

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

Decided on: 09.07.2018

+ **FAO (OS) 119/2017, C.M. APPL.14663/2017**

TRIVENI ENGINEERING AND INDUSTRIES LTD..... Appellant
Through: Sh. Sanjeev Anand and Sh. Varun Bala,
Advocates.

versus

NAHAR INDUSTRIAL ENTERPRISES Respondent
Through: Sh. Pramod. B. Agarwala and Sh. Aayush
Agarwala, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

%

1. Arguing that the learned Single Judge and the Tribunal fell into error in ignoring the salient and material omissions which qualified for the Award being characterized as patently erroneous and unreasonable, the appellant challenges an order of the learned Single Judge, rejecting its petition under Section 34 of the *Arbitration and Conciliation Act, 1996* [hereafter referred to as “the 1996 Act”].

2. The parties to the dispute had entered into an agreement on 05.08.1993 whereby the appellant was obliged to the respondent (hereafter referred to as “Nahar”) to design, procure, manufacture, supply, transport to the site, supervise erection and commissioning of sugar plant for Nahar at Amloh Tehsil, District Fatehgarh Sahib, Punjab. The consideration was

₹20.90 crores which was later increased to ₹21.24 crores. The agreement contained a condition which, it is not disputed, amounts to a liquidated pre-estimate of damages clause (clause 16.1). It provided the original date of completion of the contractual obligation and the commissioning of the equipment as 30.09.1994. Apparently, it was agreed to be extended and the first boiler was to be commissioned on or before 15.11.1994 and the entire plant on or before 15.12.1994. Undoubtedly, the extended time period too was not adhered to.

3. In these circumstances, Nahar claimed compensation for the delay/breach of contract. Whilst granting extension, Nahar had reserved its rights to claim damages in the event the time period was not adhered to. The disputes were referred to arbitration. The Tribunal rejected the larger part of the Nahar's claim but awarded ₹73.50 lakhs. This became subject matter of challenge under Section 34 of the 1996 Act.

4. Learned Single Judge rejected the appellant's arguments that Nahar had not provided its case fully and that the nature of findings led before the Tribunal could not have led the latter to conclude that it was liable at all given that the material clearly disclosed that in fact, no loss was incurred. Learned Single Judge discussed the case law cited before him, i.e. *Fateh Chand v. Balkishan Dass* AIR 1963 SC 1405, *Maula Bux v. Union of India* 1969 (2) SCC 554 and *Kailash Nath Associates v. DDA and Anr.* 1969 (2) SCC 554. Learned Single Judge also noticed *Shree Hanuman Cotton Mills v. Tata Air Craft Limited* 1969 (3) SCC 522 which was considered and relied upon in *Associate Builders v. Delhi Development Authority* 2014 (4) ARBLR 307 (sic)/*Kailash Nath Associates v. DDA and Anr.* 1969 (2) SCC 554. The relevant part of the Court's conclusions in the impugned order are

as follows:

“16. Before the learned Arbitrator, Triveni submitted calculations to justify the claims for losses in order to demonstrate that it was reasonable. The figures quoted by the learned Arbitrator in the impugned Award were taken from the annual report containing audited accounts. The learned Arbitrator examined the figures for the raw material consumed, the quantity of sugarcane crushed, the average price of sugarcane for the said crushing season etc. Therefore, it cannot be doubted that the learned Arbitrator had sufficient material on record to examine if the claim for Rs. 105 lakh towards LD was justified. Further, the learned Arbitrator did not stop at that but actually granted remission to Triveni for commissioning one boiler on 27th November, 1994. It, thus, got the benefit of Rs. 31.50 lakh. What the Arbitrator has, in fact, done is to enforce Clause 16.1 read with para 1 of the minutes of the meeting of 26th October, 1994.

17. The Court is, therefore, satisfied that the impugned Award in respect of the claim for LD by Nahar is fully consistent with the legal position explained by the Supreme Court in Kailash Nath Associates v. Delhi Development Authority (supra).

18. As rightly pointed out by Mr. Agarwala, the Court in exercise of its jurisdiction under Section 34 of the Act is not sitting in appeal over the impugned Award. Unless there is something so perverse or shocking to the judicial conscience or a finding which could be opposed to the fundamental policy of Indian law, the Court would not interfere with the impugned Award. That high threshold cannot be said to have been met in the present case. The impugned Award discusses in detail the evidence on record in light of the legal position and has concluded that Nahar would be entitled to a sum of Rs. 73.5 lakh towards LD along with interest at 10% per annum from the date of filing of the claim. There is nothing in the impugned Award which can remotely be said to attract any of the grounds under Section 34 of the Act.

5. Sh. Sanjeev Anand, learned counsel points out that Nahar's claims premised upon notional losses suffered by it and that in this regard besides other findings it had contended that it had to procure sugarcane at ₹90/- per quintal. As against this, it was urged that the government rate was ₹72/- per quintal. It is submitted that the Tribunal misdirected itself in considering other extraneous findings such as subsequent arrears, to decide injury, and if so, to what extent damages could be paid to Nahar. Learned counsel submits that the overlooking of material findings and holding that the liquidated damages clause operated *per se*, was patently illegal, in the circumstances.

6. The materials which the appellant relies upon, in the form of bills/invoices was that whereas the per quintal price of sugarcane is shown to be ₹72/-, in fact, what was paid was much more - in the range of ₹84/-. Assessing from this, as to what can be the other input costs are not matters before the Court. *Associated Builders (supra)* and *Kailash Nath (supra)* are also authorities for the proposition that the primary adjudicatory power under the 1996 Act is the Tribunal which is best suited to apprise the evidence. The matrix of patent illegality or manifest unreasonableness, as it were, would operate if the Tribunal's decisions are wholly unsupported by law in the sense that it travels beyond the acceptable limits of reasonable interpretation of the parties' rights and liabilities. This would not include interpretation of contracts *per se* as whether it is within the exclusive domain of the arbitrator. Likewise, as to the kind of unreasonableness which should warrant action under Section 34 goes, the Courts have explained that the approach or conclusions should be such that no reasonable person, placed in like circumstances, could have arrived at similar conclusions. In the present case, the respondent/claimant, Nahar did lead evidence to substantiate its claims

for loss on account of the extended performance of the contract which is not a cause for interference. As to the rest of the contention regarding whether the damages were adequate, merely amounts to appreciating or reappreciating the quality of evidence. Given these limitations, and the further fact that this Court is called upon to reappreciate the materials and second or third guess, as it were, this Court is of the opinion that there is no reason to interfere with the findings of the learned Single Judge. On the other hand, the Tribunal proceeded with caution and limited the liability of the appellant, by taking into account the fact that one boiler was commissioned after the period of one week or so, and the plant could function - the amount awarded was brought down from the maximum permissible amount of ₹1.05 crores to ₹75 lakhs. For the above reasons, the appeal is without merit. It is accordingly dismissed.



S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

JULY 09, 2018