

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

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Date of decision: 29th October, 2018

+ FAO(OS) 160/2018 & CM. Nos. 45167/2018 and 45168/2017

HINDUSTAN STEEL WORKS CONSTRUCTION..... Appellant

Through: Ms.Shipra Ghose, Adv.

versus

UNION OF INDIA

..... Respondent

Through: Mr.Jagjit Singh, Sr. Standing Counsel
with Mr.Vipin Chaudhary, Adv.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

CM No. 45168/2018 (for exemption)

Exemption allowed, subject to all just exceptions.

Application stands disposed of.

FAO(OS) 160/2018

1. The present appeal has been filed by the appellant under Section 35(1)(c) of the Arbitration and Conciliation Act, 1996 read with Section 10 of the Delhi High Court Rules.

2. Suffice to state, the provisions have been wrongly quoted. It appears to be typographical errors which has been overlooked by the Registry also. The concerned Registrar must look into the same and ensure that such mistakes do not occur in future. We proceed on the premise that this appeal has been filed under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 ('Act of 1996' in short).

3. The challenge in this appeal is to the order dated September 4, 2018 passed by the learned Single Judge in a petition filed by the appellant under Section 34 of the Act of 1996, challenging the award of the Arbitral Tribunal. Vide the award, the Arbitral Tribunal has awarded an amount of Rs. 32,999/- to the appellant against its claims; whereas, the counter claims filed by the respondent herein were allowed to the extent of Rs.1,79,40,546/-. It is contended by the learned counsel for the appellant that the learned Single Judge has erred in rejecting the submission made by her that the award is a non-speaking one. That apart, it is her submission that the learned Single Judge has erred in not appreciating the fact that it was the consistent case of the appellant that it has been writing to the respondent that the delay in execution

of the work was due to the negligence and inaction of the respondent. Learned counsel for the appellant, in support of her submission, has drawn our attention to a letter dated January 4, 2005.

4. Noting the two submissions made by the counsel for the appellant, insofar as the first submission is concerned, the learned Single Judge has relied upon a judgment of the Supreme Court in the case of **Anand Brothers Vs. Union of India, (2014) 9 SCC 212**, wherein, in para 14, the Supreme Court has held as under:

“14. It is trite that a finding can be both; a finding of fact or a finding of law. It may even be a finding on a mixed question of law and fact. In the case of a finding on a legal issue the Arbitrator may on facts that are proved or admitted explore his options and lay bare the process by which he arrives at any such finding. It is only when the conclusion is supported by reasons on which it is based that one can logically describe the process as tantamount to recording a finding. It is immaterial whether the reasons given in support of the conclusion are sound or erroneous. That is because a conclusion supported by reasons would constitute a “finding” no matter the conclusion or the reasons in support of the same may themselves be erroneous on facts or in law. It may then be

an erroneous finding but it would nonetheless be a finding. What is important is that a finding presupposes application of mind. Application of mind is best demonstrated by disclosure of the mind; mind in turn is best disclosed by recording reasons. That is the soul of every adjudicatory process which affects the rights of the parties. This is true also in the case of a finding of fact where too the process of reasoning must be disclosed in order that it is accepted as a finding in the sense the expression is used in Clause 70”.

5. From the above judgment of the Supreme Court, it is clear that an award must show an application of mind. In the case in hand, the grant of amount of Rs. 1,79,40,546/- is clear from the counter-claim submitted by the respondent inasmuch as, it is the case of the respondent that after the termination of the contract with the appellant, the Railways had to engage one M/s. Ashoka Construction Company for the same work at the cost of Rs. 5,55,4,661.73/- which was higher than the cost in which the appellant, was to execute the work. The calculation with regard to the said amount was on the record of the Tribunal which was also communicated to the appellant even prior to the arbitration being invoked. The Arbitral Tribunal finding in the Award as noted by the learned Single Judge is as under:

“Contract for the work was awarded to the Claimants in August, 2004 at a cost of Rs.6.82 Crores with stipulated completion period of 20 months. Despite many warning letters by the Respondents, the Claimants progress of work was very slow. Even after 7 days notice was issued, the Claimants never made adequate progress as compared to the programme submitted by them. The Claimants failed persistently in bringing about any significant improvement in progress. For most of the period, the level of resources deployed by the Claimants was much below the required level. Under the circumstances the work was rescinded in terms of Clause-62 of General Conditions of Contract (GCC) – 1999 in July, 2006 by the Respondents and Risk & Cost Tender was invited. The Risk & Cost Contract was awarded to another firm M/s Ashoka Construction Co. Obra. The amount is payable by the Claimants towards the cost of liquidated damages as per Clause 62 of GCC-1999,

During the Arbitration proceedings, the Claimants could not substantiate their contention that the action taken by the Respondents (Railways), in rescinding the contract & the Respondent’s Claim for liquidated damages, was irregular. In view of above, the claim of the Respondents is justified.”

6. The learned Single Judge also in para 12 of the impugned order stated as under:-

“12. A perusal of the award under challenge shows that the Tribunal has succinctly justified the grant of the counter claim in favour of the Respondent. The Tribunal has taken note of the various warning letters sent by the Respondent. The Tribunal has also considered the seven days’ notice that was issued under clause 26 and the fact that the Petitioner failed to bring about any improvement on the ground even thereafter. The Tribunal has also considered that the rescission was as per clause 62 of the General Conditions of Contract, which permitted the Respondent to re-tender the work at the risk and cost of the Petitioner. The Tribunal has also noticed the award of the tender in favour of the third party. The final finding of the Tribunal, that the Petitioner could not justify that the rescission was unlawful, shows that the Tribunal has applied its mind to all the relevant facts and circumstances”.

7. Further, the learned Single Judge has in the impugned order accepted the finding of the Arbitral Tribunal by relying upon the judgment of the Supreme Court in **Anand Brothers vs. UOI (supra)** by stating as under:

“15. The contract was rescinded, and as per the termination letter dated 7th July, 2006, the work under the contract was carried out at the risk and cost of the Petitioner. The new tender, dated 7th November, 2006 and the notice of liquidated damages dated 11th January, 2007 was also placed on record by the Respondent. The facts narrated above go to show that the findings of the Arbitrator are absolutely justified. It is not necessary in every case that the reasons have to be verbose.....”

8. So, the learned Single Judge has justified the award of Rs.1,79,40,546/- with which we agree. Insofar as the second submission of the learned counsel for the appellant is concerned, we are unable to agree with the submission so made by the counsel for the appellant inasmuch as in a subsequent letter dated July 12, 2006, the appellant itself has accepted the delay in execution of the work.

The letter dated July 12, 2006 reads in brief, as under:-

“We had indicated during various meetings & correspondences that we were facing difficulty in execution of earthwork due to Royalty problem & had requested the department to help us in this regard but we regret that no proper assistance was extended to us resulting in considerable hindrances on this account”.

9. The present proceedings being under Section 37 of the Act of 1996 and the scope of jurisdiction of this Court in considering the appeal under Section 37 being very limited, as has been held by the Co-ordinate Bench of this Court in ***MTNL vs. Finolex Cables Limited. MANU/DE/2818/2017***, wherein the Bench after examining the law laid down in various judgments of the Supreme Court delineated the contours of the jurisdiction of this Court under Section 34 and 37 of the Act as under:

40. The extent of jurisdiction of the court while dealing with the challenge to an arbitral award, by now, stands authoritatively examined by a plethora of pronouncements of the Supreme Court, which travel from the judgment reported at 1994 Supp (1) SCC 644, [Renusagar Power Co. Ltd. v. General Electric Co.](#) to (2015) 3 SCC 49, [Associated Builders v. DDA](#). On an analysis of all the said decisions, this court has, in a recent judgment reported at [MANU/DE/2699/2017](#), [NHAI v. Hindustan Construction Co. Ltd.](#), delineated the following propositions :

"36. [Associated Builders v. DDA](#), MANU/SC/1076/2014 : (2015) 3 SCC 49, may justifiably be christened as the high watermark in the law relating to [Section 34](#) of the Act, and any attempt to paraphrase the decision is

fraught with the risk of mutilation. The decision is, almost entirely, definitively authoritative, and brooks no ambiguity or anomaly. Nonetheless, in view of the proliferation of litigation, challenging arbitral awards, in recent times, we have, in a recent decision, dated 10th August 2017, in Shiam Cooperative Group v Kamal Construction Co. Ltd., extracted, in extenso, the relevant paragraphs from the said decision, and respectfully culled, therefrom, the following clear principles:

(i) The four reasons motivating the legislation of the Act, in 1996, were

(a) to provide for a fair and efficient arbitral procedure,

(b) to provide for the passing of reasoned awards,

(c) to ensure that the arbitrator does not transgress his jurisdiction, and

(d) to minimize supervision, by courts, in the arbitral process.

(ii) The merits of the award are required to be examined only in certain specified circumstances, for examining whether the award is in conflict with the public policy of India.

(iii) An award would be regarded as conflicting with the public policy of India if

*(a) it is contrary to the fundamental policy of Indian law,
or*

- (b) it is contrary to the interests of India,*
- (c) it is contrary to justice or morality,*
- (d) it is patently illegal, or*
- (e) it is so perverse, irrational, unfair or unreasonable that it shocks the conscience of the court.*
- (iv) An award would be liable to be regarded as contrary to the fundamental policy of Indian law, for example, if*
 - (a) it disregards orders passed by superior courts, or the binding effect thereof, or*
 - (b) it is patently violative of statutory provisions, or*
 - (c) it is not in public interest, or*
 - (d) the arbitrator has not adopted a "judicial approach", i.e. has not acted a fair, reasonable and objective approach, or has acted arbitrarily, capriciously or whimsically, or*
 - (e) the arbitrator has failed to draw an inference which, on the face of the facts, ought to have been drawn, or*
 - (f) the arbitrator has drawn an inference, from the facts, which, on the face of it, is unreasonable, or*
 - (g) the principles of natural justice have been violated.*
- (v) The "patent illegality" had to go to the root of the matter. Trivial illegalities were inconsequential.*
- (vi) Additionally, an award could be set aside if*
 - (a) either party was under some incapacity, or*

(b) the arbitration agreement is invalid under the law, or
(c) the applicant was not given proper notice of appointment of the arbitrator, or of the arbitral proceedings, or was otherwise unable to present his case, or

(d) the award deals with a dispute not submitted to arbitration, or decides issues outside the scope of the dispute submitted to arbitration, or

(e) the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or

(f) the arbitral procedure was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or

(g) the award contravenes the Act, or

(h) the award is contrary to the contract between the parties.

(vii) "Perversity", as a ground for setting aside an arbitral award, has to be examined on the touchstone of the Wednesbury principle of reasonableness. It would include a case in which

(a) the findings, in the award, are based on no evidence, or

(b) the Arbitral Tribunal takes into account something irrelevant to the decision arrived at, or

(c) the Arbitral Tribunal ignores vital evidence in arriving at its decision.

(viii) At the same time,

(a) a decision which is founded on some evidence, which could be relied upon, howsoever compendious, cannot be treated as "perverse",

(b) if the view adopted by the arbitrator is a possible view, it has to pass muster,

(c) neither quantity, nor quality, of evidence is open to re-assessment in judicial review over the award.

(ix) "Morality" would imply enforceability, of the agreement, given the prevailing mores of the day. "Immorality", however, can constitute a ground for interfering with an arbitral award only if it shocks the judicial conscience.

(x) For examining the above aspects, the pleadings of the parties and materials brought on record would be relevant.

(x) The court cannot sit in appeal over an arbitration award.

Errors of fact cannot be corrected under [Section 34](#). The arbitrator is the last word on facts."

41. It is apparent, therefore, that, while interference by court, with arbitral awards, is limited and circumscribed, an award which is patently illegal, on account of it being

injudicious, contrary to the law settled by the Supreme Court, or vitiated by an apparently untenable interpretation of the terms of the contract, requires to be eviscerated. In view thereof, the decision of the ld. Single Judge that reasoning of the arbitral award in this regard was based on no material and was contrary to the contract, cannot be said to be deserving of any interference at our hands under [Section 37](#) of the Act. In a pronouncement reported at MANU/DE/0459/2015, MTNL v. Fujitsu India Pvt. Ltd. (FAO(OS) No.63/2015), the Division Bench of this court has held that "an appeal under [Section 37](#) is like a second appeal, the first appeal being to the court by way of objections under [Section 34](#)". Being in the nature of a second appeal, this court would be hesitant to interfere, with the decision of the learned Single Judge, unless it is shown to be palpably erroneous on facts or in law, or manifestly perverse.

10. In view of our above discussion, we do not find merit in the appeal. The same is dismissed.

CM. No. 45167/2018 (for stay)

In view of the order passed in the appeal, the present application is dismissed as infructuous.

V. KAMESWAR RAO, J

CHIEF JUSTICE

OCTOBER 29, 2018/akb