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

% *Date of Judgment: 18th January, 2018*

+ **FAO(OS) (COMM) 4/2018**

UNION OF INDIA

..... Appellant

Through: Mr.N. Prashant Kumar Nair, Adv.

versus

BS SANGWAN

..... Respondent

Through: Mr.S.W. Haider, Advocate

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J. (ORAL)

1. This is an appeal filed under Section 37 (1) (C) of Arbitration and conciliation Act, 1996 read with Section 13(1) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 for setting aside the judgment dated 05.09.2017 as well as the impugned arbitration award dated 21.01.2017.
2. The necessary facts as noticed by the learned Single Judge are as under :-

“2. The respondent was awarded P.Way linking and other allied works between Rewari to Rohtak section on 29.01.2009 for Rs.5,40,11,614/-. Fifteen months” time was allowed for completion of work which was to expire on 28.4.2010. Various extensions were given to the respondent. The time for completion of the work was extended upto 31 months and the total period for completion of the work became 46 months. The work

was completed on 05.12.2012. The essential case of the respondent is that under compelling circumstances he was told by the respondent to deploy staff for watch and ward of railway property which was not covered in the rates provided in the agreement. It was urged that the area between Rohtak to Rewari is notorious and theft prone area. Various instances of theft and robbery have taken place and loss has been caused for which FIR has been registered. It was the case of the respondent that in compliance of instructions of the Chief Engineer an NS rate of Rs.70,000/- per block section (approximately 8 km in length) per month for watch and ward was prepared by the Deputy Chief Engineer and it was sent for approval to the competent authority. On receipt of approval, the respondent started the work as instructed by the petitioner. However, the petitioner also invited tenders for the watch and ward of its property but the work was given to M/s. Deepak Enterprises on 21.01.2012. The respondent was directed to hand over inventories of the said work to the said agency. The inventories were handed over to M/s. Deepak Enterprises on 31.3.2012.”

3. Post handing over the inventories, the respondent raised the claim with respect to keeping watch and ward of railway property round the clock for a period between 30.04.2010 to 31.03.2012 during which time, as per the case of the respondent, the respondent had deployed watch and ward for the area in question. Since the claim of the respondent was not settled, the respondent invoked the arbitration clause and since the appellant herein failed to appoint an arbitrator, a petition under section 11 of the Arbitration and Conciliation Act, 1996 was filed. A retired District Judge was appointed as a sole arbitrator, who rendered his Award on 21.01.2017. Objections to the Award stand dismissed by a

learned Single Judge of this Court, which has led to the filing of the present appeal.

4. Learned counsel for appellant submits that the learned Single Judge has failed to take into account that in the agreement entered into between the parties, there was no provision as an extra item for watch and ward. It is the submission of learned counsel for the appellant that it was the sole duty and responsibility of the respondent, who has been awarded the work to deploy watch and ward and no separate item was either provided for or could have been claimed. It has been strenuously urged before this Court that the learned Arbitrator as also the learned Single Judge has failed to take into account that no amount can be paid to the respondent in the absence of the sanction which was not accorded. Counsel contends that undue importance has been given to communications i.e. Ex.CW1/15 being letter dated 01.10.2010 written to Deputy Chief Engineer, CW1/16 being letter dated 04.10.2010, Ex.CW1/18 being letter dated 09.11.2010, CW1/19 being letter dated 23.12.2010 and Ex.CW1/20 being copy of office note for necessary administrative approval for the N.S. item. Learned counsel for the appellant also contends that the learned Single Judge as also the learned Arbitrator completely loss tract of the fact that in fact these were internal office notings and communications, on which no reliance could have been placed. Counsel submits that the respondent had only produced documents selectively and respondent has relied on PP1 but suppressed the main document PP6, thus, the learned Arbitrator and the learned Single Judge have been misled.

5. Mr. Haider, learned counsel for respondent, who enters appearance on an advance copy, submits that there is no infirmity in the Award as also the judgment passed by the learned Single Judge which would require interference in the present appeal. It is contended that neither the award nor the judgment of learned Single Judge is perverse or irrational. Counsel further submits that the award is based on evidence and PP1, relied upon by the respondent. He submits that all the PPs were filed by the respondent and in case the appellant wanted to rely on some of its own documents, the appellant was not prevented from doing so. Counsel further submits that based on the documents, the learned Single Judge dismissed the objections filed by the appellant herein. Learned counsel also relies upon various judgments in support of his contention that while hearing the objection to the award, the Court would not sit as a Court of appeal and even errors of fact cannot be corrected. He further submits that it is the settled law that the arbitrator is the ultimate master of the quality and quantity of the evidence at the time when he would deliver the award. Learned counsel for the respondent submits that the learned Single Judge has referred to each and every relevant document and has even extracted copy of PP1, which was duly signed and, as per which, the financial sanction was to be accorded.
6. We have heard learned counsel for the parties and considered their rival submissions and have also given a thoughtful consideration to the matter. It is no longer *res integra* that the scope for interference in an appeal under section 37(1) (C) of the Arbitration and Conciliation Act, 1996 is narrow. In order to succeed, the appellant must establish that

the finding of the Arbitrator is based on no evidence or the Arbitrator has taken into account material which is irrelevant or has ignored vital evidence. The only argument which has been raised before us is that there was no sanction and that deployment of watch and ward was not part of the original agreement and thus, the respondent-claimant could not raise such a claim. The communications i.e. Ex.CW1/15 letter dated 01.10.2010, Ex.CW1/16 letter dated 04.10.2010, Ex.CW1/18 letter dated 09.11.2010, Ex.CW1/19 letter dated 23.12.2010 and Ex.CW1/20 copy of office note for necessary administrative approval are the documents relied upon by arbitrator and noticed by learned Single Judge to reach a conclusion that respondent was called upon orally to deploy watch and ward round the clock as there were various incidents of theft. The reading of these documents would show that the section between Rewari to Rohtak was theft prone. The documents placed on record also show that material was removed and in fact two rails were found cut in the middle by hacksaw blade which is apparent by reading of letter dated 04.10.2010. The letters would also show that the department did not have sufficient manpower and staff for deploying as watch and ward round the clock to prevent theft. We also find that besides PP1, copies of other PPs, were also placed on record and in fact in PP3, various queries have been raised including as to whether the contractor was responsible for maintenance as per past precedents. We have referred to this PP only to satisfy ourselves that this was not a decision taken without any application of mind but was a decision after full satisfaction and based on replies received with respect to queries raised, we may note that in reply to query 3 and 4, it

has been stated “similar item of watch and ward have already been provided in one of the unit of construction organization”, in query 5 it has been stated “since the risk in the shape of cost of P.Way material is huge may be few crores, therefore calling open tender for security of P.Way material may not be economical as compared to proposed item rate”. The submission made by learned counsel for appellant that final sanction was not granted, is misplaced. We deem it appropriate to reproduce para 17 of the judgment of learned Single Judge wherein he has taken note of the fact that railway often gives oral instructions to contractors to carry out works and formal sanction comes at a much later stage. An illustration has been given where work of this type of contract was completed in the year 2012 while sanction was granted in the year 2014. Para 17 of judgment passed by learned Single Judge reads as under :-

17. The respondent has filed the claim for watch and ward staff deployed stating that it was on the directions of the petitioner and has relied on various evidence including the above documents. During the course of arguments before this court, the court had pointed out to learned counsel for the respondent that it would not be possible for the respondent to claim payment for the work done in the absence of formal contract with petitioner, which is a Government Organization. The learned counsel for the respondent had pointed out that it is the norm in Railways that number of additional works are done by the contractors on oral instructions of the officers of the petitioner and the formal sanctions comes at a much later stage. It was pointed out that even in the present contract number of additional items were done on oral instructions of the officers of the petitioner. He submits that the work was completed on 05.12.2012. However, the sanction of all these additional items done

on oral instructions was given in a note dated 27.08.2014.
The said note reads as follows:

“Notes:

1. Total items 70 (Seventy) only i.e. 70 (Seventy) only 61 (Sixty one) items under Group „B“ non-schedule items & 09(Nine) only under Group ASOR – 1996 items. 2. All items and conditions of agreement No.74- W/6/159/WA/TKJ dated 01.07.2009 will remain the same.
3. The amount of agreement will increase/decrease from Rs.6,84,80,133.08 after availing 2.71% unconditional rebate on all items to Rs.7,16,85,828.52 after 2.71% rebate.
4. No claim decrease/increase quantities.

Signature of the contractor/s
M/s B.S.Sangwan
4, G.F. Harry Plaza
Near HDFC Bank,
Subhash Chowk, Sonapat
(Haryana)

(Rakesh Yadav)
Dy.Chief Engineer/Const.
Tilak Bridge, New Delhi
for and on behalf of the
President of India

Executive Engineer/
Const, Northern
Railway, Rohtak.

Rates & quantities
Technically checked.

(SSE/C/Estt.TKJ)

Rates Checked.

WA/C/TKJ OS/W/C/TKJ”

7. We may also note that in this case it is the stand of the appellant that watch and ward was to be provided by the contractor respondent herein. We find no force in the submission so made for the reason that in case the watch and ward was the responsibility of the respondent, there would be no reason by the appellant to appoint M/s Deepak

Enterprises on 21.01.2012 for the same purpose and call upon the respondent to handover the inventories to the newly appointed contractor. We say at the cost of the repetition that in case according to the appellant, watch and ward was the responsibility of the contractor, sure enough, they would not have appointed Deepak Enterprises on 21.01.2012. Reading the PPs and communications which have been relied upon by the respondent, we do not find any objection was raised before the learned Single Judge that the said PPs could not be relied upon or that the said documents were either procured or not genuine, thus, the objections sought to be urged before us today is misplaced.

8. It is no longer *res integra* that the scope of judicial interference in an application under Section 34 of the Arbitration and Conciliation Act, 1996 is limited in nature. It has further been held that the scope of interference while deciding an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 is even more restrictive in nature. The Supreme Court of India has consistently held that an arbitration award should not be lightly interfered with. (*See Renusagar Power Co. Ltd. v. General Electric*, (1994) Supp. 1 SCC; *ONGC v. Saw Pipes*, (2003) 5 SCC 705, *Hindustan Zinc Ltd. v. Friends Coal Carbonisation*, (2006) 4 SCC 445; and *Associate Builders v. DDA*, (2015 3 SCC 49).
9. While deciding an appeal it must be kept in mind that the Arbitrator/Tribunal is the final arbiter on facts as well as law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Sections 34 or 37 of the Act. In the case of **P.C.L**

Suncon (JV) v N.H.A.I., 2015 SCC Online Del 13192 , in para 24, it was held that:

“24. As a postscript, this Court believes that it is imperative to sound a word of caution. Notwithstanding the considerable jurisprudence advising the Courts to remain circumspect in denying the enforcement of arbitral awards, interference with the awards challenged in the petitions before them has become a matter of routine, imperceptibly but surely erasing the distinction between arbitral tribunals and courts. Section 34 jurisdiction calls for judicial restraint and an awareness that the process is removed from appellate review. Arbitration as a form of alternate dispute resolution, running parallel to the judicial system, attempts to avoid the prolix and lengthy process of the courts and presupposes parties consciously agreeing to submit a potential dispute to arbitration with the object of actively avoiding a confrontation in the precincts of the judicial system. If a court is allowed to review the decision of the arbitral tribunal on the law or on the merits, the speed and, above all, the efficacy of the arbitral process is lost.”

10. The scope of judicial scrutiny and interference by an appellate court under Section 37 of the Act is even more restricted in comparison to deciding objections to the Award under Section 34 of the Act. In the case of ***State Trading Corporation of India Ltd. v. Toepfer International Asia Pte. Ltd.***, reported at 2014(144) DRJ 220(DB), in para 16 it has been held as under:

“16. The senior counsel for the respondent has in this regard rightly argued that the scope of appeal under Section 37 is even more restricted. It has been so held by the Division Benches of this Court in Thyssen

Krupp Werkstoffe Vs. Steel Authority of India (2011) 123 DRJ 724 (DB) and Shree Vinayaka Cement Clearing Agency Vs. Cement Corporation of India (2007) 142 DLT 385. It is also the contention of the senior counsel for the respondent that the argument made by the appellant before the learned Single Judge and being made before this Court, that the particular clause in the contract is a contract of indemnification, was not even raised before the Arbitral Tribunal and did not form the ground in the OMP filed under Section 34 of the Act and was raised for the first time in the arguments.”

11. In the case of **Steel Authority of India v. Gupta Brothers Steel Tubes Limited**, (2009) 10 SCC 63, the Supreme Court has laid down that an error relating to interpretations of the contract by an Arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award. The Supreme Court has further laid down that the Arbitrator having been made the final arbiter of resolution of disputes between the parties, the award is not open to challenge on the ground that the Arbitrator has reached a wrong conclusion. The courts do not interfere with the conclusion of the Arbitrator even with regard to the construction of contract, if it is a plausible view of the matter.
12. The Apex Court in **J.G. Engineers (P) Ltd. v. Union of India**, reported at (2011) 5 SCC 758, demarcated the boundary while explaining the ambit of section 34(2) of the Act. The Court in the aforesaid judgment relied upon the pronouncement of **ONGC Ltd. Vs. Saw Pipes**, in paragraph 19, held as under:-

“27. Interpreting the said provisions, this Court in ONGC Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705] held that a court can set aside an award Under Section 34(2)(b)(ii) of the Act, as being in conflict with the public policy of India, if it is (a) contrary to the fundamental policy of Indian law; or (b) contrary to the interests of India; or (c) contrary to justice or morality; or (d) patently illegal. This Court explained that to hold an award to be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. It is also observed that an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court, as then it would be opposed to public policy.”

13. In **Associate Builders vs. Delhi Development Authority**, reported at (2015) 3 SCC 49, the Supreme Court while further explaining the scope of judicial intervention under the appeal in the Act 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 score1 . 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 and Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. (2012) 1 SCC 594, this Court held:

21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating 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. In view of the discussion above, we find no infirmity, illegality or impropriety in the award and order of the learned Single Judge, which would require interference in the present appeal.
15. The appeal is accordingly dismissed.

C.M. APPL 1299/2018 (stay)

16. The application is dismissed in view of the order passed in the appeal.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

JANUARY 18, 2018

ck/pst/