shri Sharad Kumar Gupta, J.

C.A.V. Judgment

Per Thottathil B. Radhakrishnan, Chief Justice

1. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996; for short 'A&C Act', is against an order setting aside an arbitral award under Section 34 of that Act.

2. Heard the learned Senior Counsel for the Appellants and the learned Senior Counsel for the Respondent.

3. In relation to its operations in Kusmunda Area, the South Eastern Coalfields Limited; for short 'SECL', awarded a contract to the Respondent; hereinafter referred to as 'Contractor'. On 31.08.2009, SECL terminated the contract and proposed to have the unexecuted works carried out at the risk and cost of the Contractor by way of "Open Tender" following the decision to that effect by SECL's Board of Directors. However, "Limited Tenders" were called for by SECL at the risk of the Contractor and that contract was issued to the single bidder company, namely, National Construction Company, for short 'NCC' at 25.95% higher than the estimated rate and 39.14% higher than the last awarded rate. The "Limited Tender" was issued without obtaining the approval of the SECL's Board of Directors and was against the decision of the Board of Directors to rearrange the work at the risk and cost of the Respondent-Contractor by rearranging it through "Open Tender". When disputes arose between the parties and the Respondent-Contractor wanted those disputes to be resolved, SECL constituted a special committee of four persons which ultimately resulted in an arbitral award dated 31.12.2012.

4. On the arbitral award being challenged by the Respondent-Contractor, the Court below has set aside the award firstly on a ground referable to Section 34(2)(a)(v) of the A&C Act in view of Section 10 of that Act; and secondly, it was found that the arbitral award passed by the Arbitration Committee is in conflict with the public policy of India and hence, liable to be set aside under Section 34(2)(b)(ii) of the A&C Act.

5. The learned Senior Counsel for the Appellants argued that the Contractor having submitted to the jurisdiction of the Arbitral Committee, the arbitral award could not be challenged on a ground referable to the constitution of the Arbitral Committee. It was further argued that the finding of the Court below that the arbitral award is in conflict with the public policy of India, is

unsustainable on the basis of the facts and materials which were on record before the Court below.

6. The learned Senior Counsel for the Respondent-Contractor supported the decision of the Court below and argued that in view of the mandatory provision contained in Section 10 of the A&C Act, mere participation before the Arbitration Committee does not deprive the Contractor the right to challenge the arbitral award on a ground referable to the composition of Arbitral Tribunal. He further argued that the arbitral award impugned before the Court below is one in conflict with the public policy of India because its making was induced and affected by fraud and corruption and is in contravention of the fundamental policy of Indian law as well as one rendered in conflict with the most basic notions of morality and justice. He, therefore, argued that the impugned decision of the Court below does not warrant interference.

7. Sub-section (1) of Section 34 of the A&C Act provides that recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with Sub-section (2) and Sub-section (3) of that Section. Clause (v) of Sub-section (2) of Section 34 of the A&C Act provides that an arbitral award may be set aside by the Court if, *inter alia*, the composition of the arbitral tribunal was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of Part I of the A&C Act.

8. Clause 12 of the General Terms and Conditions of the contract deals with 'Settlement of Disputes'. It reads as follows:

> "**12. SETTLEMENT OF DISPUTES**:
>
> It is incumbent upon the contractor to avoid litigation and disputes during the course of execution. However, if such disputes take place between the contractor and the department, effort shall be made first to settle the dispute at company level.

> The contractor should make request in writing to the Engineer-in-Charge for settlement of such disputes/claims within 30 (thirty) days of arising of the cause of disputes/claim, failing which no disputes/claims of the contractor shall be entertained by the company.
>
> If differences still persist, the settlement of the dispute with Govt. Agencies shall be dealt with, as per the Guidelines issued by the Ministry of Finance, Government of India in this regard. In case of parties other than Govt. Agencies, the redressal of the dispute may be sought in the Court of Law."

9. On 24.11.2009, the Contractor wrote to the Chairman-cum-Managing Director of SECL, as follows:

> "Most humbly and respectfully, we wish to invite your kind attention towards the earlier correspondence exchanged in the subjected matter. It is most unfortunate that the contract has come to an end by termination, for the reasons of certain differences and disputes arisen in relation to execution of work under the contract.
>
> For us, post termination scenario have been very adverse and pathetic for the reasons of said untimely demise of the Managing Director of the company Late Shri M.P. Lakhotia on 07.11.2009 leaving the entire burden of managing the company, on the weak shoulders of his wife and only son, quite young to cope up the challenges before him.
>
> We have many a times, during the correspondence, suggested the management of SECL and accordingly requested to decide the matters of differences and disputes in bi-partite manner by forming a committee. We again emphasize on the same with the request to defer the decision of the execution of balance work under the contract on our Risk and Cost.
>
> It is always desirable in fair business and commercial practice to resolve the matters of differences and disputes in bi-partite manner before contemplating any precipitate action and therefore we are confident that our request shall be acceded to, more specifically in the present circumstances.
>
> We shall look forward for an efficacious and judicious decision and communication in the matter."

On the next day i.e. 25.11.2009, an office order was issued by the SECL through P.K.Roy Chowdhury, Director (Tech) OPRS constituting a Committee <u>consisting of four members</u>.

10. Settlement of disputes through the mode of arbitration can only be in strict conformity with the freedom of the parties to determine the number of arbitrators subject to the restriction in Section 10 of the A&C Act, to the effect that such number shall not be an even number. In the case in hand, the Contractor's letter dated 24.11.2009 was followed on the next day by constitution of a four member Committee as chosen by the SECL which is one of the parties to the contract. Therefore, the composition of the Arbitral Tribunal in the case in hand is not a bi-partite action which could tie down the Respondent-Contractor excluding him from raising a plea on the basis of Section 10 of the A&C Act, even if such exclusion is permissible; which is not. Therefore, the Court below is justified in taking the view that the constitution of the Arbitral Tribunal is in violation of Section 10(1) of the A&C Act because it had four members and therefore, an even number of members, which is impermissible in view of that statutory provision. The impugned arbitral award was liable to be set aside on that sole ground.

11. The Court below has also held that the arbitral award is liable to be set aside on a ground referable to Clause (b)(ii) of Section 34(2) of the A&C Act. That provision enables the Court to set aside the award of an Aribtral Tribunal if it finds that the arbitral award is in conflict with the public policy of India. With effect from 23.10.2015, the explanation to Section 34(2) of the A&C Act stood substituted by Act No. 3 of 2016 clarifying that an award is in conflict with the public policy of India, *inter alia*, if the making of the award was induced or affected by fraud or corruption or if it is in contravention with the fundamental policy of the Indian law or if it is in conflict with the most basic notions of morality or justice. The said amendment also brought in the word of caution that the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review of the arbitral award on the merits of the disputes, while adjudicating an application to set aside the arbitral award.

12. The contract was terminated by SECL on the basis of the decision of the Board of Directors of that Company in its 182nd meeting held on 17.08.2009. That decision of the Board, going by the communication dated 31.08.2009, approved the proposal for termination of the contract with Contractor with three conditions; the first among which was that the unexecuted quantity of work will be got executed by any agency through "Open Tender" at the risk and cost of the defaulting contractor (Respondent). However, on 30.10.2009, the SECL invited "Limited Tenders" by issuing a Limited Tender Notice. The Court below has found that following such invitation for "Limited Tenders", the contract was issued to the single bidder Company, namely NCC at 25.95% higher than the estimated rate and 39.14% higher than the last awarded rate. Such "Limited Tender" was issued without obtaining the approval of the Board of Directors of the SECL. As rightly found by the Court below, it was contrary to the decision of the Board of Directors of SECL to rearrange the work through "Open Tender" and to mulct the differential costs and penalties on the Respondent-Contractor. The Court below also found that the "Limited Tender" was issued on the face of the directive for "Open Tender" by citing urgency though that was after 56 days from the date of said directive. The CVC started enquiry. The aforesaid factors in relation to the award of the "Limited Tender Contract" at exorbitant rates is candidly stated by the Vigilance Department of SECL in a communication dated 14.07.2011, which is among the materials in this case.

13. SECL attempted to project a case before the Court below that the four member committee proceeded to evaluate the legality, correctness and propriety of the termination of the contract in view of a direction issued by this Court in Writ Petition (C) No. 7046 of 2011. The Court below has rightly found that this Court was not apprised of the fact that the members of the said Committee were facing vigilance enquiry. The Court below therefore rightly rejected SECL's contention in that regard and held that it

cannot take shelter under the High Court's order for conducting the proceedings.

14. The Court below perused the records and have noted certain factors which have rightly been acted upon by it to hold that the award is liable to be set aside as it is so unfair and unreasonable that it shocks the conscience of the Court. Noticing the parameters of jurisdiction under Section 34 of the A&C Act, particularly that the Court does not sit as if it were in an appeal, the Court below adjudicated on that issue, guided by the law laid by the Apex Court in **Associate Builders V. Delhi Development Authority (2005) 3 SC 49** and in **Indian Oil Corporation Limited v. Raja Transport Private Limited (2009) 8 SCC 520**. Bearing those legal principles in mind, the Court below adverted to certain crucial facts and materials. It noticed that the claim statement presented by the Contractor to the Arbitration Committee was forwarded to the General Manager, Kusumunda area of SECL for reply; the decision to forward the claim statement to the General Manager, Kusumunda area was taken by the Arbitral Committee including "the General Manager, Kusumunda area" and it is signed by all of them; the decision of the Committee was to forward the claim to the General Manager, Kusumunda area for countering/ admitting the claim with facts and supporting documents, if any; the General Manager, Kusumunda area participated as a member of the four member committee even thereafter and granted time to the representative of the Kusmunda area for submission of the counter to the claim of facts; on 29.09.2012, the General Manager, Kusmunda area wrote to the General Manager, CMC, SECL, Bilaspur forwarding point-wise reply with facts and supporting documents. The Court below upheld the plea of the Contractor that the Arbitration Committee consisted of a member who is to be treated as an interested party with regard to the contract and the dispute between the parties. These factors clearly show that the Court below was justified in holding, on the basis of the materials

on record, that the award is in conflict with the basic notions of morality and justice.

15. The liability that SECL invited through the "Limited Tender" process of rearranging the work and awarding the rearranged work to a single bidder company namely, NCC; and later attempting to pass on that liability to the Respondent-Contractor through the medium of the Arbitration Committee, which included General Manager, Kusumunda area of SECL stand to breach even the decision of SECL to mulct the Contractor with the liability that may arise after an "Open Tender" rearrangement of the balance work. This coupled with the factors disclosed through such materials as are available in the records of the case, as are relatable to the vigilance enquiry, clearly show that the Court below was justified in also taking the view that the award is induced by fraud and corruption.

16. The Court below has not, in any manner, exceeded the jurisdiction under Section 34 of the A&C Act. It has not attempted to sit in appeal on the factual issues relatable to the merits of the disputes which were put to arbitration. The findings rendered by it are those which necessarily fall within the grounds enumerated under Sub-section (2) of Section 34 of the A&C Act. The impugned judgment therefore does not warrant interference through this appeal under Section 37 of the A&C Act. This appeal therefore fails.

17. In the result, this appeal is dismissed with costs payable by the Appellants to the Respondent fixed at Rs. 1.5 Lacs.

Sd/-	Sd/-
(Thottathil B. Radhakrishnan) **CHIEF JUSTICE**	(Sharad Kumar Gupta) **JUDGE**

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