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

Date of decision: 4th April, 2018

+ **O.M.P. (COMM) 139/2018**

UNION OF INDIA

..... Petitioner

Through: Mr.Jaswinder Singh, Adv.

versus

RAMA PAPER MILLS LIMITED

..... Respondent

Through: Nemo

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

IA No.4343/2018

Exemption allowed, subject to all just exceptions.

O.M.P. (COMM) 139/2018 & I.A.No.4342/2018(stay)

1. The present 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 8th May, 2017 passed by the Sole Arbitrator adjudicating the disputes between the parties that had arisen in relation to the agreement for purchase of newsprint dated 11th April, 2013 executed between the parties.

2. The dispute between the parties was in relation to the deductions made by the petitioner from the invoices raised by the respondent towards the supply of the newsprint, on the ground of the newsprint being of

defective quality. The Arbitrator, after discussing the evidence led before him by the parties, awarded a sum of Rs.1,83,75,045/- in favour of the respondent inter alia holding therein that the amounts had been wrongly withheld by the petitioner.

3. Counsel for the petitioner draws my reference to the letter/ No Claim Certificate dated 22nd October, 2014 issued by the respondent wherein the respondent had claimed that except for an amount of Rs.1,31,58,471/- against the three mentioned invoices, no other amount was due and payable by the petitioner to the respondent. He further submits that after the payment claimed by the respondent was released in its favour, the respondent gave another No Due Certificate in the form of its letter dated 30th December, 2014 and in view of these letters, the claim filed by the respondent was not maintainable and should have been rejected by the Arbitrator.

4. He further submits that the Arbitrator has completely ignored the second No Due Certificate dated 30th December, 2014 issued by the respondent. He places reliance on the judgment of the Supreme Court in ***Union of India vs. Master Construction Company*** (2011) 12 SCC 349, to contend that once a No Due Certificate has been issued by the respondent, the respondent cannot claim fraud, coercion, duress or undue influence to take away the effect thereof.

5. I have considered the submissions made by the counsel for the petitioner, however, I am unable to agree with the same.

6. It is seen that vide letter dated 22nd October, 2014, the petitioner had called upon the respondent to extend the bank guarantee lying with the petitioner as a security deposit against the contract and also submit a No Due

Certificate. Admittedly, as on that date an amount of Rs.1,31,58,471/- was due and payable by the petitioner to the respondent. Therefore, calling for a No Due Certificate from the respondent at that stage itself shows the exercise of coercion on the respondent by the petitioner. The terms of the so-called 'No Due Certificate' issued by the respondent in its letter dated 22nd October, 2014 are also of relevance and are in fact pointing to the helpless position that the respondent found itself in by the conduct of the petitioner. The relevant portion of this letter is quoted herein below:-

“Since our bank account is currently under suspension for various disputes in our banking operations with the bank, the validity of the bank guarantee submitted by us cannot be got extended further, under any circumstances.

Except for payment of last supplies of newsprint covered under our Invoice No. RPML/2013-14/15 dated 25.05.2014 for Rs.1,13,35,829/- and RPML/2013-14/16 dated 30.09.2014 for Rs.18,22,542/- totalling to Rs.1,31,371/- we confirm that no dues are pending against our all preceding supplies and therefore this should be considered as our no dues certificate for the purpose. We wish to submit that we have been supplying our newsprint to your department for the last 4-5 years against annual contracts and had very cordial relationship. On various occasion we have supplied material against your S.O.S. requirements also within a very short period of time. In future also we would always be willing to continue our relationship with you and supply the material if any orders / requirements are placed on us. We have enjoyed fair and satisfactory treatment from your department on all occasions and we also assure you of our full co-operation always whenever trust is placed on us.

We would request you to please arrange to release our payments without any further delay.”

7. It is only on the receipt of the above alleged No Claim Certificate and a subsequent letter dated 24th November, 2014 from the respondent, again pleading for the release of the amount, that the admitted amount owed by the

petitioner was released by the petitioner in favour of the respondent. This letter of 24th November, 2014 also speaks volumes regarding the anguish of the respondent and is reproduced herein below:-

“Details of our several reminders and personal visits to your office got false assurances. Ever after delay of about six months nobody is available to provide us clear status regarding our payment. As per the annual contract payment finalized as 30 days therefore, let us know who is responsible for his delay? And shall that persons would bear the interest charged for above mentioned period of delay. In such circumstances we once again request your goods selves to please look into the matter personally to release the our payments as the matter has been delayed.”

8. Though the payment was released in favour of the respondent, there was still a bank guarantee of an amount of Rs.1.50 crores held by the petitioner, admittedly without the petitioner having any further claims against the respondent. As is evident from the letter dated 22nd October, 2014 of the petitioner, the petitioner insisted for a No claim Certificate to be issued before the release of this bank guarantee in favour of the respondent. The respondent, therefore, seems to have given yet another No Claim Certificate dated 30th December, 2014 so that the bank guarantee is released in its favour.

9. The above sequence of events clearly shows that the alleged No Claim Certificate(s) relied upon by the petitioner were not given freely by the respondent but were given under coercion and economic duress.

10. In **Master Construction Company** (supra), the Supreme Court, while dealing with such No Claim Certificates being relied upon as a complete discharge of the agreement, had held that there is no rule of the absolute

kind of these matters. Whether such No Claim Certificate has been obtained by fraud, coercion, duress or undue influence has to be decided by looking into the facts of each case. In the facts of that case, the Court found that the No Claim Certificate issued by the respondent therein was given voluntarily and, therefore, the contract stood discharged voluntarily.

11. In the present case, the facts noted above lead to a contrary conclusion against the petitioner. Admittedly, on the date of the first alleged No Claim Certificate a huge amount of Rs.1,31,58,471/- was due and payable by the petitioner to the respondent. On the date of the second alleged No claim Certificate, the petitioner was admittedly holding onto a bank guarantee of an amount of Rs.1.50 crores without having any claim against the respondent. Further, the fact that the respondent was facing problems with its bankers and was under huge financial stress was also stated in the letter dated 22nd October, 2014 by the respondent to the petitioner and has not been denied by the respondent. These factors clearly indicate to the economic duress that the respondent was suffering from at the time of giving these alleged No Due Certificate. The case of the respondent squarely falls in illustration (iii) given by the Supreme Court in ***National Insurance Co. Ltd. v. M/s Boghara Polyfab Pvt. Ltd.***, AIR 2009 SC 170, quoted herein below:-

“28. xxxxxx

(iii) A contractor executes the work and claims payment of say Rupees Ten Lakhs as due in terms of the contract. The employer admits the claim only for Rupees six lakhs and informs the contractor either in writing or orally that unless the contractor gives a discharge voucher in the prescribed format acknowledging receipt of Rupees Six Lakhs in full and final satisfaction of the contract, payment of the admitted amount will not be released. The contractor who is hard pressed for

funds and keen to get the admitted amount released, signs on the dotted line either in a printed form or otherwise, stating that the amount is received in full and final settlement. In such a case, the discharge is under economic duress on account of coercion employed by the employer. Obviously, the discharge voucher cannot be considered to be voluntary or as having resulted in discharge of the contract by accord and satisfaction. It will not be a bar to arbitration.”

12. In any case, the Arbitrator has considered this issue at length and has given the following findings in this regard:-

6.4. Analysis, discussions and findings

Considering entirety of the case:

I accept the contention of the claimant that there was no stipulation in the Agreement regarding the “no dues certificate” as demanded by the respondent vide their letter dated 22.10.2014.

I am also inclined to agree with the arguments of the claimant that in a manufacturing business, cash flows are important for sustaining the operations. If the arrears have mounted to large proportions, in crores of rupees, the seller, many a time, comes under a severe financial stress leading it to be subservient to the seller for the recovery of arrears.

At the particular stage when the No dues certificate was demanded by the respondent, the dues as alleged by the claimant had mounted to a large figure along with a sum of Rs.1.5 crores blocked under the bank guarantee, in spite of several communications to the respondent to settle their bills, and referring to their financial hardship. So, the claimant might have been under great financial duress and crisis that pressurized it to issue the “no dues certificate”.

The justification of the respondent that “The Respondent had asked to give their No Dues which was as per past practice and was a precedent at the time of the completion of agreement ” does not seem to be appealing. The Agreement has no clause to this effect and the respondent has not put up the case convincingly to demonstrate

that it was a precedent at the time of completion of transactions under the Agreement.

Further, the words “at the time of completion of the Agreement” in the above para as contended by the respondent (para 6.3 above) does not reflect the correct status as on 22.10.14, because at that time the stage of “completion of the Agreement” had not yet reached. There was a dispute going on between the parties and substantial bills were yet to be processed by the respondent and in fact it took two more months even after the issue of the said ‘no dues certificate’ on 22.10.2014, to make payments after deductions. In this connection it would be relevant to mention that even after one month of the issue of the said ‘no dues certificate’ the bills had still not been settled, which fact was brought to the notice of the respondent by its letter dated 24.11.14.

The mention of some problems by the respondent about defective reels at the time of asking for “No dues certificate” as mentioned by the respondent (6.3 above) does not carry any weight as there is no mention of this in the respondent’s letter of 22.10.14 asking for the said certificate. Also, the plea by the respondent that the issue of no dues certificate because the bank guarantee had expired does not appeal as the respondent had demanded both the “extension of bank guarantee” and “No dues certificate” together vide their letter of 22.10.2014.

So, the respondent's insistence on the issuance of this certificate for releasing the pending payments of the claimant was not in accordance with the Agreement and it can be termed as coercive.”

13. The Arbitrator having considered the above issue at length, it is not for this Court to re-appreciate the same as an Appellate Court to arrive at a different conclusion. In *Associate Builders vs. DDA* (2015) 3 SCC 49, the Supreme Court, had cautioned the Court of the limited grounds that are available for challenging an arbitral Award and had held as under:

“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 [Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows:

“General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong”.

It is very important to bear this in mind when awards of lay arbitrators are challenged.] . Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342] , this Court held: (SCC pp. 601-02, para 21)

“21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the

Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.”

14. Counsel for the petitioner further submits that the deductions made from the invoices raised by the petitioner were on account of a defect in the newsprint supplied by the respondent to the petitioner. The petitioner was entitled to make these deductions in terms of clause 10 of the agreement, which provides for imposition of liquidated damages in case of failure of the test report. He further submits that in this case, the newsprint supplied by the respondent were subjected to test by three laboratories and the reports thereof had indicated the deficiencies in the quality of newsprint supplied by the respondent and, therefore, the deduction made by the petitioner was in terms of the agreement.

15. I have considered the above submissions of the counsel for the petitioner, however, I am unable to agree with the same.

16. The Arbitrator has discussed the issue of the test reports and the plea of the petitioner in this regard and has *inter alia* held that the test reports were not properly proved in the arbitration proceedings; the samples of the newsprints were supplied and sent to the laboratories after an undue delay; there was a lack of appropriate monitoring system in managing the sampling, sending the samples expeditiously and following up for the test reports on the part of the petitioner ; the newsprints having a shorter life and being subjected to degradation with the time, any delay in testing would also have an effect in the test reports of the same; the best practice required that the samples be collected and dispatched to the laboratories as soon as practically possible to avoid any discrepancies in testing not being followed;

the test reports from different laboratories giving different results with wide variations itself creates a doubt on the veracity of the test reports and test reports not being communicated to the respondent in writing and in fact the respondent being informed of such test reports after almost 9 months of the supplies being made. On the basis of the above findings on evidence, the Arbitrator found the deductions being made by the petitioner to be unjustified.

17. I see no reason to disagree with the above findings of the Arbitrator. In any case, these being findings of fact given by the Arbitrator after appreciating the entire evidence led before him, it is not for this Court to re-appreciate the evidence to arrive at a different conclusion.

18. In view of the above, I find no merit in the present petition and the same is accordingly, dismissed with no order as to costs.

NAVIN CHAWLA, J

APRIL 04, 2018
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