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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 17th September, 2018

+ O.M.P. (COMM) 36/2018 & IA No. 1247/2018 & 12422/2018
NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Petitioner

Through: Mr.Manish K. Bishnoi &
Ms.Tanvi Sapra, Advs.

versus

SSANGYONG ENGINEERING & CONSTRUCTION CO.
LTD

..... Respondent

Through: Mr.Navin Kumar,
Ms.Rashmeet Kaur &
Ms.Arpana Majumdar, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 12.10.2017 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the work of Rehabilitation and Up-gradation to Four Laning of Jhansi-Lakhanadon Section Km 297 to Km 351 of NH-26 in the State of Madhya Pradesh-Contract Package ADB-11/C-8.

2. The challenge of the petitioner, when it had filed the present petition, was on the following grounds:-

a) That the Arbitrator while granting the claim of the

respondent with respect to replacement of Black Cotton Soil in the Retained Soil Zone of the RE Walls structure, has failed to consider the submission of the petitioner with respect to Clauses 3101, 3104, 3105 of Technical Specifications;

- b) That the Arbitrator has failed to appreciate that the petitioner while submitting its bid had offered a discount of 31.645%, therefore, even assuming that the respondent was entitled to its claim, the said discount had to be applied even to this portion of the claim.
- c) That the Arbitrator had awarded interest at the rate of 10% per annum compounded monthly, which is highly exorbitant and unreasonable given the facts of the present case.

3. As far as the second submission of the petitioner with respect to the application of the rebate is concerned, the counsels for the parties have drawn my reference to the order dated 12.02.2018 passed by the Arbitral Tribunal on an Application under Section 33 of the Act filed by the petitioner whereunder the Arbitral Tribunal has accepted the contention of the petitioner and has accordingly modified its Award by allowing the rebate of 31.645% to the awarded amount. The respondent is not in challenge against this modification, therefore, this should not detain me any further.

4. As far as the first ground of challenge is concerned, which is whether the respondent was entitled to its claims for replacing the Black Cotton Soil at the retained zone of the RE Wall, the learned

counsel for the petitioner has submitted that Clause 3101 read with Clause 3103.2 and 3104 of the Technical Specifications clearly provides that the respondent shall be liable for “ground improvement / strengthening” within the Reinforced Earth Structure and such work shall not be measured for purposes of payment to the respondent. He submits that in awarding the amounts to the respondent, the Arbitral Tribunal has therefore, ignored the said terms of the Agreement and the Award is vitiated on this account.

5. On the other hand, the learned counsel for the respondent draws reference to the amendment made in Clause 3104 of the Technical Specifications and has submitted that it was only the work of excavation for the full width of the “reinforced soil zone and levelling pad up to the bottom of foundation pad”, which was not to be measured or paid for to the respondent. He further submits that the Arbitrator had duly considered the effect of these Technical Specifications and in the Impugned Award has rejected the submission of the petitioner.

6. I have considered the submissions made by the learned counsels for the parties. The Arbitral Tribunal in paragraph 7.7 of its Impugned Award has held as under:-

“7.7 The AT, however, accepts the Claimant’s Claim in respect of the extra work which was carried out in the retained zone of RE Wall below the levelling pad whereby the Engineer had instructed the Claimant to replace the black cotton soil below the levelling pad with suitable sand. We do not agree with the Engineer’s observation and that of the Respondent that the said extra work of

replacing the black cotton soil below the levelling pad with suitable sand was incidental to the ground improvement work of levelling pad. The Respondent has not been able to show that the said additional work was envisaged as incidental work within the Contract Specifications and Terms and the AT is of the view that the Claimant deserves to be compensated for the work of replacement of black cotton soil with suitable sand, especially when the same was carried out at the instruction of the Engineer. As regards the quantities of this work, the Claimant has submitted details of the executed quantities at page 43 of the Statement of Claim, which have not been specifically denied by the Respondent. The Claimant has not been specifically denied by the Respondent. The Claimant has claimed an amount of Rs. 65,38,362/- towards this claim, which the AT hereby awards in favour of the Claimant and against the Respondent. The Engineer was not justified in rejecting this claim and terming it as incidental to the work of ground improvement. The AT finds from the records that the Claimant had submitted its Notice of Claim against this claim vide letter dated 7.4.2012 (page 123 of CD-1) which was rejected by the Engineer vide letter dated 17.4.2012 (page 124 of CD-1). In fact, the Claimant had raised a claim of Rs.64,77,167/- on this account vide its letter dated 30.4.2012 (page 126 of CD-1).”

7. In the Application filed under Section 33 of the Act before the Arbitral Tribunal, petitioner had again reagitated the said issue. The Arbitral Tribunal considered and rejected the same and has held as under:-

“7. The AT has reconsidered the submissions of the parties on the above issue and also the observations made in the Award dated 12.10.2017. The AT has clearly indicated in the

Award that the replacement of black cotton soil in the Retained Zone could not be envisaged as a part of the Claimant's scope of work under the Contract. The AT is of the opinion that there is no reason to reopen the issue or to give specific interpretation of Clause 3104 of the Technical Specifications as has been sought by the Respondent in its Correction Application. The AT may clarify here that admittedly there is no scope for ground improvement in the RE Wall work below the leveling pad. Admittedly, the existence of Black Cotton Soil was not known to any of the parties at the time of award of the contract and the said extra work was carried out by the claimant only upon the instruction of the Engineer. Further, at the relevant time the Engineer was also of the view that the said work is payable separately to the Claimant. It is for these specific reasons that in Para 7.7 of the Award, the AT has disagreed with the observations of the Engineer and of the Respondent that the extra work of replacing the black cotton soil below the levelling pad with suitable sand was incidental to the ground improvement work of levelling pad. The AT may further clarify that it is not reviewing its decision already given in the Award and the above is only clarificatory in respect of the issue raised by the Respondent in its Correction Application."

8. It cannot be denied by the petitioner that in the 'Reinforced Earth Structure' there are two distinct zones, which are 'Reinforced Zone' and the 'Retained Zone'. The question before the Arbitral Tribunal was whether for the replacement of the black cotton soil in the 'Retained Zone', the respondent was entitled to charge separately or it was included in the original work which was not to be measured and paid. The Arbitral Tribunal upon interpretation of the terms of the Technical Specifications has given the above findings to the effect that the work of replacing the black cotton soil below the levelling pad with suitable sand within the 'Retained Zone' was not

incidental to the ground improvement work for levelling pad. It has further held that the petitioner was unable to show that the said additional work was envisaged as incidental work within the contract specifications and terms. In the order dated 12.02.2018 Arbitral Tribunal further clarified that there is no scope for ground improvement in the RE walls below the levelling pad and during the relevant time the engineer was also of the view that the said work is payable separately to the respondent.

9. I may only note that the Arbitral Tribunal consisted of three members who are experts in the field of engineering and have construed the technical terms as per their expert knowledge understanding. The Supreme Court in ***Municipal Corporation of Delhi v. Jagan Nath Ashok Kumar and Anr.***, (1987) 4 SCC 497, has held as under:-

“4. In this case, there was no violation of any principles of natural justice. It is not a case where the arbitrator has refused cogent and material factors to be taken into consideration. The award cannot be said to be vitiated by non-reception of material or non-consideration of the relevant aspects of the matter. Appraisal of evidence by the arbitrator is ordinarily never a matter which the court questions and considers. The parties have selected their own forum and the deciding forum must be conceded the power of appraisal of the evidence. In the instant case, there was no evidence of violation of any principle of natural justice. The arbitrator in our opinion is the sole judge of the quality as well as quantity of evidence and it will not be for this Court to take upon itself the task of being a judge of the evidence before the arbitrator. It may be possible that on the same evidence the court might have arrived at a different conclusion than the one arrived at by the arbitrator but that by itself is no ground in

our view for setting aside the award of an arbitrator.

5. It is familiar learning but requires emphasis that Section 1 of the Evidence Act, 1872 in its rigour is not intended to apply to proceedings before an arbitrator. P.B. Mukharji, J. as the learned Chief Justice then was, expressed the above view in Haji Ebrahim Kassam Cochinwalla v. Northern India Oil Industries Ltd. and we are of the opinion that this represents the correct statement of law on this aspect. Lord Goddard, C.J. in Mediterranean & Eastern Export Co. Ltd. v. Fortress Fabrics Ltd. observed at pages 188-89 of the report as follows:

“A man in the trade who is selected for his experience would be likely to know, and, indeed, would be expected to know, the fluctuations of the market and would have plenty of means of informing himself or refreshing his memory on any point on which he might find it necessary so to do. In this case, according to the affidavit of the sellers, they did take the point before the arbitrator that the Southern African market has ‘slumped’. Whether the buyers contested that statement does not appear, but an experienced arbitrator would know, or have the means of knowing, whether that was so or not and to what extent, and I see no reason why in principle he should be required to have evidence on this point any more than on any other question relating to a particular trade. It must be taken, I think, that in fixing the amount that he has, he has acted on his own knowledge and experience. The day has long gone by when the courts looked with jealousy on the jurisdiction of arbitrators. The modern tendency is, in my opinion, more especially in commercial arbitrations, to endeavour to uphold awards of the skilled persons that the parties themselves have selected to decide the questions at issue between them. If an arbitrator has acted within the terms of his submission and has not violated any rules of what is so often called natural justice the courts should be slow indeed to set aside his award.”

6. This in our opinion is an appropriate attitude.

7. *In this case the reasons given by the arbitrator are cogent and based on materials on record. In Stroud's Judicial Dictionary, Fourth Edn., page 2258 states that it would be unreasonable to expect an exact definition of the word "reasonable". Reason varies in its conclusions according to the idiosyncrasy of the individual, and the times and circumstances in which he thinks. The reasoning which built up the old scholastic logic sounds now like the jingling of a child's toy. But mankind must be satisfied with the reasonableness within reach; and in cases not covered by authority, the verdict of a jury or the decision of a judge sitting as a jury usually determines what is "reasonable" in each particular case. The word "reasonable" has in law the prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know. See the observations, in Re a Solicitor.*

8. *After all an arbitrator as a judge in the words of Benjamin N. Cardozo, has to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life".*

10. In ***Associate Builders vs. Delhi Development Authority***, 2015

(3) SCC 49, the Supreme Court again reiterated that:-

42.3(c) *Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:*

28. Rules applicable to substance of dispute.—(1)-
92) * * *

(3) *In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction. ” This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the*

terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do.

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43. *In McDermott International Inc. v. Burn Standard Co. Ltd.,(2006) 11 SCC 181 this Court held as under: (SCC pp. 225-26, paras 112-13)*

“112. It is trite that the terms of the contract can be expressed 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. v. Oil and Natural Gas Commission, (2003) 8 SCC 593;2003 Supp (4) SCR 561 and D.D.Sharma v. 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 fact of the award.”

44. *In MSK Projects (I) (JV) Ltd. v. State of Rajasthan, (2011)10 SCC 573: 2012 3 SCC (Civ) 818, the Court held : (SCC pp. 581-82, para 17)*

“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 v. Lachhmi Ram, AIR 1954 SC 689, Thawardas Pherumal v. Union of India, AIR 1955 SC 468, Union of India v. Kishorilal Gupta & Bros., AIR 1959 SC 1362, Alopi Parshad & Sons Ltd. v. Union of India, AIR 1960 SC 588, Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji, AIR 1965 SC 214 and Renusagar Power Co. Ltd. v. General Electric Co. (1984) 4 SCC 679: AIR 1985 SC 1156)”

11. The above observations and law declared by the Supreme Court would fully apply to the facts of the present case. Once the Arbitral Tribunal construed the terms of the Agreement, merely because it has not given the reasons as one would expect from the judgment written by persons well versed in the legal terminology, the Award cannot be set aside only on this ground. I do not find the interpretation given by the Arbitral Tribunal to Clause 3101, 3103 and 3104 of the Technical Specifications to be unreasonable or one which no fair minded or reasonable person could do. I, therefore, find no merit in the said challenge to the Impugned Award.

12. The learned counsel for the petitioner, relying upon the order dated 03.03.2017 passed by the Supreme Court in Civil Appeal No. 3597/2017 titled M/s National Highways Authority of India (NHAI) vs. M/s KNR-Patel (JV) KNR House, submits that in the said case also the Supreme Court had reduced the rate of interest to simple

interest at the rate of 12% per annum. The counsel for the respondent submits that, on the peculiar facts of the present case, the respondent has no objection if the rate of interest is reduced. However, this be not read as an admission of the respondent that the interest awarded was unjustified and also it should not prejudice the rights of the respondent in any other litigation. I agree with the above conditions.

13. I may note that the Arbitrator in the Impugned Award has granted interest at the rate of 15% per annum for the post award period. In view of the above, the pre-Award interest is modified to be 15% per annum.

14. The petitioner had earlier deposited with the registry of this Court amount in terms of the Impugned Award as directed in order dated 12.02.2018. As the petition is partly allowed, the Registry shall release the amount so deposited alongwith interest accrued thereon to the respondent and to the petitioner respectively in accordance with the present order.

15. The petition is partly allowed in the above terms, with no order as to cost.

NAVIN CHAWLA, J

SEPTEMBER 17, 2018/rv