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

Date of decision: 06.08.2018

+ **FAO(OS) (COMM) 165/2018**

UNION OF INDIA Appellant

Through: Mr. Jaswinder Singh, Advocate.

versus

RAMA PAPER MILLS LIMITED Respondent

Through: Mr. Manav Vohra and Mr. Sidhant
Kapur, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K. CHAWLA

HON'BLE MR. JUSTICE S. RAVINDRA BHAT (ORAL)

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CAV 704/2018

Since the counsel for the caveator has put in appearance the
caveat stands discharged.

CM APPL. 31123/2018 (for exemption)

Allowed, subject to all just exceptions.

FAO(OS) (COMM) 165/2018 & CM APPL. 31121 (for stay)

The appellant-Union of India which appeals the decision of the
learned Single Judge rejecting its objections to the award pursuant to

an Agreement of 11.04.2013 (made with the respondent-Rama Paper Mills Limited - hereinafter “claimant”) urges two grounds in support of its plea that the award was patently illegal and the learned Single Judge fell into error in upholding it.

2. The two grounds on which the appeal primarily rests are; First, that the findings vis-à-vis the ‘no dues’ or ‘no objection’ certificates issued by the claimant foreclosing its demands in arbitration and second, the rejection of the test reports was, under the circumstances, unwarranted.

3. The agreement in question entered into by the parties was for the supply – to Union of India, quantities of news-prints. The quantities and the rates were agreed upon. The contract conditions stipulated, *inter alia*, that every batch of supply was to be subjected to deductions based upon assessment of the quality and for that purpose, the samples from the batch were to be referred to Government approved laboratories. The fee for the sample testing was to be borne by the claimant. The claimant sought a reference complaining that its dues were withheld unjustly by the Union of India. The claimant’s ground was that a sum of ₹1,31,58,471/- in respect of three invoices was withheld. The Union relied upon a letter or no claim certificate dated 22.10.2014 and the second, no dues certificate dated 30.12.2014. Both the Arbitrator and the learned Single Judge (who examined the merits of the award on the basis of the Union of India’s objections) concluded that the Union’s claims with respect to foreclosure of the claimant’s dues, by its own conduct, were

insubstantial and meritless. It was held that Union was holding on to a bank guarantee of ₹1.5 crores and had even insisted for its extension after the completion of the supplies and that since the claimant was facing problems with its bankers, in effect, it was compelled to issue the two letters relied upon by the Union. The reliance was placed upon the judgment of *National Insurance Company Limited vs. M/s Boghara Polyfab Pvt. Ltd.*, AIR 2009 SC 170, outlining the circumstances where an apparent waiver of claims has to be closely examined in the background of the overall circumstances of the case. As far as the test reports relied upon by the Union in the Arbitration proceedings were concerned, the learned Single Judge was persuaded with the reasoning of the Arbitral Tribunal that the documents were not properly proved in Arbitration proceedings and that the samples were supplied after undue delay without appropriate monitoring. Most importantly, the absence of any expert in support of the deductions on behalf of the Union, was held against it.

4. Mr. Jaswinder Singh, learned counsel for the Union urges that the impugned award is patently erroneous and relies upon the judgment in *'Union of India vs. Master Construction Company'*, (2011) 12 SCC 349 to say that if a party by expressed documentary evidence, forecloses its claims, it cannot be permitted to raise it in arbitration or legal proceedings. It was urged that to establish any fraud, coercion or any other vitiating circumstances there has to be in each case sufficient proof as well as pleadings. Highlighting that these were absent conspicuously in the present proceedings learned

counsel submitted that the claimant failed to specifically prove coercion or rather the manner of it and also lead any evidence in this regard. It was urged in this context that the reliance placed upon the bank guarantee, the extension of which was insisted by the Union, was irrelevant, given that it had expired. It was submitted that in these circumstances there was no compulsion by the claimant to issue the no dues certificate if in fact it had any claims against the Union. On the second aspect it was urged that the test reports were sent to the laboratories in terms of the understanding and the express agreement of the parties and that in arbitration proceedings, insistence on strict proof of these documents was unnecessary. Learned counsel submitted that the method adopted by the Union i.e. of averaging the test reports results, was reasonable and justified.

5. Both the Tribunal and the learned Single Judge noticed that at the time when the claimant took no dues certificate, substantial amounts – of upto ₹1.5 crores, were payable on the one hand and that at the same time it was facing problems with its bankers. The insistence on extension of bank guarantee, in the circumstances urged by the Union, is unpersuasive. If indeed, the Union had received all the supplies and had deducted all amounts justifiably there was no rationale for it to insist on extension of what it now terms to be as an expired bank guarantee. Furthermore, as to what compulsions lay with the claimant when it sought for return of the guarantee are matters that the Arbitral Tribunal satisfied itself while returning the findings that, in fact, there was some kind of pressure that prevailed

upon the claimant to issue the two documents. The learned Single Judge, we notice, had appreciated all these facts. At any given point of time, Tribunals have to see the totality of the circumstances and not go by the use of particular expression or “labels”. The method of proving coercion or pressure varies from case to case; in this case the Tribunal inferred that there was coercion and that the claimant proved it, having regard to the facts, which appeared to it self-evident from the record. Since this factual analysis lies entirely within the domain of the Arbitral Tribunal, the learned Single Judge quite correctly held that there was no patent error of law.

6. So far as the question of test reports is concerned, this Court is of the opinion that here too Union’s argument cannot be accepted. There is no material on record to show that there was indeed a contemporaneous testing of the samples received from time to time. The Tribunal held that there was undue delay in regard to the forwarding of those samples. The absence of any expert, who could testify as to the correctness of the methods employed by the concerned laboratories and more crucially also the accuracy of the method adopted i.e. averaging, in the circumstances, on the part of the Tribunal, cannot be followed. Since the Union primarily relied upon these test reports it was incumbent upon it if not in keeping the strict rules of evidence atleast some manner of acceptable evidence that the methods employed by it, were generally acceptable having regard to the nature of supplies received by it. Its omission to do so, in the

opinion of this Court, justified the rejection of its argument both before the Tribunal and the learned Single Judge.

7. Given the extremely circumspect nature of the second guessing jurisdiction that this Court possesses under Section 37 of the Arbitration and Conciliation Act, 1996, we are satisfied that no case is made out for interference with the impugned judgment.

The appeal is therefore dismissed along with the pending application.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

AUGUST 06, 2018

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