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

+ **O.M.P. (COMM) 41/2017**

M/S GUJARAT NRE COKE LIMITED & ANR. Petitioners

Through: Mr Balbir Singh, Senior Advocate
with Mr Sandeep Bajaj, Mr Soaib
Qureshi, Mr Abhishek Baghel, Ms
Kritika Seth, Advocates alongwith Mr
Nitin Daga, AR.

versus

M/S JINDAL STEEL AND POWER LIMITED Respondent

Through: Mr Gopal Jain, Senior Advocate with
Mr Ajay Bhargava, Mr Rajiv
Bhatnagar, Mr Anshuman Sharma,
Mr Shreshth Sharma, Mr Aseem
Chaturvedi and Mr Vipul Joshi,
Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

% **01.02.2017**

VIBHU BAKHRU, J

IA No.1332/2017

Allowed, subject to all just exceptions.

The application is disposed of.

O.M.P. (COMM) 41/2017 & IA No. 1333/2017

1. The petitioners have filed the present petition under section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') assailing the arbitral award (hereafter 'the impugned award') dated 16.08.2016 entered by the sole arbitrator, Justice Vikramajit Sen, a former judge of the Supreme Court of India.

2. Admittedly, the petitioners had received the impugned award on 30.08.2016 and filed the present petition on 30.11.2016, that is, on the last date of limitation.

3. It is also not disputed that the petition as initially filed, was not accompanied by a certified copy of the arbitral award. In addition, there were large number of other defects and consequently, the petition was returned on 01.12.2016. It was re-filed on 16.12.2016 but the defects were not cured and the petition was returned on 17.12.2016. The petition was again re-filed on 02.01.2017 and was returned on 03.01.2017. Repeated opportunities were given to the petitioners to cure the defects but the petitioners took considerable time to do so and it is averred that the petitioners finally re-filed the petition on 23.01.2017, that is, more than 54 days after the petition was initially filed. The logs maintained by the registry indicate that the petition was re-filed on 24.01.2017; 28.01.2017 and 30.01.2017. The petition was also not accompanied with the applications for exemption and condonation of delay (IA 1332/2017 and 1333/2017) which were filed subsequently. It is seen that total period taken by the petitioners to file the defect free petition is beyond the period of 120 days as contemplated under Section 34(3) of the Act.

4. A Division Bench of this Court in **Delhi Development Authority v M/s Durga Construction Co: 2013 (139) DRJ 133** had held that it is within the jurisdiction of this Court to condone the delay in re-filing even beyond the period specified under Section 34(3) of the Act; nonetheless given the statutory mandate, the courts are constrained to take a strict view on condonation of delay in re-filing and a liberal approach would not be

warranted.

5. In the present case, the petitioners have sought to explain the delay in re-filing on account of vacations in this High Court; non-availability of the authorised representative; non-availability of the documents; and various litigations pending against the petitioners. None of the aforesaid grounds are persuasive. The vacations in the Delhi High Court (in December) were only for a period of about one week. Non-availability of an authorised representative can hardly be a ground for a delay of over a month. Even the ground of non-availability of documents cannot be entertained. Admittedly, the petitioners had received the impugned award on 30.08.2016. In fact, the arbitrator had scheduled a hearing on 16.08.2016 which was postponed to 26.08.2016 and had handed over the impugned award on that date. The petitioners were unrepresented on the said date as they had refused to participate in the arbitration proceedings. Thus, the petitioners had ample time to collate the relevant documents and had filed the petition only on the last date of limitation. Therefore, the excuse that petitioners did not have the necessary documents can hardly be accepted. The contention that there are various litigations pending against the petitioners also cannot be entertained as no details have been provided as to how the pending litigations prevented or precluded the petitioners from filing the present petition within the prescribed time. The application for condonation of delay in re-filing the petition - IA 1333/2017 - is accordingly liable to be dismissed.

6. Notwithstanding the above, for the sake of completeness, I have heard Mr Balbir Singh, the learned senior counsel appearing for the petitioners on merits as well.

7. The impugned award was made in the context of the disputes between the petitioners and Jindal Steel and Power Limited, the respondent, (hereafter 'JSPL'). The sole arbitrator was appointed by an order dated 08.01.2016 passed by the Supreme Court in Special Leave to Appeal (C) No. 30818/2015. The subject disputes referred to the sole arbitrator arose between the parties in connection with the Coal Purchase Agreement dated 27.08.2013 (hereafter 'CPA') and the Amended Coal Purchase Agreement dated 12.09.2013 (hereafter 'amended CPA') entered into between JSPL and the petitioners. In terms of the CPA, petitioner no. 1 (hereafter 'GNCL') undertook to supply 50,000 MT of NRE Australian Hard Coking Coal of the agreed specifications from mines at Australia (hereafter referred to as 'the product') between the period 01.09.2013 to 31.03.2014. JSPL claimed that it had made an advance payment of ₹24.75 crores in terms of the CPA, which was also secured by pledge of certain shares held by the petitioners in Bharat NRE Coke Limited. JSPL claimed that thereafter the petitioners demanded additional advance which was agreed to and on 12.09.2013, the amended CPA was executed. In terms of the said amended CPA, GNCL undertook to supply 65,000 MT of the product instead of 50,000 MT as agreed under the earlier CPA. JSPL also agreed to enhance the advance from ₹24.75 crores to ₹39 crores.

8. It is JSPL's case that GNCL failed to adhere to its obligation under the CPA and/or the amended CPA and supplied only one rake of 3514.080 MT of the product. JSPL alleged that it sent several communications to GNCL, however, despite persistent requests and reminders, GNCL failed to perform its contractual obligations. JSPL's principal claim before the

arbitrator was thus essentially for refund of the balance amount of advance paid, which was computed at ₹36,89,15,520/- after adjustment on account of the value of the product received. JSPL further claimed interest at the rate of 30% per annum compounded monthly on the balance advanced in terms of the amended CPA, which was computed at ₹35,95,41,460/-. In addition, JSPL also claimed liquidated damages in terms of the amended CPA being the difference in the base price of the product as per the amended CPA and the price at which JSPL had procured the remaining quantity from the market. The base price under the amended CPA was ₹8000 per MT and JSPL claimed that the price for coal procured from the market was ₹10,897.80 per MT. Accordingly, JSPL claimed the liquidated damages of ₹17,81,73,898.976/- being the difference in the base price and market price (₹2897.80 per MT being the difference between ₹8,000 and ₹10,897.80) for 61485.920 MT of the product, which GNCL had failed to supply. JSPL also claimed costs and *pendente lite* interest.

9. The arbitrator entered upon the reference and it is not disputed that the arbitrator held a preliminary hearing on 14.01.2016. On the said date, the arbitrator *inter alia* fixed the schedule for completion of pleadings in consultation with the counsel for the parties. JSPL filed its statement of claims within the time prescribed but the petitioners failed to file their statement of defence and counter claims as per the agreed schedule - that is, on or before 25.02.2016.

10. After the time period for filing the statement of defence was over, the petitioners filed an application for enlargement of time for filing the statement of defence. It is relevant to mention that in their application, the

petitioners claimed that the proceedings under Section 391 and 394 of the Companies Act, 1956 had been initiated in the High Court of Calcutta for sanction of a scheme of compromise and arrangement between GNCL and its creditors. The petitioners pleaded that *“it was reluctant to disclose its defence as it may lead to an adverse impact on the creditors and can frustrate the move”*; they, accordingly, prayed that they be permitted to file their response and counter claims after the proceedings in the Company Application No. 112/2016 were over. The said application was heard and the arbitrator rejected the same by a detailed order dated 07.04.2016.

11. However, thereafter, the petitioners abandoned the arbitral proceedings and did not participate in the said proceedings any further.

12. Admittedly, the arbitrator continued to inform the petitioners as to the scheduled dates of hearings including for framing of issues and for recording of evidence. The arbitrator also adjourned the proceedings for cross-examination of JSPL's witnesses. Even though, the petitioners did not participate in the arbitral proceedings, the arbitrator ensured that they were duly informed of the same.

13. Three witnesses of JSPL were examined and after considering the evidence and material on record, the arbitrator passed the impugned award. The arbitrator awarded a sum of ₹36,89,15,520/- being the balance unadjusted advance payable by GNCL. Although, the amended CPA provided for interest at the rate of 30% per annum compounded monthly, the arbitrator in his wisdom awarded interest at the rate of 16% on the unadjusted advances. In addition, the arbitrator allowed the claim of

damages on the basis of the difference between the agreed base price and the price of similar products in the market delivered at JSPL's plant at Raigarh. Further, the arbitrator also awarded cost and *pendente lite* interest.

14. Mr Balbir Singh contended that the impugned award is perverse and is liable to be set aside. He submitted that merely because GNCL had not participated in the arbitral proceedings would not render the award immune from challenge under Section 34 of the Act. He earnestly contended that the arbitrator had failed to consider the averments made by the petitioners in the suit filed before the Calcutta High Court being CS (OS) 227/2014. He submitted that it was the petitioners' case that the performance of the amended CPA was frustrated by hindrances caused by JSPL. He submitted that GNCL had entered into agreements (dated 11.05.2007 and 04.11.2007) with two Australian Companies - Wollongong Coal Limited (formerly known as Gujarat NRE Coking Coal Limited) and Wongawilli Coal Pty Ltd. (formerly known as Gujarat NRE Wonga Pty Ltd.) - for purchase of the product. He submitted that JSPL was always aware that GNCL was to source the product from the said Australian Companies. He stated that JSPL had acquired control over the Australian Companies and had prevented the supply of the product to GNCL and thus, disabled GNCL from performing the amended CPA. He submitted that the arbitrator had grossly erred in ignoring the aforesaid allegations/averments.

15. He relied on the decision of the Supreme Court in **State of Uttar Pradesh and Others v. Combined Chemicals Company Private Limited: (2011) 2 SCC 151** and drew the attention of the court to paragraph 30 of the said decision. On the strength of the said decision, he contended that even

where an arbitrator proceeds *ex-parte*, the arbitral award which is unsustainable would be set aside. He further contended that the arbitrator had awarded damages merely on the statement of JSPL without any other material.

16. In my view, the contentions advanced by Mr Singh are inconsiderable and without merit. There is no dispute that GNCL had accepted the advances as claimed by JSPL. It is also not disputed that GNCL had failed to supply the product as contracted. On these admitted facts alone, JSPL would be entitled to refund of the advances made. It is also not disputed that the arbitrator has the discretion to award interest and thus the interest awarded, cannot be questioned in these proceedings.

17. The damages awarded by the arbitrator are also as contemplated under the CPA/amended CPA. JSPL had led evidence to prove that it had purchased the undelivered quantity of product from the market at a higher price. It had led evidence to indicate that JSPL had received quotation from various parties to procure the short supplied coal; the price quotation received from BHP Billiton was selected and in order to minimise the losses, JSPL had procured the coal from BHP Billiton.

18. Thus, the contention that the award of damages is unsubstantiated by material on record is erroneous. Indisputably, JSPL would be entitled to damages being the difference between the base price of the product and the market price at which it was available. JSPL had also produced the affidavits of witnesses and the arbitrator had given full opportunity to GNCL to cross-examine the witnesses. However, GNCL had wilfully declined to participate

in the arbitral proceedings. Thus, the impugned award made by the arbitrator in favour of JSPL cannot, by any stretch, be stated to be contrary to the public policy of India.

19. The award is well reasoned. The arbitrator has examined the evidence on record and also provided detailed reasons for awarding the sums. The contention that the arbitrator should have considered the case of the petitioners - as in the suit (CS (OS) 227/2014) - and rejected the claims of JSPL on the ground that GNCL was prevented from performing its obligations under the amended CPA, is wholly unsustainable. The onus to prove that there were any hindrances caused by JSPL on account of which GNCL was prevented from performing its obligations, was on the petitioners. The averments made by petitioners in its suit filed in the Calcutta High Court could not be accepted without GNCL establishing the same. Clearly, JSPL's claim could not be rejected on the basis of averments made by the petitioners in another proceeding without the petitioners proving the same.

20. However, as stated earlier, GNCL declined to participate in the arbitration proceedings and failed to either disclose its defence or lead any evidence. GNCL also did not challenge the evidence led by JSPL. In the circumstances, GNCL cannot now be heard to complain that its averments ought to have been considered by the arbitrator to reject the claims of JSPL. On the contrary, it is difficult to understand as to how the award could be sustained if the arbitrator had rejected the claims of JSPL on the basis of unsubstantiated averments made by the petitioners in another proceeding, without the petitioners establishing the same.

21. The decision in the case of *State of Uttar Pradesh and Others v. Combined Chemicals Company Private Limited* (*supra*) also does not carry the case of the petitioners any further. In that case, the court had found that the arbitrator had passed an award without assigning any reason and without even recording a finding that the respondent therein had suffered a loss. The court held that the award impugned (in that case) was made in a casual manner. The relevant portion of the award extracted in the said decision clearly indicates that there were no discussions or reasons as to why the arbitrator had awarded in favour of the respondent therein. In the present case, a plain reading of the impugned award would indicate that the arbitrator has discussed the pleadings, the evidence led and thereafter made the award indicating detailed reasons for the sums awarded.

22. For the reasons stated above, this Court does not find any merit in the present petition. Accordingly, the present petition is dismissed on account of delay as well as on merits.

FEBRUARY 01, 2017
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VIBHU BAKHRU, J