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

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Date of decision:05.09.2017

+ O.M.P. (COMM) 235/2017 & IA Nos.6126-6127/2017

UNION OF INDIA THROUGH DY. CHIEF ENGINEER...Petitioner

Through Mr.N.Prashant Kumar Nair, Adv.

versus

B.S. SANGWAN

..... Respondent

Through Mr.S.W.Haider, Adv.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

IA No.6127/2017(exemption)

Allowed subject to all just exceptions.

O.M.P. (COMM) 235/2017 & IA No.6126/2017(stay)

1. The present petition is filed under section 34 of the Arbitration and Conciliation Act, 1996 seeking to impugn the Award of the learned Arbitrator dated 21.01.2017.
2. The respondent was awarded P.Way linking and other allied works between Rewari to Rohtak section on 29.01.2009 for Rs.5,40,11,614/-. Fifteen months' time was allowed for completion of work which was to expire on 28.4.2010. Various extensions were given to the respondent. The time for completion of the work was extended upto 31 months and the total

period for completion of the work became 46 months. The work was completed on 05.12.2012. The essential case of the respondent is that under compelling circumstances he was told by the respondent to deploy staff for watch and ward of railway property which was not covered in the rates provided in the agreement. It was urged that the area between Rohtak to Rewari is notorious and theft prone area. Various instances of theft and robbery have taken place and loss has been caused for which FIR has been registered. It was the case of the respondent that in compliance of instructions of the Chief Engineer an NS rate of Rs.70,000/- per block section (approximately 8 km in length) per month for watch and ward was prepared by the Deputy Chief Engineer and it was sent for approval to the competent authority. On receipt of approval, the respondent started the work as instructed by the petitioner. However, the petitioner also invited tenders for the watch and ward of its property but the work was given to M/s. Deepak Enterprises on 21.01.2012. The respondent was directed to hand over inventories of the said work to the said agency. The inventories were handed over to M/s. Deepak Enterprises on 31.3.2012.

3. Based on this background the respondent invoked the arbitration clause. As the respondent did not appoint the arbitrator, a petition was filed in this court for appointment of an Arbitrator. Vide order dated 12.2.2015 in Arb.P.No.479/2014 this court appointed the Sole Arbitrator. Mr. Vinod Jain (ADJ, Retd.).

4. Before the learned Arbitrator the respondent made three claims i.e. Claim No.1 was for Rs.1,19,88,000/- for keeping watch and ward of railway property round the clock by deputing adequate number of people. Claim No.2 was for Rs.19,18,080/- for price variation clause on the above claim

No.1 for the period 30.4.2010 to 31.03.2012 calculated as per RBI Index. Claim No.3 was for interest. The learned Arbitrator framed the following issues:-

1. Whether the claimant is entitled for the amounts claimed as alleged? OPC

2. Whether the claimant is entitled for interest, if so, at what rate and for what period? OPC

3. Whether the claim of the claimant is not maintainable due to execution of supplementary agreement dated 06.05,2014? OPR

4. Relief.

5. A perusal of the Award shows that the same notes the evidence by way of affidavit of the respondent Sh. B.S. Sangwan (CW1). The Award concludes that he has justified that under the compulsion of circumstances, he had to deploy staff for watch and ward not covered in the rates provided in the agreement which was instructed to him. He further justified that on instructions of the Chief Engineer a rate of Rs. 70,000/- per block section per month for watch and ward was prepared by the Deputy Engineer, which was vetted by the Chief Draftsman and justified by XEN on 06.10.2010. The matter was sent for approval to the competent authority and that accordingly, as instructed he deployed watch and ward staff on patrolling. Subsequently when the tender was floated for the same work, the work was given to Deepak Enterprises to whom the respondent was asked to handover charge. The Award notes that the testimony of the respondent has not been seriously assailed in cross-examination and gets full support and corroboration from the documentary evidence. The Award also notes that the petitioner had led

the evidence of Sh. S.K. Garg/RW-1. However, the matter in issue pertained to the period 2010-2012 when the concerned officer looking after the work was the predecessor of Sh.S.K. Garg, namely, Sh. Naresh Chand, the then XEN, Rohtak. There was no explanation as to why Sh. Naresh Chand was not summoned for evidence. The learned Arbitrator concludes that the best evidence has not been led by the petitioner and necessary inference can be made against the petitioner and in favour of the respondent. The Award hence accepted the version of the respondent that he deployed the watch ward staff on the instructions of the petitioner.

6. The learned Arbitrator awarded a sum of Rs.1,19,88,000/- under claim No.1 and of Rs.19,18,080/- under claim No.2. Interest on the amount @ 10% per annum from the date of filing of the claim petition i.e. 12.5.2015 till the date of the Award and @12% per annum from the date of the award till realization was passed in favour of the respondent. Costs were also awarded to the respondent.

7. I have heard learned counsel for the parties. Learned counsel for the Petitioner has challenged the award. He has submitted as follows:-

(i) The contract stood discharged by way of a supplementary agreement dated 6.5.2014 and subsequent payment of the final bill. The finding of the learned Arbitrator that the said supplementary agreement is vitiated by coercion is completely misplaced as there was a heavy burden of proof against the respondent which the respondent failed to discharge.

(ii) The competent authority had rejected the proposed option for deployment of watch and ward and there was no written agreement for the same. Hence, no such payment could have been made to the respondent.

(iii) The respondent has failed to prove that he had executed the work for watch and ward and no appropriate evidence in this regard was filed.

8. I will first deal with the submission of the learned counsel for the petitioner relating to the contention that pursuant to execution of the supplementary agreement dated 06.05.2014, no further claim of the respondent survives.

9. The learned Arbitrator has concluded from the facts on record that the said agreement dt. 06.05.2014 is illegal and invalid and cannot be binding upon the respondent. The learned Arbitrator noted that the supplementary agreement was executed on 6.5.2014 which states that the respondent has received full payment of the final bill of Rs.57,66,376.54/- as full and final settlement of his claim under the principal agreement. The Award notes that this claim is false as the said payment of Rs.57,66,376.54/- was received much after the supplementary agreement on 18.5.2014. The award also notes that the security deposit of Rs.31,29,291/- and the earnest money of Rs. 35,84,291/- was paid to the respondent on 26.05.2014 well after execution of the agreement. The FDR amount of Rs.4,50,000/- was released on 02.06.2014. Had there been no duress or coercion upon the respondent in execution of the supplementary agreement, these payments would have been released on execution of the supplementary agreement.

The award also notes that a perusal of the supplementary agreement shows that it is on dotted lines which in normal course of business would not have been the result of mutual agreement. It also notes that getting said supplementary agreement executed seems to be the Modus operandi of the respondent. The Award also notes that immediately after the so-called supplementary agreement dated 6.5.2014, the respondent has on the next

date 7.5.2014 (Ex.CW1/8) and on 8.5.2014 (Ex.CW1/9) specifically protested and mentioned about coercion to execute supplementary agreement dated 6.5.2014. The award also notes that in cross-examination the petitioners have not cross-examined the witnesses of the respondent on these communications. Hence, the Award concludes that coercion is proved.

The learned Arbitrator has noted the judgment of the Supreme Court in *National Insurance Company Limited Vs. M/s Bhoghara Polyfab Pvt. Ltd AIR 2009 SC 170* to come to a conclusion that the supplementary agreement dated 06.05.2014 has been executed by the respondent under coercion and does not bind the respondent.

10. I may look at some of the evidence relied upon by the learned arbitrator. A perusal of the evidence by way of affidavit of Shri B.S.Sangwan (CW1) would show that he has stated in his affidavit that he was specifically told that unless he signs the final bill and supplementary agreement in advance without protest, he will not get any payment which has been pending for a long time. Under coercion, pressure and undue influence, he signed the bill and supplementary agreement dated 06.05.2014 but immediately thereafter on 07.05.2014 and 08.05.2014 (Ex.CW1/8 and Ex.CW1/9) intimated the respondents about the grievance and requested for payment of the claims.

A perusal of the cross-examination of the said witness (CW1) Shri B.S.Sangwan would show that in his cross-examination that took place on 26.10.2016 not a single question has been asked about the execution of the supplementary agreement dated 06.05.2014 or that it was executed voluntarily etc.

11. The award has also noted Clause 9.8 of the Special Tender Conditions and Instructions to Tenderer (Ex.RW1/3) whereby the respondent was obliged to execute a supplementary agreement. The said Clause 9.8 reads as follows:

"After the work is completed and taken over by the Railway as per terms and conditions of the contract agreement or otherwise concluded by the parties with mutual consent and full and final payment is made by the Railway to the contractor for work done under the contract the parties shall execute the supplementary agreement annexed here to as Annexure-B." (Emphasis supplied)."

Hence, it is obvious that it was mandatory on the part of the respondent to execute the supplementary agreement after receiving full and final payment. However, in the present case, the supplementary agreement was got executed from the respondent while the payments were still not released. It is noteworthy that the work was completed on 05.12.2012 but the payments to the respondent were not released. Payments have been released to the respondent almost one and a half years thereafter in May, 2014 after execution of the supplementary agreement dated 06.05.2014.

12. Reference may be had to the judgment of the Supreme Court in *National Insurance Company Limited Vs. M/s Bhoghara Polyfab Pvt. Ltd.* (*supra*). The Supreme Court held as follows:

"25. In several insurance claim cases arising under Consumer Protection Act, 1986, this Court has held that if a complainant/ claimant satisfies the consumer forum that discharge vouchers were obtained by fraud, coercion, undue influence etc., they should be ignored, but if they were found to be voluntary, the claimant will be bound by it resulting in rejection of complaint. In United India Insurance Co. Ltd., v.

Ajmer Singh Cotton & General Mills, AIR1999SC3027, this Court held:

The mere execution of the discharge voucher would not always deprive the consumer from preferring claim with respect to the deficiency in service or consequential benefits arising out of the amount paid in default of the service rendered. Despite execution of the discharge voucher, the consumer may be in a position to satisfy the Tribunal or the Commission under the Act that such discharge voucher or receipt had been obtained from him under the circumstances which can be termed as fraudulent or exercise of undue influence or by misrepresentation or the like. If in a given case the consumer satisfies the authority under the Act that the discharge voucher was obtained by fraud, misrepresentation, undue influence or the like, coercive bargaining compelled by circumstances, the authority before whom the complaint is made would be justified in granting appropriate relief.

In the instant cases the discharge vouchers were admittedly executed voluntarily and the complainants had not alleged their execution under fraud, undue influence, misrepresentation or the like. In the absence of pleadings and evidence the State Commission was justified in dismissing their complaints.

The above principle was followed and reiterated in National Insurance Co. Ltd. v. Nipha Exports (P) Ltd. : (2006)8SCC156 and National Insurance Co. Ltd., v. Sehtia Shoes:(2008)5SCC400 . It will also not be out of place to refer to what this Court had said in Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly: (1986)11LLJ171SC in a different context (not intended to apply to commercial transactions):

(This) principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all

bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infra- structural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances. [emphasis supplied]”

13. Hence based on the evidence on record, the finding recorded by the learned arbitrator that the supplementary agreement was executed under coercion and duress and cannot bind the respondent is a plausible finding based on evidence on record and cannot be set aside as pleaded.

14. I will now deal with the second and third contention of the learned counsel for the petitioner i.e. about absence of a written agreement and proof

of having executed the work. The learned Arbitrator has noted the various communications between the petitioner and the respondent with regard to the work said to have been done by the respondent. Reference was made to documents on record i.e. Ex.CW1/15 being copy of letter dated 1.10.2010 written to Deputy Chief Engineer on the subject of theft of railway material between Rohtak and Rewari suggesting that the respondent may be asked to do the job, Ex.CW1/16 being letter dated 4.10.2010, Ex.CW1/18 being letter dated 9.11.2010 written to Deputy Chief Engineer, Northern Railway, New Delhi for sanctioning of NS item at the proposed rates based upon accepted rates in the unit of Deputy Chief Engineer. Ex.CW1/19 being letter dated 23.12.2010 specifically mentioning that the Chief Engineer, Northern Railway had accorded administrative approval to process the NS item i.e. watch and ward around the clock, Ex.CW1/20 being the copy of office note for necessary administrative approval for the NS item. Based on these documents and other evidence, the learned Arbitrator recorded a finding of fact that the documentary evidence proved the case of the claimant/respondent that on instructions of the petitioner the watch and ward work was done by the respondent for protection of railway property from theft which was not in the original agreement. The learned Arbitrator concluded that the respondent was orally as well as in writing asked to deploy his men for watch and ward to avoid theft of railway property and hence, the petitioner has to pay for the same.

15. I may see some of the evidence led by the respondent/claimant especially the documents relied up on by the learned Arbitrator. Ex.CW1/14 is a communication dated 29.09.2010 written by the respondent pointing out to the petitioner that many incidents of theft of fittings are taking place.

Similarly, Ex.CW1/15 is the communication dated 3.10.2010 from XEN/C/11/ROK of the petitioner noting that the entire section between Rewari to Rohtak is theft prone and sufficient watch men are required to be deputed and that the contractor may be asked to do the job. Ex.CW-1/17 is a note prepared by the officers of the petitioner, relevant portion of which reads as follows:

SE/C/P. way & XEN/C-II/ROK have also certified that the theft of P.Way material & fittings and fastenings is going on and a FIR for the same has been logged in GRP, Police station at Rewari. Similar letters have been written to SHO/Police Chowki, Dujana (Jhajjar).

Keeping the above facts in view it is proposed to engage chowkidars etc. from the existing agency to avoid theft of railway property. It is proposed to process NS item for the same based on accepted rates of same type of item vide Dy.CE/C/PTK letter No.33-Acs/Dy.CE/C/PTK dated 16.08.10 for the work of P.Way linking in Bharoli yard in c/with Jallandhar- Pathankot -Jammu Tawi doubling in the existing contract. No undue benefit has been given to the contractor due to this NS item.

The document is signed by various officers of the petitioner.

16. Similarly, a note put up by the officers for obtaining necessary sanction was Ex.CW1/20. This note has been signed on 26.10.2016, which reads as follows:

"PP-1

Sub:- Sanction of N.S. item for the work "P. Way linking and other allied works such as Assembling, laying, linking & dismantling of BG Railway tracks, points & crossings, traps, leading of P.Way material & PRC sleepers, putting of 65 mm machine crushed stone ballast etc. between Rewari -Rohtak

including station yards in connection with Rewari - Rohtak New line.

The NS has been prepared on the basis of accepted rates, the same duly signed by all concerned & technically checked are being processed. The proper justification is also placed at SN-9. A copy of agreement is placed at SN-1. It is also certified that already one no. N.S. rate amounting to Rs.21,60,600/- has been sanctioned by CE/C/NC after finance vetting. The details are as given below:-

SN.	Description	Qty.	Unit	Rate Rs. Ps	Amount irrespective of +ve or -ve Rs.	Remarks
1.	Keeping watch & ward of newly linked track/T-out round the clock by deputing adequate no. of patrol men after the linking and two round packing of section and upto CRS inspection etc	6x4= Block months	Per block section per month	Rs. 70000	Rs.16,80,000/-	N.S. being processed for finance vetting & the same shall be sanctioned by CE/C/NC after finance concurrence

CE/C/NC is requested to accord Administrative approval for the above N.S.item, so that case may be processed for Finance vetting.

Dy.FA & CAO/C/Admn. is requested to kindly vet the NS Item amounting to Rs.16,80,000/-at the earliest.

It is also certified that:-

1. After inclusion of the variation, the revised face value of the contract does not exceed the powers of the original tender accepting authority.
2. Variations proposed are bare minimum and the same does not lead to completely change the scope, character and purpose of the original contract.
3. Tender does not vitiate after incorporating the proposed variations.
4. No undue favour has been accorded to the contractor after the proposed Non- Schedule item,
5. Proposed N.S. item is covered within the sanctioned estimate.
6. The proposed N.S. item does not contain any item which is derived from banned/restricted LAR."

17. The respondent has filed the claim for watch and ward staff deployed stating that it was on the directions of the petitioner and has relied on various evidence including the above documents. During the course of arguments before this court, the court had pointed out to learned counsel for the respondent that it would not be possible for the respondent to claim payment for the work done in the absence of formal contract with petitioner, which is a Government Organization. The learned counsel for the respondent had pointed out that it is the norm in Railways that number of additional works are done by the contractors on oral instructions of the officers of the petitioner and the formal sanctions comes at a much later stage. It was pointed out that even in the present contract number of additional items were done on oral instructions of the officers of the petitioner. He submits that the work was completed on 05.12.2012. However, the sanction of all these additional items done on oral instructions was given in a note dated 27.08.2014. The said note reads as follows:

“Notes:

1. Total items 70 (Seventy) only i.e. 70 (Seventy) only 61 (Sixty one) items under Group ‘B’ non-schedule items & 09(Nine) only under Group ASOR – 1996 items.
2. All items and conditions of agreement No.74-W/6/159/WA/TKJ dated 01.07.2009 will remain the same.
3. The amount of agreement will increase/decrease from Rs.6,84,80,133.08 after availing 2.71% unconditional rebate on all items to Rs.7,16,85,828.52 after 2.71% rebate.
4. No claim decrease/increase quantities.

Signature of the contractor/s
M/s B.S.Sangwan
4, G.F. Harry Plaza
Near HDFC Bank,
Subhash Chowk, Sonapat
(Haryana)

(Rakesh Yadav)
Dy.Chief Engineer/Const.
Tilak Bridge, New Delhi
for and on behalf of the
President of India

Executive Engineer/
Const, Northern
Railway, Rohtak.

Rates & quantities
Technically checked.

(SSE/C/Estt.TKJ)

Rates Checked.

WA/C/TKJ OS/W/C/TKJ”

The above note is signed on 27.02.2014 much after the work was completed on 05.12.2012 and the amount of the contract, entered into with the respondent on 01.07.2009 is increased to Rs.7,16,85,828/-.

The respondent had submitted that these items of watch and ward had to be approved along with the above note but it appears that they have been left out inadvertently and thereafter the petitioner has taken no steps to get

the work subject matter of this award formally approved. There is clearly merit in the contention of the respondent.

18. I have also perused the evidence by way of affidavit of the respondent and his cross-examination. There is nothing in the cross-examination of the respondent to doubt the veracity of the case of the respondent.

19. Based on the above material on record, namely, the evidence of witnesses and the documents, the learned Arbitrator has come to a conclusion that the factum of deployment of watch and ward by the respondents to avoid theft of railway property on the instructions of the petitioner is amply proved.

20. In the above context, reference may be had to the judgment of the Supreme Court in the case of *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49 where the Court 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.

.....”

21. Essentially the petitioner seeks to challenge the findings of fact recorded by the learned Arbitrator about the fact that the respondent has done the work for which compensation is being claimed on the instructions of the officers of the petitioner. The conclusion in the award are a plausible conclusion based on evidence on record.

22. There is no merit in the petition. The same is dismissed.

(JAYANT NATH)
JUDGE

SEPTEMBER 05, 2017

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