IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.1239 OF 2013

M/s. Radiant Fire Protection Engineers Pvt. Ltd. ....Petitioner
vs
M/s. Juniper Hotels Pvt. Ltd. And Anr.. ...Respondents
.....
Mr. Uday Bobade, i/b. Mr. Bharat Punekar, for the Petitioner.

Mr. Sandeep Parikh, a/w. Mr. Prashant Beri, i/b. Beri & Co., for Respondent No.1.
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CORAM : S.C. GUPTE, J.

DATED: 10 DECEMBER, 2018

P.C.:.

. Heard learned Counsel for the parties. This arbitration petition challenges an award passed by a sole arbitrator in a reference arising out of a construction contract.

2. The Petitioner herein, who was the contractor and claimant before the learned arbitrator, had raised various claims under the contract. The claims were rejected by the learned arbitrator, firstly, on the ground that there was no privity of contract as between the Petitioner and Respondent No.1, the employer. Secondly, the learned arbitrator held that the claims made by the Petitioner, which were in respect of two guarantees, i.e. mobilisation advance guarantee and performance guarantee, were not payable by Respondent No.1. The learned arbitrator held that these claims did not, firstly, fall within the terms of submission and, secondly, and at any rate, the bank guarantees for mobilisation

advance as well as due performance of the contract by the Petitioner were properly encashed by Respondent No.1. As for the other claim, namely, the claim for balance amount purportedly due under the final bill, the learned arbitrator did not accept the Petitioner's case on merits. The learned arbitrator, in the premises, rejected the Petitioner's claims.

3. Learned Counsel for the Petitioner submits that when the original contract was entered into in the name of the Petitioner, who was then in the process of being incorporated, the promoters of the company were carrying on business in the name of a firm called M/s. Radiant Fire Protection Engineers. Learned Counsel submits that the business of the firm was taken over by the Petitioner and it was the Petitioner, who carried on the business. It is submitted that the contract work was carried out and payments were received for the same by the Petitioner. It is submitted that this issue was initially raised by Respondent No.1 in an application made to the arbitrator under Section 16(1) of the Arbitration and Conciliation Act, 1996 ("Act"). It is submitted that at that stage, the issue was held by the arbitrator in favour of the Petitioner and yet, at the final hearing of the reference, the arbitrator rejected the Petitioner's claim on the very same ground, i.e. on the ground of a purported lack of privity of contract as between the Petitioner and Respondent No.1.

4. If one has regard to the preliminary award of the arbitrator, it is clear that, at that stage, the arbitrator essentially held that it was the Petitioner company, who was a party to the MOU, which, *inter alia* contained the subject arbitration agreement. The arbitrator noted that it was the Petitioner company, who applied for appointment of an

arbitrator under Section 11 of the Act and that, in the premises, the company, being both a party to the arbitration agreement and a party invoking the arbitration agreement, the arbitrator had the jurisdiction to adjudicate the disputes between the parties. What is important to note is that even at that stage, the question as to whether the company was incorporated on the date of the contract or not, was left to be decided on merits at the hearing of the reference. At the hearing of the reference, the learned arbitrator noted that the Petitioner company was admittedly incorporated on 26 December 2000, whereas the work contract between the parties was entered into on 6 December 2000. The arbitrator noted that it was, thus, clear that on the date of the work contract, the Petitioner company was not in existence, since it was not incorporated by that date and that if it was not in existence on the date of the contract, it could not be said that the contract was entered into between the Petitioner company and Respondent No.1. The arbitrator was of the view that the law stated by the Supreme Court in the case of **Jay Narain Parshurampuria (Dead) & Ors. vs. Pushpa Devi Saraf & Ors.**[1] was not applicable to the facts of the present case. In **Pushpa Devi**'s case, promoters of the company had, before its incorporation, entered into a contract for the purpose of the company and such contract was warranted by the terms of the incorporation. The company, upon its incorporation, had accepted such contract and communicated such acceptance to the other party. Since it was not the Petitioner's case in the present case that it was the promoter, who had entered into the contract with Respondent No.1 for the purpose of the company and later it was ratified and accepted by the company, the arbitrator was of the

1 1999, Supreme Court Cases 2006 (SCC 756)

view that **Pushpa Devi**'s case was not applicable to the facts of the present case.

5. The second submission of the Petitioner in this behalf was that by a resolution dated 1 June 2008, the company had taken over the assets and liabilities of the partnership firm of Radiant Fire Protection Engineers with effect from 1 June 2008 and that, at any rate, even if it is to be assumed that it was the firm, with whom Respondent No.1 had entered into the work contract, and/or it was the firm or, at its instance, the Petitioner company, who carried out the work, the benefit of that contract, including the claim of the firm for recovery of its debt, was taken over by the Petitioner company. The learned arbitrator did not accept the Petitioner's case on this resolution. The learned arbitrator observed that the resolution was not referred to anywhere in the pleadings, including the statement of claim or any previous documents. The arbitrator also expressed reservation about the efficacy of the resolution simplicitor for transfer of rights and liabilities of the dissolved firm in the absence of any document of assignment in that behalf made by partners/their heirs. The arbitrator held that the resolution, accordingly, had no value in the eyes of law for conferring rights and liabilities of the firm on the claimant company. The arbitrator also noted that Clause 3 of the Work Contract Agreement prohibited assignment of the contract or any benefits or interest therein. The long and short of the arbitrator's discussion in this behalf was his conclusion that the subject work contract was executed between the firm of M/s. Radiant Fire Protection Engineers and Respondent No.1 and there being no valid assignment of the rights and liabilities under that contract in favour of

the Petitioner company, the claim filed by it was not maintainable. This clearly is a possible view, supported by material on record; the application of law cannot be termed as a patent illegality appearing on the face of the award.

6. It may well be that the contract was entered into between promoters of a company, who were, at the relevant time, partners in a partnership firm, but merely because the same promoters in fact proceeded to incorporate a company and claimed to have carried out that work through the company, it cannot be said either that the pre-incorporation contract was entered into by the promoters for the benefit of the company or that such contract was warranted by the terms of incorporation of the company or that this contract was, in fact, adopted by the company after its incorporation and such acceptance was communicated by it to the other contracting party. In the absence of any material to show these matters, the arbitrator's view that there was no privity of contract on the part of the Petitioner company, both by reason of the law of pre-incorporation contracts not being satisfied, as also there being no valid assignment of the rights of the partnership firm in relation to the contract, is a possible view. It is not a view which no fair or judiciously minded person could have taken or something that would shock the conscience of the Court. It does not, thus, warrant any interference by this Court under Section 34 of the Act.

7. Even on merits, the learned arbitrator has come to possible conclusions, which are supported by materials on record. The arbitrator does not appear to have taken into account any irrelevant or non-

germane material or circumstance or disregarded any relevant or germane material or circumstance for arriving at his conclusions. The first claim of the Petitioner was in respect of balance amount due and payable under the final bill. The balance amount was claimed purportedly on the basis that 98% of the contract work was completed by the Petitioner. Whether 98% or any other percentage of work was completed by the Petitioner and the amount stated to be due under the final bill in that behalf was in fact due, are pure matters by fact, which are to be assessed on the basis of evidence. The learned arbitrator did not accept the Petitioner's evidence in this behalf. It is pertinent to note that there was a Court Commissioner appointed to ascertain the actual work carried out at site. The learned arbitrator, in particular, held that even if one were to accept the Court Commissioner's report in relation to the work, the claimant's case that it had completed 98% work was not made out on the basis of such report read with the bills. The learned arbitrator was of the view that the evidence led by the Petitioner was not enough to come to such conclusion. There was indeed no evidence that any particular percentage of work was completed by the Petitioner by October 2002. The learned arbitrator, in this behalf, also noted that the Petitioner's own witness was unable to show even by arithmetic calculation that 98% or any other particular percentage of work could be said to have been completed. On the other hand, the arbitrator noted that what was paid by Respondent No.1 to the contractor went well over the contract price payable. The arbitrator, in the premises, did not allow the Petitioner's claim. Once again, within the parameters of Section 34 of the Act, no fault can be found with this assessment of the learned arbitrator.

8. Insofar as the two claims pertaining to the bank guarantees, i.e. mobilisation advance guarantee and performance bank guarantee, respectively, of Rs.18 lakhs and Rs.25 lakhs, are concerned, the arbitrator disallowed the claim, firstly, on the ground that the bank guarantees and their encashment were not the subject matter of arbitration. It is not in dispute that the letter of invocation of the arbitration agreement, which forms part of the terms of submission, does not refer to the claims of refund of amounts recovered by encashment of these two bank guarantees. It was submitted by the Petitioner before the learned arbitrator that this defence was not taken by Respondent No.1 in its written statement. The arbitrator, however, did not go simply by the written statement of defence in this behalf, but made an assessment of his own on the basis of the claimant's own documents, which did not show that these two items were arbitrable under the terms of submission to arbitration. The arbitrator, however, did not leave the matter there. He nevertheless proceeded to consider both claims on their merits and came to a conclusion that the Petitioner had failed to prove that the bank guarantees were dishonestly or wrongfully encashed by Respondent No.1.

9. So far as the mobilisation advance guarantee is concerned, the learned arbitrator noted Clause 60(2) of General Conditions of the Contract, which provided for advance payment of Rs.18 lakhs towards mobilisation. This advance was to be secured by issuance of the advance mobilisation bank guarantee. The arbitrator noted that the guarantee was admittedly subsisting and valid as of 21 July 2007, when it was

invoked. The arbitrator noted that under Clause 17.2.1 of the special conditions of contract, Respondent No.1, at the initial stages, went on to deduct/recover a certain percentage of advance payment from each running bill certified for payment and made payment of only the balance amount to the firm. The learned arbitrator noted that this continued till RA Bill No.13. In RA Bill No.13, Respondent No.1 had deducted in all a sum of Rs.17,64,716.94 in this behalf. The learned arbitrator noted that then for RA Bill No.14, a certificate for payment had been issued by Respondent No.2, under which the entire recovery amount of the advance payment was credited back to the firm. The arbitrator noted that the Petitioner's witness, Himanshu Gandhi, had admitted originally to the correctness of this certificate of payment, at the foot of which it was clearly stated that the advance payment made to the firm was not recovered. The learned arbitrator noted that when this fact was put to the witness in his cross-examination, he at first admitted it to be correct but then sought to resile from his statement, and yet, he could not show the correct position with regard to the same even though he had stated that he would be able to clarify the position later. The arbitrator noted another admission of the witness in reply to another question, where the witness had confirmed that the entire recovered amount of the advance payment was credited back to the firm. In the premises, the arbitrator did not find anything wrong with encashment of the mobilisation advance guarantee. The arbitrator essentially came to the conclusion that, at the end of the day, when RA Bill No.14 was paid, the mobilisation advance, which was substantially recovered earlier before the bill was issued, was credited back in payment of RA Bill No.14 to the contractor firm, and that, in the premises, recovery of the advance by encashment of the mobilisation bank guarantee was in order. No fault can be found with this conclusion of the learned arbitrator under the grounds available under Section 34 of the Act.

10. Insofar as performance guarantee is concerned, its encashment was objected to on the ground of the purported completion of 98% work by the Petitioner. As observed above, the Petitioner had failed to prove that this work was, in fact, accomplished. The arbitrator, as noted above, noted that a total amount of over Rs.2.40 crores was already paid as against the contract price of over Rs.2.40 crores, when the figures placed before the arbitrator did not indicate that 98% work was accomplished, leaving a meager balance of 2%. The arbitrator noted that 98% completion was alleged only on the basis of the price of work done and certified. (This price obviously included items of extra work.) Having thus come to the conclusion that there being nothing to indicate that the work was completed by the Petitioner to the extent as suggested in the reference, the arbitrator held that the Petitioner had failed to make out any case for recovery of the amount of performance bank guarantee encashed by Respondent No.1 on merits. Once again, no fault can be found with this assessment within the parameters of Section 34 of the Act. It is not a view which no fair and judiciously minded person could have arrived at or a view that would shock the conscience of the Court. It cannot be said that for arriving at this conclusion, the arbitrator has either taken into account any non-germane or irrelevant material or disregarded any germane or relevant material or circumstance.

11. In the premises, there is no merit in the challenge to the

impugned award. The arbitration petition is, accordingly, dismissed.

(S.C. GUPTE, J.)