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

Date of decision: 27.07.2018

+ **FAO(OS) (COMM) 74/2017**

ZEMAN TECHNOGROUP Appellant

Through: Mr. Saket Sikri, Mr. Junaid Nahvi,
Mr. Ajay Pal Singh, Mr. Neeraj Choudhary,
Mr. Niraj Singh, Advs.

versus

UNION OF INDIA Respondent

Through: Mr. Anurag Ahluwalia, CGSC
with Mr. Abhigyan, Ms. Tejaswitha, Advs.,
Ms. Nidhi Mohan & Mr. Vikram Verma,
Deputy Director.

+ **FAO(OS) (COMM) 30/2018**

UNION OF INDIA Appellant

Through: Mr. Anurag Ahluwalia, CGSC
with Mr. Abhigyan, Ms. Tejaswitha, Advs.,
Ms. Nidhi Mohan & Mr. Vikram Verma,
Deputy Director.

versus

M/S ZEMAN TECHNO GROUP Respondent

Through: Mr. Saket Sikri, Mr. Junaid Nahvi,
Mr. Ajay Pal Singh, Mr. Neeraj Choudhary,
Mr. Niraj Singh, Advs.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

S. RAVINDRA BHAT, J.(ORAL)

1. These two common appeals deal with the same subject matter i.e. the legality and validity of an International arbitration award dated 27.08.2015.

2. The parties i.e. M/s Zeman Technogroup (hereinafter referred to as 'Zeman'), a Czech incorporated company, entered into a contract for the supply of 29,740 pairs of Anti-Mine boots (BAMI). The agreement was entered into by the parties on 23.03.2009. The payment terms were amended on 30.09.2009. The working of the contract led to disputes between the parties. These were referred to International Arbitration. In the majority award rendered on behalf of the Tribunal by two of its members, it was held that the Union of India ("Union" hereafter) was in breach of the conditions. The Tribunal rejected the Union's blast reports – which were its pretext for denying the payments due to Zeman. It was directed that the Tribunal held that the claimant/Zeman was entitled for refund of the amount of the bank guarantee to the tune of US \$377,698 which was encashed on 16.04.2012 along with 12% interest.

3. As to the issue of damages, the Tribunal concluded as follows:

“As far as the Cranfield University report is concerned, the Tribunal is not taking the findings

of the report or expenditure incurred for it, into account as the blast test conducted was not as per the ATP laid down in the contract between the Claimant and the Respondent.

Therefore the Tribunal is of the opinion that the Respondent followed the ATP laid down in the contract to a large extent; however the Respondent digressed from the procedure laid down in the ATP only in so far as the use of fine dry sand is concerned.

In light of the above findings the Tribunal holds that the Blast tests carried out by the Respondent were not as per the Accepted Test Procedure laid down in the Contract. The Respondent ought to have followed the blast test procedure laid down in the contract as it is and any digression from the procedure i.e. using alluvial soil instead of dry sand leads to declaring the Report of the tests void.

As the Blast tests reports are held to be invalid, the Respondents plea of encashing the Bank Guarantees on the premise of failure of the Blast tests and hence resulting in breach of Contract by the Claimant's side does not hold the field.

Therefore the claimant is entitled for refund of the amount of the performance bank guarantee of USS 377,698.00 encashed by the Respondent on 16.04.2012 alongwith 12% interest levied on the said amount from the date of encashment until the date of the award.

In so far as the Claimant's Claim in respect of the Boots produced by them is concerned, the Tribunal is of the view that the consignment of 29,740 pairs of BAMI was produced by the Claimant and the Respondent inspected the same. However the Claimant did not bring on record any documentary

evidence to prove that the Claimant suffered actual loss due to boots not being sold to the Respondent.

The Claimant has made no averments nor led any evidence to prove that the boots produced by them were incapable of being sold to a third party. They also did not place any material on record to show that the boots get wasted lying in the warehouse. It was however submitted only during arguments that the shelf life of the boots is only 3 years. Thus this plea of the Claimant unsupported by pleading and evidence cannot be accepted.

Therefore in light of the above findings it will not be just and equitable to award the total sale price of the 29,740 pairs of BAMF to the Claimant as the Claimant has not been able to set out its case in so far as the actual loss suffered by the Claimant is concerned.

Having considered the following circumstances in the present case:

A. That the Respondent followed the ATP to a large extent and only one deviation was made by the Respondent of not using fine dry sand while conducting the blast test;

B. That the Claimant made no averments in respect of the actual loss suffered by it due to the boots not being bought by the Respondent;

C. That the Bank Guarantee furnished by the Claimant wrongly encashed by the Respondent is being returned to the Claimant along with 12 % interest;

We are of the view that the Claimant is entitled to 25% of the total amount of 7,494,480.00 US\$ as

Claimed by the Claimant in its Statement of Claim.

4. The Union invoking Section 34 of the Arbitration and Conciliation Act, 1996, approached this Court; a learned Single Judge, by the impugned order rejected the petition so far as it related to the contention vis-a-vis wrongful award on the question of refund with respect to the underlining amounts of the performance guarantee but upheld the challenge so far as it related to the grant of Zeman damages to the tune of 25% of the cost. The Single Judge reasoned as follows:

“25. Learned counsel for the Respondent argued that the shelf life of these boots were only three years and obviously the Respondent suffered a loss because the boots were made specifically for the Petitioner and could not be used for any other purpose. Even this plea has been negated by the majority. It observed that "it was further submitted only during arguments that the shelf life of the boots is only three years. Thus this plea of the Claimant unsupported by pleading and evidence cannot be accepted”.

26. The fact remains that the above findings have not been challenged by the Petitioner in this Court. The unchallenged conclusion of the majority is that the Respondent's claim was "unsupported by pleadings and evidence". The question of permitting the Respondent to refer to the evidence, if any, on record to persuade this Court to overturn the above findings of the AT, particularly when it has not chosen to challenge those findings, simply does not arise.

27. In light of the above findings of the majority, and its conclusion that "the Claimant has not been able to set out its case insofar as the actual loss suffered by the Claimant is concerned" it is inexplicable how it proceeded to allow 25% of the total amount of \$7,494,480 as claimed by the Respondent. This part of the Award suffers from a patent illegality and is opposed to the fundamental policy of Indian law inasmuch as it is based on no evidence and is not supported by reasons. It is contrary to the statutory requirement under Section 31(3) of the Act which mandates that the conclusions of the AT have to be supported by reasons. In the present case, the reasons given by the majority of the AT far from supporting the above conclusion, contradict it. Consequently, the Court has no hesitation in setting aside the impugned majority Award to the extent that it awards to the Respondent 25% of the total amount of \$7,494,480."

5. It is urged by Mr. Saket Sikri, learned counsel appearing for Zeman that the finding with respect to the loss of profits rendered by the award is justified. Even the consistent trend of judgments of this Court which have followed the Supreme Court ruling in *A.T. Brij Paul Singh & Ors. v. State of Gujarat* (1984) 4 SCC 59 and *MSK Projects India (JV) Ltd. v. State of Rajasthan* (2011) 10 SCC 573.

6. The Union's appeal which was argued by Mr. Anurag Ahluwalia, is that the Single Judge, did not consider the salient fact that the Tribunal overlooked that there was no evidence to support the finding with respect to the quality of the boots and

that there was absence of any expert evidence in this aspect as well.

7. As far as Zeman's appeal is concerned, we notice that the Tribunal in all relevant parts of its findings, held that no proof of injury or the extent of it, to indicate the yardstick which could form the basis of compensation had been led by the claimant. The Single Judge in our opinion quite correctly concluded that the figure of 20% was merely an assumption. It goes without saying that one who claims any relief is under a primary obligation to support it with appropriate evidence. The reliance on *A.T. Brij Paul Singh* (supra) or any other decision, in our opinion, is not apt because those were rendered in the context of breach of construction contracts. The Court rulings largely were based upon the settled principles of construction of such contracts and the nature of the profit, indicated by a long line of authorities and even by experts. In this case, however, there is no such evidence. Those principles cannot be imported uncritically. Moreover, it was within the claimant's claim to support its submission with regard to the extent of injury suffered by placing on record its consistent pattern of profits in similar contracts or the industry practice as it were. Its failure to do so, therefore, cannot result in an arbitrary figure transmitting into a margin of profit. We also notice that the recent judgment in *Kinnari Mullick and Anr. v. Ghanshyam Dass Damani* (2018) 11 SCC 328, set outs extremely limited circumstances whereby the Court can require re-adjudication

and the conditions applicable. Those conditions too do not apply in this case.

8. As far as the Union's appeal is concerned, this Court is of the opinion that, the evidence or the lack of it is a matter of appreciation by the Tribunal, this fact was also noticed by the Single Judge. Having regard to the limited nature of the appellate review available under Section 37, the grievance urged cannot be looked into. Besides, the Union has not proffered acceptable explanation for its delay of 250 days in filing of the appeal.

9. For these reasons, we find no merit in both the appeals, and they are accordingly dismissed.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

JULY 27, 2018/akv