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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 08.02.2018

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FAO 94/2017 & CM APPL. 7330/2017

M/S NATIONAL ENGINEERING INDUSTRIES LTD..... Appellant
Through: Mr. Anurag Kumar, Advocate.

Versus

M/S CONTRACT ADVERTISING (INDIA) PVT LTD. ..Respondent
Through: Mr.Ashwani Kr., Advocate (Mobile
No. 9871085028).

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J (Oral)

1. This appeal impugns an order under section 37 of the Arbitration and Conciliation Act, 1996 on the ground that it is against the public policy of India inasmuch as it has awarded certain amounts which tantamount to unjust enrichment i.e. fees to be paid for no work done.

2. In support of his contention, the learned counsel for the appellant relies upon the judgement in *Indian Council for Enviro-Legal Action vs.*

Union of India (UOI) and Ors. 2011 (8) SCC 161 which held as under:

“197. In Padmawati v. Harijan Sewak Sangh CM (Main) No. 449 of 2002 decided by the Delhi high Court on 6.11.2008, the court held as under:

“The case at hand shows that frivolous defences and frivolous litigation is a calculated venture involving no risks situation. You have only to engage professionals to prolong the litigation so as to deprive the rights of a person

and enjoy the fruits of illegalities. I consider that in such cases where Court finds that using the Courts as a tool, a litigant has perpetuated illegalities or has perpetuated an illegal possession, the Court must impose costs on such litigants which should be equal to the benefits derived by the litigant and harm and deprivation suffered by the rightful person so as to check the frivolous litigation and prevent the people from reaping a rich harvest of illegal acts through the Court. One of the aims of every judicial system has to be to discourage unjust enrichment using Courts as a tool. The costs imposed by the Courts must in all cases should be the real costs equal to deprivation suffered by the rightful person.””

3. In the same vein, he also relies upon the judgment in ***Oil and Natural Gas Corporation Limited vs. Western Geco International Limited*** (2014) 9 SCC 263 which has held that the Arbitrator is required to look into the fact situation; the judgment reads *inter alia*, as under:

*“35. What then would constitute the 'Fundamental policy of Indian Law' is the question. The decision in **Saw Pipes Ltd.** (supra) does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "Fundamental Policy of Indian Law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the Fundamental Policy of Indian law. The first and foremost is the principle that in every determination whether by a Court or other authority that affects the rights of a citizen or leads to any civil consequences, the Court or authority concerned is bound to adopt what is in legal parlance called a 'judicial approach'*

in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the Court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of Judicial approach in judicial and quasi judicial determination lies in the fact so long as the Court, Tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bonafide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a Court, Tribunal or Authority vulnerable to challenge.

38. *Equally important and indeed fundamental to the policy of Indian law is the principle that a Court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated 'audi alteram partem' rule one of the facets of the principles of natural justice is that the Court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the Court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian Law."*

4. There cannot be any dispute about the aforesaid position in law. However, what has to be seen is whether the award and the impugned order

fell foul of it.

5. According to the learned counsel for the appellant, the monies envisaged payable under Clause 8 of the Agreement between the parties, was to be paid only in the eventuality of the work being carried out in terms of Clauses 3 and 6; that since, no work was done by the respondent, therefore, no monies were to be paid. However, in this regard, the impugned order has reasoned as under:

18. The pleas that have been taken may be within section 34 of the Act but the question remains whether these have been validly raised. The repeated contention is that clause 8 had to be read with clause 6 and clause 3 of the agreement and that since the Ld. Arbitrator had failed to consider the same, the Award was liable to be set aside. However, a perusal of the Award would show that the Ld. Arbitrator had in fact considered clause 6 and clause 8 before concluding that the claimant/ respondent was entitled to Rs. 20,04,032/-.

19. Ld. Counsel for the Objector has sought to interpret the agreement to mean that approval of jobs would alone entail release of payment. According to him the agreement was to work out in the following manner - under clause 3 the agency being M/s Contract Advertising (India) Pvt. Ltd. would provide services to the client namely M/s National Engineering Industries Ltd. as mentioned in Annexure A of the agreement. The Annexure A lists out several activities such as print creative, TVC script writing, TVC - coordination and supervision of production, AV film writing upto two minutes, online banners, POS, Poster, Leaflet, Dangler 2D, Dangler 3D, folders upto 4 pages, folder more than 4 pages, brochure/ booklet and so on and so forth. There need not be any dispute with this contention. Thereafter, under clause 6, the written approval of the activity mentioned in Annexure 'A' had to be obtained and only after that the money was to be released.

20. Clause 6 on which much emphasis is being placed is as follows:

Approvals; The Agency shall seek written approval of all visual, artworks, copy, scripts, media schedules, estimates etc and the Agency shall not be required to proceed further with any work until the Client's approval of related documents.

Both the Client and the Agency shall communicate to each other the names of officials authorized to sign various documents or grant approvals under this agreement.

21. This would mean that whatever visual, artworks, copy, scripts, media schedule etc that are mentioned in Annexure A in relation to which services are to be provided by the claimant/ respondent herein under clause 3 would have to be approved in writing before respondent/ claimant could proceed further. Each party was to communicate to each other the names of officials authorized to sign various documents and grant approvals. Therefore, it is clear that the services to be provided by the agency being the claimant/ respondent under clause 3 of the agreement and as spelt out in the Annexure A could be provided in respect of each item in Annexure A only with the written approval of the objector.

22. This was the reason why they raised their claim for Rs. 33,090/- and which was disallowed by the Ld. Arbitrator on the ground that the claimant had not placed any document on record to show that the job was completed or that the payments have been made to M/s Paint Box.

23. The moot question is whether this approval is also for the payments set up under clause 8 of the agreement. According to the objector, they are, whereas the respondent claims that the fee was payable as per schedule mentioned in clause 8 and was not dependent on the clause 6 of

individual approval for the work.

24. The Ld. Arbitrator rightly concluded that the clause 6 did not provide for any condition for the payment of fee fixed under clause 8 of the agreement and that clause 6 related to approval of documents in respect of specific work undertaken by the claimant and executed either itself or through outside vendors.

25 A reading of clause 6 would show that it relates to the payment of "fees" "for the project". Thus, the agency/claimant was entitled to receive a fee of Rs. 35,00,000/- under clause 8 of the agreement in four equal instalments. The period of the agreement was from OP' September, 2011 till 31st December 2011 during which time the agency had to provide several services and for these services in respect of art work, copies etc. the work would be only executed after the written approval of the client/objector under clause 6 of the agreement. For providing this facility and services, the agency was entitled to remuneration which was mutually fixed at Rs 35,00,000. Clearly this fee payable to the agency/ claimant for the project in relation to the client namely the objector was not dependent upon the various services to be provided under clause 3 read with Annexure A and which were subject to the approval under Clause 6.

26. Thus, the Ld. Arbitrator has clearly applied judicial approach in reading the agreement in the words recorded therein. There is no occasion for unjust enrichment as the remuneration under clause 8 of the agreement was for services rendered by the agency and not for specific jobs. Therefore, neither is the award capricious or perverse nor is it based on no evidence nor is the Award against the Public Policy of India. Thus, there is no reason to interfere with the Award dated 18.08.2015 of the Ld. Arbitrator."

6. The learned counsel for the appellant submits that it is not as if the

money was to be paid simply because the emoluments were mentioned in Clause 8 of the Agreement, instead the underlying understanding of the Agreement was that the monies would be payable only when some services were rendered by the respondent in terms of Clauses 3 to 6 and the Schedule to the Agreement. The impugned order, however, did not find the said arguments tenable. It held that even if a single service, as enumerated in the Schedule, was rendered, then the amount specified therein would be payable and it had been so held in the Award. It reasoned that for the services listed in Schedule 8, the agency/respondent would be paid the amounts. It is not the appellant's case that the respondent was not ready and willing or not available to carry out the duties, which it may have been called upon. It is in terms of Clauses 3 to 6 and the Schedule to the Agreement that the appellant's client ought to have intimated the respondent about the nature of the work they wanted to be carried out. Preparedness, readiness, willingness and competence of the respondent were never in doubt. Their man and material were available to discharge their part of the Agreement and they did so in terms of what they were asked to.

7. The Award discounted the appellant's contention that the job done by the respondent did not meet with their approval; neither this approval was justified nor was it necessary. Indeed, apropos this issue, the Award has reasoned as under:

“23. The moot question is whether this approval is also for the payments set up under clause 8 of the agreement. According to the objector, they are, whereas the respondent claims that the fee was payable as per schedule mentioned in clause 8 and was not dependent on the clause 6 of individual approval for the work”

8. The impugned order has held that the view taken by the Arbitrator is a plausible view and the Courts would not seek to substitute the same with another plausible view. In this regard, it had rightly relied upon the judgment of the Supreme Court in *Associate Builders vs. Delhi Development Authority*, (2015) 3 SCC 49. It has also referred to *Sumitomo Heavy Industries Ltd. v. Oil & Natural Gas Corporation Ltd.*, (2010) 11 SCC 296 to examine that there was nothing perverse in the Award i.e. it had not ignored the relevant evidence or taken into consideration inadmissible material or was entirely against the evidence. The limited scope of inquiry under section 34 of the Act has been judiciously observed. The impugned order did not find that the learned Arbitrator had adopted a less than judicial approach or that the sums were awarded without performance of the Contract or that the Award was against the Public Policy of India. The reasons for awarding the amounts have been discussed in paras 19 to 23 of the impugned order and do not call for any interference by this Court. The appeal is without merits and is accordingly dismissed. The pending application also stands dismissed.

FEBRUARY 08, 2018

ACM/ sb

NAJMI WAZIRI, J