

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

+ FAO (OS) 393/2015

Reserved on: 07.07.2017

Date of decision: 18.07.2017

IN THE MATTER OF:

M/S TELECOMMUNICATION CONSULTANTS INDIA LIMITED

..... Appellant

Through: Mr. Anil Sapra, Senior Advocate with
Mr. P.K. Bansal, Ms. Piyusha Singh, Mr. Kartik
Bhardwaj and Mr. Jaideep Singh, Advocates

versus

M/S CATVISION LTD

..... Respondent

Through: Mr. Amit Bansal, Advocate with
Ms. Seema Dolo and Mr. Akhil Khulshrestha,
Advocates

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MS. JUSTICE DEEPA SHARMA

HIMA KOHLI, J.

1. The appellant, a Government of India Undertaking, has filed the present appeal under Section 37(1) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as '**A&C Act**'), questioning the legal tenability of the judgment dated 17.03.2015 passed by the learned Single Judge on a petition filed by the respondent/company under Section 34 of the A&C Act (OMP 1076/2012), assailing an Arbitral Award dated 28.09.2012, published by the learned Sole Arbitrator.

2. It is considered expedient to recapitulate the factual matrix of the case. The Organizing Committee of the Commonwealth Games (CWG) awarded a contract to the appellant for providing Cable Access Television Services (CATV) for the CWG. The appellant in turn issued a purchase order dated 08.07.2010 in favour of the respondent for providing CATV services for the CWG, 2010 for a total sum of Rs.1,38,89,548/-. The contract executed between the parties contained an arbitration clause. On completing the work, the respondent raised an invoice dated 10.03.2011 on the appellant for payment of Rs.1,94,09,685.76 paise. However, the said bill was processed by the appellant and cleared for payment of Rs.1,93,32,798/-. Before the said amount was released, the appellant received a letter dated 04.04.2011 addressed to it by Mr. Rajesh Kukreja, Vice President-Sales in the respondent/company, stating *inter alia* as below:-

“Dear Sir,

With reference to the subject we wish to state as under:

1. According to us there is a disputed amount of Rs.100000/- only due from us to TCIL on account of an earlier project done for us by TCIL. You may deduct that amount from the payment immediately due to us on account of the above-referred Purchase Order and retained it with you until we reach a mutual settlement of the old disputed amount. In case the disputed amount is settled for an amount more than Rs.100000/- the difference may be recovered from the remaining payment due to us against the above-referred PO.

2. As per the payment terms of the above-referred PO an amount of 90% of contract value is due to us since this is the amount TCIL has received from the Organizing Committee of the Common Wealth Games, 2010. You are requested to release this payment to us after deducting Rs.100000/- as stated in (1) above.

We look forward to your kind and favourable action in this matter.

Thanking you,

*Yours truly,
(Rajesh Kukreja)
VP – Sales”*

3. On 18.04.2011, the appellant wrote to the respondent informing it that a sum of Rs.11,43,674/- was payable to it for an earlier project, namely, the Rourkela Steel Plant CATV Project with effect from 14.06.1996 and that the said amount would be deducted from the amounts payable “*from your present and future dues*”. On the very same day, the respondent lodged a protest against the aforesaid deduction and informed the appellant that the captioned letter dated 04.04.2011 was not issued under its authority and since it did not owe any amount under the earlier project, the said deduction will be illegal/unauthorised.

4. Despite the aforesaid protest, the appellant proceeded to deduct amounts from the agreed amount payable in respect of the CWG, 2010 CATV project and cleared a final bill for a sum of Rs.1,54,66,238/-. In other words, 20% of the amount due and payable to the respondent was deducted by the appellant under the following heads:-

(a) On account of 10% deduction of TDS	Rs.19,33,280/-
(b) On account of liquidated damages	Rs.8,17,284/-
(c) On account of old dues of the..... .. CATV Rourkela Project	Rs.11,43,674/-
(d) On account of interest calculated @ 13.25% on the sum of Rs.11,43,674/- w.e.f. 14.06.1996 to 24.05.2011.	Rs.22,42,329/-
Total =	<u>Rs.61,36,567/-</u>

After deducting the aforesaid amount, as per the appellant, only a sum of Rs.93,29,671/- was to be payable to the respondent.

5. As disputes and differences arose between the parties with regard to the amount payable, the respondent invoked Clause 9(a), the Arbitration Clause governing the parties and the disputes were referred to a Sole Arbitrator, who was an officer of the appellant. The respondent preferred seven claims in the arbitration proceedings. However, for purposes of deciding the present appeal, we are only concerned with the findings returned by the learned Single Judge in respect of claim No.1, relating to deduction of a sum of Rs.11,43,674/- made by the appellant on account of the alleged dues of the earlier project together with interest calculated as Rs.22,42,329/- and claim No.2, regarding wrongful deduction of liquidated damages on the part of the appellant. Arguments were addressed by both sides only on the aforesaid claims.

6. Coming first to claim No.1, the learned Sole Arbitrator observed that the arbitration clause permitted him to adjudicate upon disputes relating to any previous contract between the parties and accordingly, held that the respondent is liable to pay an amount of Rs.11,43,674/- to the appellant alongwith interest, which it had wrongly withheld towards the past dues. It was argued by the counsel for the respondent before the learned Single Judge that the Sole Arbitrator could not have examined the aspect of the liability of the respondent in respect of the past dues relating to the Rourkela Steel Plant CATV Project as the said issue was completely beyond the scope of the arbitration proceedings and furthermore, the amount sought to be recovered by the appellant in respect of the aforesaid project was patently barred by limitation as it related to the years 1994-95. The said

submission found favour with the learned Single Judge, who concluded that the Sole Arbitrator had misconstrued the arbitration clause governing the parties and thereby committed a serious error by holding that the appellant was entitled to deduct past dues under the Rourkela Steel Plant CATV Project from the amounts payable to the respondent in respect of the CWG, 2010 project. It was also observed that the letter dated 04.04.2011 relied upon by the appellant could not be construed as a consent given by the respondent for deduction of the aforesaid amount from the final bill.

7. Accordingly, the findings returned by the Sole Arbitrator in respect of claim No.1 were set aside in the impugned judgment and the appellant was directed to pay to the respondent, the sums deducted by it from the approved amount of the final bill together with simple interest @ 9% per annum from 28.06.2011 (the date on which the final bill was payable), till the date of payment.

8. Assailing the above findings, Mr. Sapra, learned Senior Advocate appearing for the appellant had argued before us that the learned Single Judge failed to appreciate that the letter dated 04.04.2011 was an acknowledgement of debt on behalf of the respondent, arising from the Rourkela CATV Project and as it failed to keep its promise of settling the said debt, the appellant was entitled to deduct the entire amount from the amount payable to the respondent under the final bill. He urged that the learned Single Judge had fallen into an error by holding that the Sole Arbitrator had wrongly assumed that the arbitration clause permitted him to examine the aspect of the liability of the respondent in respect of the previous contract between the parties, whereas the scope of the said clause was wide enough to include the earlier dispute as well.

9. In the alternate and without prejudice to the above submission, it was stated on behalf of the appellant that if the learned Single Judge was of the opinion that the Sole Arbitrator had exceeded his jurisdiction, then at best, the findings returned in the impugned award approving the deductions made by the appellant could have been set aside but no order could have been passed thereafter, directing payment of any amount that was deducted by the appellant, much less with interest awarded in favour of the respondent. To substantiate the said submission, reliance was placed on the following decisions:-

- (i) McDermott International Inc. vs. Burn Standard Co. Ltd. and Ors.; (2006) 11 SCC 181
- (ii) Nussli Switzerland Ltd. vs. Organizing Committee Commonwealth Games, 2010; 2015 (1) R.A.J. 676 (Del.)

10. Per contra, Mr. Amit Bansal, learned counsel for the respondent supported the findings returned in the impugned judgment in respect of claim No.1 and states that on a bare reading of clause 9(a), i.e. the arbitration clause governing the parties, it is apparent that the learned Arbitrator could not have adjudicated upon any dispute between the parties relating to a previous contract and he ought to have confined himself to the disputes subject matter of the present contract alone.

11. Before considering the rival submissions advanced by the counsels for the parties, as recorded above and referring to the case law cited by them, a glance at the language used in clause 9(a) of the arbitration clause governing the parties is considered imperative. Clause 9(a) reads as under:-

“9(a). In the event of any dispute arising between TCIL and the Supplier in any matter covered by this contract or arising directly or indirectly there from or connected or concerned

with the said contract in any manner of the implementation of any terms and conditions of the said contract, the matter shall be referred to the Chairman & Managing Director, TCIL who may himself act as sole arbitrator or may name as sole arbitrator an officer of TCIL notwithstanding the fact that such officer has been directly or indirectly associated with this contract and the provisions of the Indian Arbitration Conciliation Act, 1996 shall apply to such arbitration. The supplier expressly agrees that the arbitration proceedings shall be held at New Delhi.” (emphasis added)

12. Indubitably, construction of the terms of a contract is primarily in the domain of the Arbitrator, even on the questions of law. In the case of McDermott International (supra) relied upon by the appellant, the Supreme Court had made the following observations:-

“112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law.[See: Pure Helium India (P) Ltd. vs. Oil & Natural Gas Commission; (2003) 8 SCC 593 and D.D. Sharma vs. Union of India; (2004) 5 SCC 325].

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.

114. The above principles have been reiterated in Chairman and MD, NTPC Ltd. vs. Reshmi Constructions, Builders & Contractors; (2004) 2 SCC 663; Union of India vs. Banwari Lal& Sons (P) Ltd.; (2004) 5 SCC 304; Continental Construction Ltd. vs. State of U.P.; (2003) 8 SCC 4; State of U.P. v. Allied Constructions (2003) 7 SCC 396.”

13. Although interpretation of a contract is to be determined by the Arbitrator, if he travels beyond the contract and interprets the same in such a manner which that cannot be termed as one that a reasonable person would construe, then it shall amount to a “patent illegality” and can be remedied by the court. On this aspect, the Supreme Court had held in MSK Projects India (JV) Ltd. vs. State of Rajasthan and Another reported as **(2011) 10 SCC 573**, as follows:-

“17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. [See: Gobardhan Das vs. Lachhmi Ram and Others; AIR 1954 SC 689, Thawardas Pherumal and Another vs. UOI; AIR 1955 SC 468, UOI vs. Kishorilal Gupta and Bros.; AIR 1959 SC 1362, M/s Alopi Parshad and Sons Ltd. vs. UOI; AIR 1960 SC 588, Jivarajbhai Ujamshi Sheth and Others vs. Chintamanrao Balaji and Others; AIR 1965 SC 214 and Renusagar Power Co. Ltd. vs. General Electric Company and another; AIR 1985 SC 1156].” (emphasis added)

14. In the case of Numaligarh Refinery Ltd. vs. Daelim Industrial Co. Ltd. reported as (2007) 8 SCC 466, the Supreme Court had made the following pertinent observations on the aspect of modification of the award:-

“17. We have considered the rival submissions of the parties. So far as the legal proposition as enunciated by this Court in various decisions mentioned above, it is correct that Courts shall not ordinarily substitute their interpretation for that of the arbitrator. It is also true that if the parties with their eyes wide open have consented to refer the matter to the arbitration, then normally the finding of the arbitrator should be accepted without demur. There is no quarrel with this legal proposition. But in a case where it is found that the Arbitrator has acted without jurisdiction and has put an interpretation on the clause of the agreement which is wholly contrary to law then in that case there is no prohibition for the Courts to set things right.....” (emphasis added)

15. In the present case, on going through the arbitration clause reproduced hereinabove, we do not find any infirmity in the findings returned by the learned Single Judge to the effect that the Sole Arbitrator had patently misconstrued the arbitration clause. Use of the expression, “*directly or indirectly*” in the aforesaid clause was only in the context of the present contract governing the parties, namely, CATV services for the CWG, 2010. By no stretch of imagination could the scope of the above clause be enlarged to include the claims of the appellant against the respondent in respect of the previous contract. Evidently, the Sole Arbitrator has travelled beyond the scope of the contract and dealt with matters that were outside his jurisdiction, thereby committing a jurisdictional error.

16. Furthermore, we do not find any merit in the submission made on behalf of the appellant that the letter dated 04.04.2011 issued by the Vice

President-Sales of the respondent permitting the appellant to deduct an amount of Rs.1 lakh from the payments due under the subject contract, was an acknowledgement of the previous debt and since the respondent had failed to abide by its promise of settling the amount, the Sole Arbitrator had rightly held that the appellant was entitled to deduct the amount due in respect of the previous contract from the amount payable in terms of the final bill, subject matter of the present contract. Besides the view expressed above that the learned Arbitrator had travelled beyond the scope of the contract and dealt with matters which were not allotted to him, even otherwise, the tone and tenor of the letter dated 04.04.2011 addressed by the Vice President-Sales of the respondent to the appellant does not support the version of the appellant. All that was stated in the said letter was that an amount of Rs.1 lakh only was payable by the respondent to the appellant on account of the earlier project and that the said amount could be deducted from the final bill and retained till the parties “*reach a mutual settlement of the old disputed amount*”. The said letter had gone on to clarify that in the event the disputed amount is settled for an amount over and above Rs.1 lakh, then the difference may be recovered from the remaining amounts payable by the appellant to the respondent against the present contract.

17. It being an undisputed position that ultimately, no mutual settlement could be arrived at between the parties in respect of the disputed amount relating to the Rourkela CATV Project, the appellant could not have taken benefit of the aforesaid letter for deducting any amount from the final bill payable to the respondent under the present contract. We are therefore of the opinion that there is no error in the findings returned in the impugned judgment in respect of claim No.1.

18. Dovetailed with the aforesaid argument was the submission of the learned counsel for the appellant that on setting aside the findings of the Sole Arbitrator in respect of claim No.1, the learned Single Judge ought to have left the matter at that point for the aggrieved party to commence fresh proceedings, if so advised, but any direction issued to the appellant to pay the respondent the amount deducted together with simple interest @ 9% per annum, amounts to correcting an error committed by the Sole Arbitrator, which is impermissible.

19. We are unable to endorse the said submission. The moment the impugned Award in respect of claim No.1 was set aside by the learned Single Judge, it is axiomatic that the entire amount under the final bill, duly cleared by the appellant for payment was to be released in favour of the respondent, including the sums of Rs.11,43,674/- plus Rs.22,42,329/-, that were deducted by it. A natural corollary thereto was the direction issued to the appellant to pay simple interest @ 9% per annum on the amount so withheld, from the date the final bill became due for payment i.e., from 28.06.2011, till the date of realization.

20. There is no quarrel with the legal proposition laid down in the case of McDermott International (supra) that the A&C Act makes provisions for the supervisory role of courts and review of the arbitral award is only to ensure fairness and that the courts cannot correct errors of the Arbitrator but only quash the award thereby leaving the parties free to begin the arbitration again, if so desired. However, the appellant cannot be permitted to rely on the aforesaid observations out of context and urge that in the present case, once the learned Single Judge had set aside the findings returned by the Sole Arbitrator in respect of claim No.1, he ought to have stopped at that point.

Nor can reliance placed by the appellant on the decision of a Division Bench of this Court in the case of Nussli Switzerland Ltd. (supra) would be of any assistance. The decision in the said case was with regard to the entitlement of a party that had lost before the Arbitral Tribunal and had no enforceable claim under an award, and still sought an interim order against the winning party under Section 9 of the A&C Act. The fact position of the present case is entirely at variance. Here, there is no dispute between the parties with regard to the exact amount payable by the appellant to the respondent in respect of the final bill raised. The amount due and payable had already been determined by the appellant and only thereafter, was a particular sum deducted in respect of the previous contract. Once the deduction made by the appellant in the final bill was declared as illegal and arbitrary, the logical inference is that the appellant shall release the deducted amount to the respondent and no further evidence was required to be led for arriving at the said conclusion. Therefore, the question of the respondent having to commence fresh arbitration proceedings to recover the deducted amount, does not arise.

21. Nor can the respondent be compelled to commence any proceedings for recovery of interest due on account of late payment of the deducted amount as interest awarded under the impugned judgment is only to compensate the respondent for the denial of its right to utilize the money due to it and wrongfully withheld by the appellant. In any event, Section 31(7) (b) of the A&C Act contemplates that where an arbitral award is for payment of money, it shall carry interest and that too @ of 2%, higher than the current rate of interest prevalent on the date of the award, till realisation. The appellant has only been directed to pay simple interest @ 9% p.a.,

which is far below the commercial rate of interest prevalent in the year 2011. It is not out of place to mention that in the case of McDermott International (supra) and Krishna Bhagya Jala Nigam Ltd. vs. G. Harischandra Reddy and Anr. reported as **(2007) 2 SCC 720**, in order to complete justice, the Supreme Court had modified the interest awarded by the Arbitral Awards in the penultimate paras.

22. Coming next to the submission made by Mr. Sapra, learned Senior Advocate appearing for the appellant that the learned Single Judge has erred in setting aside the impugned Award in respect of claim No.2, we may note that claim No.2 was preferred by the respondent with regard to wrongful deduction of liquidated damages by the appellant. Counsel for the respondent had argued before the learned Arbitrator that no delay in completing the project was attributable to his client and that the delay that had occurred was on account of the fact that the project order had to be amended twice. The said submission was however, disputed by the counsel for the appellant, who had stated before the learned Arbitrator that the appellant is contractually empowered to levy liquidated damages under clause 8 of the Purchase Order and as per clause 23, though the date of completion of the project, fixed as 02.09.2010, it was actually completed on 29.09.2010. At the evidence stage, the appellant had filed e-mails that were exchanged between the CWG, the respondent and the appellant alongwith the commissioning and measurement reports of the CWG venues, the delayed delivery challans and the liquidated damage calculation sheet. Taking into consideration the pleadings, evidence and oral and written arguments of both sides, the Sole Arbitrator has held that the appellant is entitled to levy liquidated damages on the respondent and deduct the said

amount from the payments due and payable to the latter. As a result, claim No.2 preferred by the respondent was rejected under the Award.

23. Before the learned Single Judge, learned counsel for the respondent had argued that the appellant had arbitrarily reduced the period of delay on the part of the respondent in handing over the sites to it by 50% and then proceeded to calculate the liquidated damages by attributing the remaining delay entirely to the respondent, which was a totally illegal method adopted by it. In proceedings under Section 34 of the A&C Act, after noting the reasons furnished in the impugned award for rejecting claim No.2 preferred by the respondent, the learned Single Judge had observed that the Sole Arbitrator had failed to discuss the evidence led in the matter including the relevant chart and has proceeded to set aside the findings returned in respect of claim No.2.

24. The scope of interference by the Court in exercising its review jurisdiction under Section 34 of the A&C Act when it comes to testing an arbitration award has been delineated in several judicial pronouncements. In the case of Associate Builders vs. DDA reported as (2015) 3 SCC 49, speaking for the Bench, Justice Rohinton Fali Nariman has observed 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.” (*emphasis added*)

25. While expressing the above view, the Supreme Court had referred to its earlier decisions on the same aspect, which included the decision in the case of Kuldeep Singh vs. Commissioner of Police and Others reported as (1999) 2 SCC 10 where it was held as follows:-

“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.**” (*emphasis added*)

26. It is clear from the above that at the time of exercising its power of review under Section 34 of the A&C Act, the court cannot sit in appeal over the award of the Arbitral Tribunal by reassessing or re-appreciating the evidence. The intention of the Legislature in bringing in Section 34 was to lay a focus not on the correctness of the decision, but to examine whether the decision taken by an Arbitral Tribunal was a result of a legitimate process, irrespective of the errors and the application of law or the determination of facts. An award can only be faulted on the grounds mentioned in Section 34(2) of the A&C Act and in the absence of any ground, it is not possible to re-examine the facts to find out whether a different decision could be arrived at.

27. In the instant case, the observations made in the impugned judgment in respect of claim No.2 would tantamount to re-assessing and re-appreciating the evidence, which is impermissible [Ref: Sumitomo Heavy Industries Ltd. vs. Oil and Natural Gas Corporation Ltd.; (2010) 11 SCC 296, Kwality Manufacturing Corporation vs. Central Warehousing Corporation; (2009) 5 SCC 142 and P.R. Shah, Shares & Stock Brokers Private Ltd. vs. B.H.H. Securities Private Ltd. and Others; (2012) 1 SCC 594].

28. Guided by the aforesaid legal principles, we are of the opinion that the findings returned in the impugned judgment in respect of claim No.2 cannot be sustained and are accordingly set aside. The relief granted in favour of the appellant under the Arbitral Award in respect of claim No.2 is restored. It is held that the appellant is entitled to levy liquidated damages on the respondent and deduct the same from the payments due and payable under the subject contract.

29. The appeal is partly allowed on the terms noted above, while leaving the parties to bear their own expenses.

HIMA KOHLI, J

DEEPA SHARMA, J

JULY 18, 2017

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