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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 10.07.2017

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Pronounced on: 19.07.2017

+ O.M.P. 256/2009

M/S HARVINDER SINGH & CO.

..... Petitioner

Through Mr. Sandeep Sharma and Mr.Brighu
Dhami, Advs.

versus

NATIONAL PROJECTS CONSTRUCTION
CORP. LTD. D+

..... Respondent

Through Mr.Anup J. Bhambhani, Sr. Adv. with
Mr.Rajat Arora and Mr.Paypreet Singh, Advs.

+ O.M.P. 352/2009

NATIONAL PROJECT CONSTRUCTION
CORPORATION LTD.

..... Petitioner

Through Mr.Anup J. Bhambhani, Sr. Adv. with
Mr.Rajat Arora and Mr.Paypreet Singh, Advs.

versus

HARVINDER SINGH & CO. B+

..... Respondent

Through Mr. Sandeep Sharma and Mr.Brighu
Dhami, Advs.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. These two petitions are filed impugning the Award dated 10.11.2008 under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as the Act).

2. OMP 256/2009 is filed by Harvinder Singh and Company (hereinafter referred to as the Contractor) whereas OMP 352/2009 is filed by the National Project Construction Corporation Limited (hereinafter referred to as NPCC).

3. Some of the admitted facts are that M/s.Container Corporation of India Ltd. (hereinafter referred to as 'CONCOR') floated a tender for construction of pavement for development of DCT, Okhla, New Delhi. The tenders were invited through RITES Limited, a Government of India Company. NPCC submitted its tender. It also entered into an MOU with the contractor dated 4.12.2003 to the effect that in case the work is awarded by CONCOR to NPCC, it would in turn award the same to the Contractor. The tender of NPCC was accepted. CONCOR issued a letter of intent dated 2.4.2004 to NPCC. NPCC awarded the said work by issuing a letter of intent to the Contractor on 8.4.2004. An Agreement was executed between the parties on 13.9.2004. The work was to be completed within a period of 11 months i.e. on or before 1.3.2005. Disputes and differences having arisen between the parties the matter was referred to the learned Arbitrator for adjudication of the disputes.

4. The grievance of the Contractor was that after Award of the work, in order to complete the same within the allotted time, the Contractor mobilized the resources at the site of work. However, the Contractor could not proceed as the site was not made available on time. It is contended that NPCC was unable to ensure that the site, free of all hindrances is made available. There was live network of railway tracks at the site. There were problems faced with MCD. Permission to utilise fly ash which was mandatory was delayed. Batching plant was installed as per instructions of NPCC on one side of the

site whereas the work was to be executed at the other side. There were several live tracks being used by the railways. Hence, the contractor was unable to use the short passage for reaching the work site leading to delay. There was change of drawings from time to time. The NPCC terminated the contract on 31.3.2005. As per the Contractor the termination was illegal and unjustified.

5. The Contractor before the learned Arbitrator made eleven different claims. Regarding the claims of the contractor., I am concerned with only four of the claims, namely, claim No.1 for Rs.27,82,159/- for payment in respect of work executed by the Contractor, Claim No.4 for Rs.90,20,981/- on account of idling of machineries, Claim No.9 for loss of profit of Rs.55,15,680/- and Claim No.10 for refund of earnest money to the claimant for a sum of Rs.5,60,000/-. It may be noted that the learned Arbitrator only awarded claim No.1 and 10 to the Contractor.

6. NPCC filed a counter-claim on account of loss and damages suffered on account of and arising out of negligence and breach of contract on the part of the contractor. A sum of Rs.63,42,805/- was claimed by way of liquidated damages. Claim No.2 was raised on account of loss of profit for an amount of Rs.32,28,000/-. In addition, costs of arbitration and interest was also sought.

7. The learned Arbitrator noted that one of the conditions imposed upon NPCC by CONCOR was that NPCC will not assign or sublet the contract or any part thereof without permission in writing of CONCOR. Learned Arbitrator also noted that as NPCC had subcontracted the work to the contractor, and this entitled CONCOR to rescind the contract. It was

admitted by the learned counsel for the parties that CONCOR had terminated the contract in favour of NPCC on the ground of sub-contracting.

8. The learned Arbitrator on facts came to a conclusion in the Award that the plea of the contractor about the delay having been caused by NPCC stands substantiated. The Award notes that the version of the contractor finds credence from various communications addressed by NPCC to CONCOR that it was not due to the contractor not mobilizing enough men and machinery but it was because of various hindrances which were not removed or got removed. The Award notes existence of a live railway track which prevented trucks crossing over 500 meters of area from the site of the batching plant to the site of the work. No efforts were made to regulate the flow of the traffic on the live tracks or deploy staff so as to facilitate passing of trucks of the contractor resulting in the contractor having been compelled to take a longer route to bring the material to the site. The Award also notes the issue of non-obtaining of necessary permission or non-sorting out of the matter with MCD. The Award also notes that the correspondences suggest that there have been frequent changes in the plans and drawings from time to time.

9. On claim No.1 the Award notes that an amount of Rs.27,82,159 has been claimed by the Contractor as the balance due on account of pending bills for work done. The award notes that total value of work executed is Rs.47,82,158/- and that an amount of Rs.27,82,159/- remains payable. However, the Award notes that from the abstract of first and second running bills and the endorsement made therein, it appeared that a cheque for a balance amount of Rs.24,71,417/- has been issued to the Contractor and a sum of Rs.16,08,789 is payable. The Award notes that under clause 29 of the

Agreement between the parties all payments are to be made to the contractor within five working days from receipt of payment by NPCC from CONCOR. However, the Award concludes that there is no privity of contract between the contractor and CONCOR. As far as the contractor is concerned he has to get the work executed for NPCC and the liability to pay is of NPCC and not that of CONCOR. The Award holds that interpretation of various clauses of the contract has to be a reasonable one and in case CONCOR for any reason do not release amounts to NPCC, the said NPCC cannot withhold payments due to the Contractor. Hence, claim No.1 was allowed for Rs.16,08,789/-.

10. Regarding claim No.10 the Award notes that a security deposit was made by the Contractor. The only ground taken by NPCC not to refund the said security amount was that it was payable by CONCOR at the end of defect period liability. The Award notes that as the Contract was terminated by NPCC and the NPCC cannot withhold the security amount of Rs.5,60,000/-, claim No.10 was accordingly allowed for the said amount.

11. The counter-claims filed by NPCC were rejected. The Award notes that the counter-claim pertained to the alleged loss/damages on account of negligence and breach of contract by the Contractor. The Award notes that the basis of the counter-claim No.1 is alleged negligence and breach of contract on the part of the contractor. However, the Award notes that in view of letters addressed by NPCC to CONCOR, the contention of NPCC is not tenable. Same analogy would apply to counter-claim No.2 for alleged loss of profit. It also noted that termination of contract by CONCOR was due to absence of permission to sub-let. Hence, the Award concludes that NPCC would not be entitled to any counter-claim.

12. I have heard learned counsel for the parties. Learned senior counsel appearing for the NPCC relies upon clause 3 of the MOU dated 4.12.2003 and other clauses of the agreement to contend that the agreement between the NPCC and the Contractor was a back to back arrangement. Reliance is also placed on clause 22 and 29 of the Agreement dated 8.4.2004. The arrangement/agreement was, it is submitted, that the entire work would be conducted by the contractor and all payments received from CONCOR would be paid to the Contractor back to back after deduction of the commission/profit of NPCC. It is stated that as payments have not been received from CONCOR, NPCC was not liable to pay any amounts to the Contractor. Based on the above, it is urged that the learned arbitrator has passed a grossly illegal award. The Award, it is urged, is completely illegal and perverse. Hence, it is urged that none of the two claims that have been awarded in favour of the contractor were payable by CONCOR.

13. Learned counsel appearing for the Contractor has reiterated that the learned Arbitrator has wrongly allowed claim No.1 for only Rs.16,08,789/-. He submits that the learned Arbitrator has wrongly concluded that from the first and second running bills a payment of Rs.24,71,417/- was made and that the balance is Rs.16,08,789/-. It is urged that an application under section 33 of the Arbitration Act was also filed before the learned Arbitrator to rectify the defect which the learned Arbitrator did not accept and dismissed the same. Reliance is also placed on claim No.4 relating to higher charges of machinery and claim No.9 being loss of profit to claim that these claims have been wrongly disallowed by the learned Arbitrator on a completely incorrect appreciation of facts and terms of the contract.

14. I will first deal with the plea of learned senior counsel for NPCC, on the issue of contract being a back to back contract. We may first have a look at the various terms of the Agreement dated 13.09.2004 relied upon by NPCC which read as follows:-

“22. All terms and conditions agreed between client and NPCC Limited shall be binding to M/s.HSC on back to back basis. Payment for all variations, shall be made by NPCC Limited to M/s. HSC on pro rata basis in proportion to their quoted price to NPCC Limited and NPCC Limited’s price to client. For all extra items and claims the margin of NPCC Limited shall be 10% and 15% respectively.

.....

29. All payment shall be made to M/s HSC within five working days of receipt of payment of NPCC Limited from client after necessary deductions as per agreed terms and NPCC Limited shall get a clear margin of 5.5% (five point five zero percent) on gross amount of the bills paid by clients. The payments for the quantities to Ms.HSC shall be restricted to the quantities paid by clients to NPCC Limited, but payments in respect of extra items and claims shall be made as per clause No.22 of this additional terms and conditions.

.....

35. All other items and conditions will be same as applicable between NPCC Limited and Container Corporation of India Limited on back to back basis.”

15. The learned Arbitrator while interpreting the above clauses has noted that there is no privity of contract between the Contractor and CONCOR. The privity of contract is between the parties to the present proceedings. Work has been got executed at the instance of NPCC. In case there is any liability to pay it would be that of NPCC and not of CONCOR. The Award also holds that in case no amount is released by CONCOR and no action is taken by NPCC for realization of the amount, the Contractor cannot be

without any remedy as he cannot approach CONCOR directly by filing appropriate judicial proceedings. It cannot be said that in such a situation the Contractor would be deprived of his amount which is admittedly due as per the contract and he would be remediless. The Award notes that interpretation of various clauses of the contract has to be a reasonable one. The Award further concludes that it would be the obligation of NPCC to pay the amount to the contractor and later, seek remedy against CONCOR.

16. Even otherwise a perusal of the terms shows that there is no provision which specifically states that in case of failure of CONCOR to release payments to NPCC which are legitimately due and payable, the liability of NPCC to release payments to the contractor gets extinguished. The above noted provisions, namely, clauses 22, 29 and 35 merely stress that the terms and conditions of the contract between NPCC and CONCOR will apply back to back to the contractor. Specifically clause 29 which was stressed upon by the learned senior counsel for the NPCC merely states that payment when received by NPCC shall be released to the contractor within five working days. It is not implicit in this clause that in case the payment is not released by CONCOR for the work done, the contractor is not entitled to any payment.

17. The above interpretation of the clauses of the agreement between the parties by the learned Arbitrator is a reasonable and plausible interpretation. Further, on a finding of fact the learned Arbitrator has concluded that there was inaction and delay which took place on account of the acts and negligence of NPCC. The only claim that has been allowed to the Contractor is unpaid dues and refund of his security deposit and nothing more. The Contractor cannot be left remediless. These payments were legitimately due

and the only entity from whom the contractor could recover is NPCC. There are no reasons to hold that the interpretation of contract is illegal or perverse.

18. In any case, interpretation of the contract is within the domain of the arbitrator. It is settled legal position that the court shall not ordinarily substitute its interpretation of the terms of the contract with the interpretation of the arbitrator. A reference may be had to the judgment of the Supreme Court in the case of *Swan Gold Mining Ltd. v. Hindustan Copper Ltd.*, (2015) 5 SCC 739. The court held as follows:

“19. The words “public policy” or “opposed to public policy”, find reference in Section 23 of the Contract Act and also Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996. As stated above, the interpretation of the contract is matter of the arbitrator, who is a judge, chosen by the parties to determine and decide the dispute. The Court is precluded from re-appreciating the evidence and to arrive at different conclusion by holding that the arbitral award is against the public policy.”

19. Similarly, the Supreme Court in *National Highways Authority of India vs. ITD. Cementation India Limited*, (2015) 14 SCC 21/(MANU /SC/0490/2015), held as follows:

“25. It is thus well settled that construction of the terms of a contract is primarily for an arbitrator to decide. He is entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the contract. The court while considering challenge to an arbitral award does not sit in appeal over the findings and decisions unless the arbitrator construes the contract in such a way that no fair minded or reasonable person could do.”

20. In view of the above factual and legal position, it is manifest that there is no merit in the contentions of the learned senior counsel for NPCC.

21. I may now deal with the contentions of the learned counsel appearing for the contractor.

22. As far as claim No.1 is concerned, it has been pointed out that the application under Section 33 of the Act was filed before the learned arbitrator to make corrections inasmuch as the total amount unpaid to the contractor is Rs.23,42,904 and not Rs.16,08,789. The learned arbitrator rejected the said application of the contractor. The learned arbitrator noted the stand of the NPCC that the contractor has failed to give details of the unpaid bills and that there is no clerical, typographical or computation error in the award. The learned arbitrator noted the contention of the contractor and did not accept the same and rejected the application. The learned arbitrator in the award notes that as per NPCC Rs.24,71,417/- has already been paid to the contractor and the balance amount is only Rs.16,08,789/-. Noting the above contention, the award based on the documents on record accepted the versions of the NPCC that Rs.24,71,417/- has been paid and balance amount payable is Rs.16,08,789/-.

23. Regarding claim No.4 the award notes that this relates to hire charges of the machinery which according to the contractor were idle due to the acts of NPCC. The award notes that there is no denial of the fact that the machinery was deployed, however, there are disputes regarding the extent of machinery deployed by the contractor. It also noted that assuming NPCC was negligent to discharge its obligation, contractor was bound to take steps to mitigate the damages. There is nothing to show that steps were taken by

the contractor to mitigate the damages by taking away the material after putting NPCC to notice. Hence, the learned arbitrator has come to the conclusion that the amount claimed is unjustified.

24. The learned arbitrator on claim No. 9 (For loss of profit) noted that at best there was a delay in handing over the site by NPCC to the contractor. At best for the said delay, the contractor was entitled to seek extension of time but cannot claim loss of profit. In these circumstances, there can be no ground to loss of profit.

25. The learned Arbitrator has rejected the said claim Nos. 4 and 9 and awarded a lesser amount on claim No. 1 based on the conclusions and facts as noted by the learned Arbitrator.

26. The Supreme Court in *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49 held as follows:

“31.....The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where-

1. a finding is based on no evidence, or
2. an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or
3. ignores vital evidence in arriving at its decision,

such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In **H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons**, 1992 Supp (2) SCC 312 at p.317, it was held:

7.It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration

irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.

In *Kuldeep Singh v. Commr. of Police*, (1999) 2 SCC 10 at para 10, it was held:

10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.”

33. It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In *P.R.Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.*(2012) 1 SCC 594, this Court held:

21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has

examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.

.....”

27. Accordingly, there is no merit in the contentions of the learned counsel for the contractor. There are no reasons to dispute the findings of facts recorded by the learned Arbitrator.

28. There is no merit in these petitions. The same are dismissed.

(JAYANT NATH)
JUDGE

JULY 19, 2017

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