

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

+ FAO (OS)(COMM) 84/2017 and CM APPL. 14328/2017

Reserved on: 01.05.2017

Date of decision: 13.07.2017

IN THE MATTER OF:

M/S CWHEC-HCIL (JV)

..... Appellant

Through: Mr. Arvind Minocha and Mr. Mayank
Kshirsagar, Advocates

versus

M/S CHPRCL

..... Respondent

Through: Mr. Ramesh Kumar, Advocate

CORAM

HON'BLE MS.JUSTICE HIMA KOHLI

HON'BLE MS.JUSTICE SANGITA DHINGRA SEHGAL

HIMA KOHLI, J.

1. The present appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as '**A&C Act**') assails an order dated 14.02.2017 passed by the learned Single Judge partly allowing a petition under Section 34 of the A&C Act filed by the respondent, a joint venture company, impugning an Arbitral Award dated 22.04.2009, published by a three member Arbitral Tribunal.

2. A glance at the facts of case that are relevant for deciding the present appeal are as follows:-

3. The respondent, Calcutta-Haldia Port Road Company Ltd. had floated a tender for execution of the project i.e., *“Four laning of Km 0/500 to Km 52/700 of Kolaghat-Haldia section of NH-41 in the State of West Bengal -Package WB (Haldia)”*. The appellant, a joint venture formed between two companies namely, M/s China National Water Resources & Hydropower Engineering Company of P.R. China (subsequently named as Syno Hydro Power Engineering Corporation) and M/s Harish Chandra (India) Ltd., was a successful bidder in respect of the aforesaid work that was awarded in its favour at a contract price of Rs.2,19,98,91,379/-. The Agreement dated 24.07.2002 executed between the parties was an item rate contract and had stipulated the date of commencement of the work as 10.09.2002. Under the said Agreement, the appellant had quoted rates for different items, as was detailed in the Bill of Quantities (hereinafter referred to as ‘**BOQ**’). On disputes and differences arising between the parties, the appellant invoked the arbitration clause and preferred seven claims before the Arbitral Tribunal. The first four claims preferred by the

appellant were rejected by the Arbitral Tribunal. Against claim No.5 (raised towards additional payment on account of sand filling under Box culverts in lieu of earth filling as per BOQ Item No. 5.42), a sum of Rs.13,03,690/- was allowed as against a sum of Rs.13,03,694/- preferred by the appellant. Against claim No.6, (raised towards extra payment for using Grade-III filter media as directed, in place of Grade-I filter media) a sum of Rs.13,00,495/- was allowed as against a sum of Rs.19,60,167/- preferred by the appellant. Against claim No.7 (raised towards non-payment for providing epoxy bonding layer) a sum of Rs.1,42,540/- was allowed as against a claim of Rs.1,42,543.90 paise preferred by the appellant.

4. Aggrieved by the Arbitral Award, the respondent/company filed a petition under Section 34 of the A&C Act, on which a limited notice in respect of claims No.5 and 6 was issued by the learned Single Judge. Under the impugned judgment, the objections raised by the respondent in respect of claim No.5 awarded in favour of the appellant, were turned down and it was held that there was no infirmity in the reasoning given by the Arbitral Tribunal for granting additional payment to the appellant on account of using sand instead of earthen material for filling under the box culverts etc.

Coming to the question as to whether the appellant would be entitled to any additional amount on account of using material conforming to class-III grading, the learned Single Judge has declined to interfere with the view taken by the Arbitral Tribunal that the appellant ought to be compensated if it had incurred any additional cost on that count, by observing that it was a plausible view which did not deserve any interference. This left the question as to whether there was any material placed before the Arbitral Tribunal to ascertain as to whether the appellant had incurred additional cost for entitlement to a sum of Rs.13,00,495/-.

5. On examining the findings of the Arbitral Tribunal on the third aspect referred to above, the learned Single Judge concluded that the Award was conspicuously silent as to the basis on which the rate of Rs.345/- per cubic meter was worked out for arriving at a conclusion that the appellant was entitled to any additional amount on the said basis. Holding that the amount awarded in favour of the appellant under claim No.6 was not based on any evidence and therefore could not be sustained, that part of the Award was set aside. Aggrieved by the aforesaid findings, the appellant has filed the present appeal.

6. Mr. Minocha, learned counsel for the appellant contended that the scope of interference under Section 34 of the A&C Act is very limited and while returning the findings in the impugned order, the learned Single Judge has transgressed the said scope by going into findings of fact, which is impermissible; that there was no dispute that the appellant had executed the work, which was a variation and not included in the contract specifications, for which it was entitled to receive additional payment and that the respondent had never disputed that extra cost was being incurred by the appellant in doing the extra work and that the analysis of extra cost submitted by the appellant before the Arbitral Tribunal, was not questioned by the respondent. He had also referred to the recommendations made by the Dispute Review Board (DRB), that had recommended that the Engineer should determine the rate payable to the appellant for the filter media used by it as per the Grade-III specifications, in accordance with the provisions of the contract by treating that the BOQ Item No.5.42 gave the rate for Grade-I filter media only and the difference of the two rates ought to be paid by the respondent. To fortify his submission that where the Arbitral Tribunal comprises of persons with technical

knowledge, who are well versed with the practice in their respective fields, as in the present case, they were entitled to use their expertise to decide the dispute, reliance was placed by learned counsel on the decision of the Supreme Court in the case of P.R. Shah, Shares and Stock Broker (P) Ltd. vs. B.H.H. Securities (P) Ltd. and Ors. reported as **(2012) 1 SCC 594**.

7. *Per contra*, Mr. Ramesh Kumar, learned counsel for the respondent supported the impugned judgment and controverted the submission made by the other side to the effect that the respondent had not disputed the extra cost allegedly incurred by the appellant in executing the work under claim No.6 or that it had never questioned the analysis of extra cost submitted by the appellant before the Arbitral Tribunal. To counter the submission made by the other side, he drew out attention to the submissions of the parties recorded in the Arbitral Award in respect of claim No.6 and contended that it was specifically recorded therein that as per the respondent, there was no question of any extra payment being released in favour of the appellant, over and above the rates quoted for BOQ Item No.5.03 and that the said claim was inadmissible. Learned counsel canvassed that even if the appellant had failed to produce any evidence to substantiate its claim for

extra payment under claim No.6 and the Arbitral Tribunal was of the view that the claimant was entitled to extra payment, then nothing precluded the Tribunal from calling for evidence from any third party or from the party to the proceedings, as provided for under Section 25 and 27 of the A&C Act, for arriving at a conclusion as to what was the amount, if any, that was payable to the appellant towards the difference in the cost for executing of the same work with material conforming to class-I Grade-A and class-III Grade-A. But no such measures were taken by the Tribunal in the present case. Reliance was placed on the decision of the Supreme Court in the case of Delta Distilleries Limited vs. United Spirits Limited and Anr. reported as **(2014) 1 SCC 113**, wherein it was held that if necessary documents are not produced to justify a claim, then an adverse inference can be drawn by the Arbitral Tribunal against the defaulting party and in circumstances where a party fails to appear or produce documentary evidence, the Arbitral Tribunal can still continue the proceedings and render an Award on the evidence before it, which evidence can be sought from any third party or from the party to the proceedings itself.

8. We had carefully considered the arguments advanced by learned counsels for the parties at the stage of admission before reserving judgment.

9. In the recent case of Associate Builders vs. DDA reported as **(2015) 3 SCC 49**, the Supreme Court has gone to great lengths to comprehensively spell out the law on the aspect of the limitations that are placed on a court that is hearing objections to an arbitral award under Section 34 of the A&C Act, which prescribes the grounds on which such an award can be set aside. It was observed that Section 34 read in conjunction with Section 5 (*Extent of judicial intervention*) makes it clear that the arbitral award which is governed by Part-I of the A&C Act can be set aside only on the grounds mentioned in Section 34(2) and (3) and not otherwise. The Supreme Court emphasized that none of the grounds available in Section 34(2)(a) deal with the merits of the decision rendered by an arbitral award and it is only when a grievance is raised that the award in conflict with the public policy of India, can the merits of the said award be examined and that too, under specified circumstances. The judgment has elaborated on the specific heads of public policy in the above context. Under the sub-head of “the award

being contrary to the fundamental policy of the Indian law”, have been included the pre-condition of the award being compliant of the statutes and judicial precedents, the need for a judicial approach, compliance with the principles of natural justice and the *Wednesbury* principles of reasonableness. The said judgment delineated the grounds on which an award may be set aside as contrary to public policy, which include a ground that the award is contrary to the interests of India, or is against justice or morality or one that is patently illegal, i.e., induced or affected by fraud or corruption.

10. While dealing with the first juristic principle discussed in the case of Associate Builders (supra), namely, an award that is contrary to the fundamental policy of Indian law, the Supreme Court has observed as follows:-

“29. It is clear that the juristic principle of a “judicial approach” demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

30. The *audi alteram partem* principle which undoubtedly is a fundamental juristic principle in Indian law is also contained in Sections 18 and 34 (2)(a)(iii) of the Arbitration and Conciliation Act. These Sections read as follows:

18. Equal treatment of parties - The parties shall be treated with equality and each party shall be given a full opportunity to present his case.

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34. Application for setting aside arbitral award – (1)

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(2) An arbitral award may be set aside by the Court only if-

(a) the party making the application furnishes proof that-

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(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

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-

(i) a finding is based on no evidence, or

(ii) an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) ignores vital evidence in arriving at its decision,

Such decision would necessarily be perverse.” (emphasis added)

11. Citing an earlier decision in the case of Kuldeep Singh vs. Commissioner of Police reported as (1999) 2 SCC 10, where it was held that a broad distinction has to be maintained between decisions which are perverse and those which are not and if a decision is arrived at on no evidence or such evidence which is thoroughly unreliable and no reasonable person would act upon it, the said order would be perverse, the Supreme Court has explained in para 33 as follows:-

“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.”

12. We now proceed to test the findings returned in the impugned order, on the anvil of the guidelines laid down in the captioned decision. The findings of the Arbitral Tribunal in respect of claim No.6 are as follows:-

“A T’s Observations and findings

We have gone through the pleadings of both the parties. We have also examined the documents filed by them and heard their respective arguments in the matter.

From the arguments and counter arguments being made by the parties, it is evident that the major area of disagreement is regarding sub-clause No.309.3.2 (B). The contractor is stating that sub-clause No.309.3.2(B) is applicable to the BOQ item No.5.03 against which the work of back filling with filter media behind structure has been done by them. On the contrary, the Respondent has taken a stand that the Cause No.309 of MORTH Specification is applicable to Surface and Sub-surface drains only and accordingly, its sub-clause No.309.3.2(B) is not at all applicable for determination of the grading requirement of filter media behind Structures. The Respondent has further stated that in the absence of any specific provisions in the Contract regarding the grading of filter media behind the structures the Engineer would decide the same conforming to sound engineering practice. In view thereof, the stand of the Respondent is that decision taken by the Engineer shall be final and binding on the Contractor.

We have gone through Clause 305 of Technical specifications as well as Clause 309 in detail. We find that sub-clause No.305.4.4 of Tech. Specifications deals with the provision of filter media behind the structures wherein it is clearly provided that the material to be used for filter media shall conform to the requirement of filter medium spelt out in sub-clause No.309.3.2(B). We also find that as stated in sub-clause No.309.3.2(B), Table 300-3 governs the grading requirements of filter media.

In view of above clear provisions provided in the Technical Specifications, which is a part of the Contract, we do not find any merit in the contentions of the Respondent.

We are of the considered opinion that in view of the above said stipulations, the Contractor was entitled to use grade – I material for Filter Media against BOQ No.5.03 while the Engineer ordered to use grade – III material and that too with a different methodology of using two different types of Filter Media. Accordingly, the Contractor is entitled to payment as a variation item for the work so done.

We have analyzed the rate payable to the Contractor as extra expenditure incurred for using the Grade – III filter media in two columns of 300 mm thickness each, using different sizes of materials as per instructions/methodology approved by the Engineer. This analysis has been done, keeping in view the contract provisions.

We find that additional rate, over and above the rate quoted by the Contractor against BOQ item No.5.03, comes to Rs.345/- per CUM. So the Contractor is entitled to payment of 3769.55 cum x Rs.345/- = Rs.13,00,495.78 say Rs.13,00,495/-.

The Contractor is also entitled to price adjustment of the above said amount of Rs.13,00,495/-. For this purpose, the base index would be considered on the basis of the date on which the methodology was approved by the Engineer.

The Contractor is entitled to interest on the delayed payment. The rate of interest and period of interest would be governed by the provisions of sub-clause 43.1 and 43.2 of the Contract.”

13. As noted above, though the Award records that the Tribunal has analyzed the rates payable to the contractor as extra expenditure incurred for using Grade-III filter media in two columns, there is no discussion with respect to the material evidence that forms the basis of the said analysis. Except for the appellant submitting before the Arbitral Tribunal, a calculation sheet of the extra expenditure allegedly incurred by it for filter media, admittedly, it did not lead any evidence to prove the said computation. In such circumstances, we are of the opinion that the findings returned by the learned Single Judge to the effect that the Award is

conspicuously silent as to the basis on which the rate of Rs.345/- per cubic meter was worked out by the Arbitral Tribunal, cannot be faulted.

14. The next contention of the learned counsel for the appellant that the calculation of extra expenditure submitted by the appellant before the Arbitral Tribunal was not disputed by the respondent and therefore, there was no requirement for the appellant to adduce evidence to prove the same, is unacceptable in the light of the specific objection taken by the respondent before the Arbitral Tribunal which has been so recorded in the Award. In fact the stand of the respondent all along has been that the use of class-III grade filter media was completely in consonance with the contract specification and therefore, there was no question of making any extra payment on the said head and the BOQ Item No.5.03 and the contract did not make any mention about the grading of the material to be used in the work. Having notice of a categorical objection taken by the respondent for release of extra payment to the appellant, it was incumbent for the latter to have produced material evidence to justify its claim of extra expenditure for the work done beyond the BOQ items, which is completely absent in the present case. Had the appellant produced some evidence, however

sketchy it may have been and the Arbitral Tribunal relying on that and using its expertise in the field, had accepted the same and then proceeded to recommend release of extra payment in its favour, then the decision in the case of P.R. Shah, Share and Stock Brokers (P) Ltd. (supra) would have had application to the said fact situation. However, in the absence of any evidence produced by the appellant, neither the recommendations made by the DRB, nor the Calculation Sheet submitted before the Arbitral Tribunal would be of any value.

15. We may emphasize that the review that an Appellate Court undertakes under Section 37 of the A&C Act, is not of the award published by the Arbitral Tribunal but of the view taken by the learned Single Judge in the impugned judgment. In other words, the scope of review available under Section 34 of the A&C Act, is further constricted in appeal. Only if the learned Single Judge has taken a view that is glaringly preposterous or has overlooked a patent error, the same can be set right in appeal. But when all the facts and the law on the aspects argued have been examined in the impugned judgment and the decision taken is one which is found to be plausible, even if it is not the only one that can be arrived at in law, the

Appellate Court would forbear from substituting the said view by its own in appeal. In the present case, the learned Single Judge has reviewed the Arbitral Award within the parameters of Section 34 of the A&C Act and thereafter returned his findings. We are of the opinion that there is no infirmity in the observation of the learned Single Judge that the findings based on no material would fall foul of the public policy test laid down under Section 34(2)(b)(ii) of the A&C Act and therefore they cannot be sustained.

16. For the reasons stated above, we are inclined to concur with the view taken in the impugned judgment in respect of the observations made with respect to claim No.6. Accordingly, the present appeal is dismissed as being devoid of merits, but with no orders as to costs.

(HIMA KOHLI)
JUDGE

(SANGITA DHINGRA SEHGAL)
JUDGE

JULY 13, 2017
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