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

+ **O.M.P. (COMM) 5/2018**

RAKESH KUMAR & CO.

..... Petitioner

Through Mr S.W. Haider, Advocate.
versus

UNION OF INDIA

..... Respondent

Through Mr N. Parashant Kumar Nair,
Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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03.05.2018

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning an arbitral award dated 16.09.2017 (hereafter 'impugned award') delivered by the Arbitral Tribunal comprising of a Sole Arbitrator (hereafter 'the Arbitral Tribunal').

2. The impugned award was rendered in the context of disputes that had arisen between the parties in relation to a Contract Agreement dated 29.03.2008 (hereafter 'the Agreement').

3. Mr S.W. Haider, the learned counsel appearing for the petitioner has restricted the challenge to the impugned award only with respect to two issues. The first, relates to the rejection of the

petitioner's contention that it had entered into a Supplementary Agreement accepting the full and final settlement under coercion and pressure; and, the second, relates to imposition of costs.

Factual Background

4. The respondent (Northern Railways) had invited tenders for construction of PSC Slabs and Girders and other allied works relating to various bridges. The tenders submitted pursuant to the said invitation were opened on 28.07.2006. The petitioner's bid was the lowest and was accepted after negotiations. The same was communicated by the respondent by a letter dated 27.10.2006 (Letter of Acceptance). Thereafter, the parties entered into a formal agreement on 29.03.2008 ('the Agreement').

5. The works were to be completed within a period of seven months from the Letter of Acceptance (that is, by 26.05.2007).

6. The works commenced on 12.09.2007 and were finally completed on 14.04.2010. The respondent duly extended the time for completion of the contract from time to time – in all, eight extensions were granted – either without levy of penalty or with levy of a token penalty.

7. On 11.11.2010, the petitioner executed a Supplementary Agreement, whereby the petitioner accepted the amounts specified therein "*in full and final satisfaction of all its dues and claims*". Thereafter, the petitioner invoked the arbitration clause by a letter

dated 16.11.2010.

8. The petitioner filed an application under Section 11 of the Act before this Court (ARB. P. 172/2012 captioned ***Rakesh Kumar & Co. v. Union of India***) which was withdrawn on 16.07.2013. Thereafter, the petitioner addressed a letter dated 02.09.2013 once again invoking the arbitration clause and seeking appointment of an arbitrator. On 21.03.2014, the respondent declined to refer the claims to the arbitrator in view of the Supplementary Agreement dated 11.11.2010 entered into between the parties.

9. Thereafter, the petitioner once again filed an application under Section 11 of the Act (ARB. P. 330/2014 captioned ***Rakesh Kumar & Co. v. Union of India***) which was disposed of by an order dated 09.02.2015 appointing the Sole Arbitrator.

10. Before the Arbitral Tribunal, the petitioner filed a statement of claims raising eleven claims : Claim No.1 for a sum of ₹12,23,531/- as the balance payment due under the Final Bill; Claim No. 2 for a sum of ₹63,16,157/- as escalation computed according to the Railway PVC Clause 2008; Claim No.3 for a sum of ₹14,54,250/- for 20774 cement bags for providing admixture which was not included in the Schedule of rates; Claim No.4 for a sum of ₹6,77,919/- for HTS cables and for Epoxy for sealing; Claim No.5 for a sum of ₹15,26,180/- for difference on account of sales tax; Claim No.6 for a sum of ₹2,07,770/- for Labour cess imposed after the award of contract; Claim No.7 for a sum of ₹3,50,000/- for refund of Token Penalty;

Claim No. 8 for a sum of ₹48,32,000/- as expenditure incurred for lifting and transporting the PSC Girders from the costing yard to the bridge sites; Claim No. 9 for a sum of ₹68,00,000/- for deployment of machinery for executing works at the rate of ₹2,00,000/- per month for a period of 34 months; Claim No. 10 for a sum of ₹17,00,000/- for salary paid to staff for 34 months restricted to ₹50,000/- per month; and Claim no.11 for interest on the claimed amount at the rate of 18% per annum and costs.

11. The respondent contested the aforesaid claims on several grounds. First, it submitted that the claims were untenable, as the Agreement was discharged by accord and satisfaction with the parties entering into the Supplementary Agreement. Second, the respondent claimed that claim Nos. 1 to 6 and claim Nos. 8 to 11 were Excepted Matters in terms of the Special Tender Conditions (STC) and were not arbitrable. And third, the respondent also contested the claims on merits.

12. The Arbitral Tribunal accepted the respondent's contention that claim Nos. 1 to 6 and 8 to 10 were Excepted Matters. In regard to claim No. 7, the same was rejected on merits. The Arbitral Tribunal also rejected the petitioner's contention that the Supplementary Agreement was entered into under coercion or undue influence. The Arbitral Tribunal concluded that the petitioner was guilty of suppression of material facts and had also falsely claimed that the work of sub structure was being executed by a different contractor. Finally, the Arbitral Tribunal not only rejected the claims made by the

petitioner but also awarded costs of ₹5 lakhs in favour of the respondent.

Submissions

13. Mr S.W. Haider, learned counsel appearing for the petitioner contended that the Arbitral Tribunal had grossly erred in rejecting the petitioner's contention that the Supplementary Agreement was executed under coercion and was not with free consent. He pointed out that the Supplementary Agreement was signed by the Executive Engineer on 09.11.2010 while the voucher, which was referred to in the Supplementary Agreement, was dated 10.01.2010. He further contended that in terms of the Agreement, the petitioner was required to execute the Supplementary Agreement after receiving the amount due, while in the present case it was admitted that the amounts admittedly due to the petitioner were paid after execution of the Supplementary Agreement. He further stated that the Arbitral Tribunal had erred in not accepting that the petitioner had protested against the respondent's insistence to enter into a Supplementary Agreement by a letter dated 31.08.2010.

14. Next he contended that the imposition of cost of ₹5 lakhs was not warranted, as no such counter claim had been made by the respondent.

Reasons and Conclusions

15. At the outset, it is relevant to state that the scope of judicial

review under Section 34 of the Act is restricted and an arbitral award cannot be interfered with unless any of the grounds, as stated in Section 34(2) of the Act, are established. In the present case, the petitioner has sought to place its case within the scope of Section 34(2)(b) of the Act – the impugned award is contrary to the public policy of India. In view of the above, the scope of inquiry is limited to examining whether the impugned award is patently illegal and/or the conclusion drawn by the arbitrator is wholly perverse and falls foul of the *Wednesbury* test; that is, no reasonable person could have arrived at such a conclusion.

16. Keeping the aforesaid principles in mind, the first and foremost issue to be examined is whether the Arbitral Tribunal's decision to reject the petitioner's claim, that the Supplementary Agreement was entered into under coercion, is required to be interfered with.

17. At the outset, this Court had inquired from the learned counsel for the petitioner whether the petitioner had placed any evidence showing any financial distress in support of its contention that the Supplementary Agreement was entered into under coercion. The counsel has fairly responded in the negative. He had, however, submitted that the petitioner had protested against entering into the Supplementary Agreement and had sent a letter dated 01.09.2010, which was prior to signing the Supplementary Agreement. He submitted that the petitioner had also protested immediately thereafter and, therefore, it was evident that the petitioner had not entered into the Supplementary Agreement voluntarily but under coercion and

economic pressure exerted by the respondent.

18. Before proceeding further, it would be relevant to refer to the Supplementary Agreement dated 11.11.2010. The Supplementary Agreement clearly records that the petitioner had received sums aggregating to ₹3,60,19,915.84/- including the final bill bearing voucher dated 10.11.2010. The recitals also record that the petitioner had received a sum of ₹9,35,875/- through a voucher bearing No.60-C/Dy,CE/C/PTK dated 10.11.2010, which was acknowledged by the petitioner. The Supplementary Agreement further expressly recorded that the aforesaid sums had been received in full and final satisfaction of its dues. The relevant extract of the Supplementary Agreement is set out below:-

“Now, it is hereby agreed by and between the parties in the consideration of sums already paid by the party hereto of the first part to the party hereto of the second part against all outstanding dues and claims for, all works done under the aforesaid principal agreement including/excluding the security deposit the party hereto of the second part have no further dues of claims against the party hereto the first part under the aforesaid Principal Agreement. It is further agreed by and between the parties that the party hereto of the second part has accepted the said sums mentioned above in full and final 'satisfaction of all its dues and claims under the said Principal Agreement

it is further agreed and-understood by and' between the parties that in_ consideration of the payment already made, under the agreement shall stand pent finally discharged and rescinded all the terms and

conditions including the arbitration clause. it is further agreed and understood by and between the parties that the arbitration clause contained in the said principal, agreement shall cease to have any effect and/or shall be deemed to be non-existent for all purposes”

19. It is clear from the above that the petitioner had unequivocally acknowledged receiving the balance amount in full and final settlement of its dues.

20. The petitioner had contended that the Supplementary Agreement was executed under pressure and coercion for which protest were made on 31.08.2010 and 16.11.2010 and also on prior occasions. The petitioner had relied heavily on a letter dated 31.08.2010 in support of its contention. The receipt of the aforesaid letter was disputed.

21. The respondent had contested the claim that the letter dated 31.08.2010 was received on 01.09.2010 as claimed by the petitioner. According to the respondent, the said letter was submitted on 07.02.2011 that is much after the petitioner had executed the Supplementary Agreement. The respondent had also produced a copy of the said letter indicating the endorsement of receipt on 07.02.2011. The Arbitral Tribunal examined the same and accepted the respondent's contention that though the letter in question was dated 31.08.2010, it was submitted to the office of the respondent only on 07.02.2011. The relevant extract of the impugned order indicating the reasoning for the aforesaid conclusion is set out below:-

“A look at both these (Exb. CWI/7 and RWI/1) which are respectively office copies of the Claimant and Respondent, would out rightly make any one decide that the date “1/9/10” which is mentioned on Exb. CWI/7 i.e. office copy of the Claimant is not in the same hand as the date "07/02" appearing on the office copy of the Respondent (Exb. RWI/I). There are also office notings at the bottom of Exb. RW 1/1 regarding its movement and also an official stamp of its receipt on "15.02.2011" by its Kashmere Gate Office, Delhi (Administrative Office). Here I may note that it is not understandable as to why this letter was delivered by the Claimant at GM (Engg.) office at Head Quarter, New Delhi, when the project was under the overall supervision and control of Deputy Chief Engineering (Construction) Pathankot Northern Railway. The Claimant has also not explained much less by any cogent and satisfactory reason of the appearance of two different dates with different hand writings on the copies of this document. There is no reason either to doubt or disbelieve that this letter, though dated 31.08.2010 was given by the Claimant in the office of the Respondent only on 07.02.2011, i.e. much after the execution of SA. Regarding the letter dated 16.11.2010 (Exb. RWI/2), the same was delivered in the office of the Respondent on 18.11.2010.”

22. The Arbitral Tribunal also considered various decisions rendered by the Supreme Court including in ***National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd. : 2009 (1) SCC 267*** and ***Chairman and M.D. N.T.P.C. Ltd. v. Reshmi Constructions Builders and Contractors : (2004) 2 SCC 663*** and after considering the relevant facts, the Arbitral Tribunal concluded that “*the respondent has not been able to prove that the SA was executed under pre-protest or*

under any duress or threat and thus was not executed freely and voluntarily.”

23. This Court is unable to accept that the aforesaid said conclusion warrants any interference by this Court. In ***Union of India And Ors. v. Master Construction Company : (2011) 12 SCC 349***, the Supreme Court had explained that the party claiming that no claim certificate had been obtained by fraud, coercion, duress or undue influence must place material before the Chief Justice/his designate to establish the same. The Court had held that “*a bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets up such a plea must prima facie establish the same by placing material before the Chief Justice/his designate.*” In ***New India Assurance Company Ltd. v. Genus Power Infrastructure Ltd. : (2015) 2 SCC 424***, the Supreme Court had reiterated the aforesaid requirement.

24. The aforesaid decisions were rendered in the context of Section 11 of the Act, where the Court was only required to take a *prima facie* view. Thus, any party raising such pleas would *a fortiori* necessarily have to establish the same by cogent evidence and material in order for the Arbitral Tribunal to conclusively accept the same. As noticed above, in the present case, the petitioner has not produced any evidence or material that would establish that the delaying or withholding of admitted dues had resulted in the petitioner being coerced to sign the Supplementary Agreement. There was no material produced by the petitioner to establish that it was in a financial distress and non-receipt of the balance amount would have a material adverse

effect of sufficient magnitude for the petitioner to succumb to such coercive measure.

25. Although, the learned counsel for the petitioner had contended that the petitioner was required to make payments to its vendors, no material is placed before the Arbitral Tribunal to indicate that the petitioner had any pressing creditors that were required to be paid and but for the amount receivable from the respondent, the petitioner would not be able to meet its financial commitments.

26. In view of the above, the contention that the impugned award is patently illegal inasmuch as it rejects the contention that the Supplementary Agreement was signed under undue influence, is not merited.

27. This Court is also unable to accept that any interference with the award of cost is warranted. The petitioner has not prevailed in its claim and, therefore, there is no infirmity in directing the petitioner to bear the costs of the Arbitral Tribunal. The estimate of cost of ₹5 lakhs also cannot be stated to be unreasonable.

28. The Arbitral Tribunal had also held that several claims were not arbitrable and claim regarding levy of token penalty was unmerited; but, the said decisions are not assailed. As noticed at the outset, Mr Haider, learned counsel for the petitioner had restricted his challenge to the impugned award only on two counts and, as discussed above, the same are unmerited.

29. In view of the above, the petition is dismissed. The parties are left to bear their own costs.

VIBHU BAKHRU, J

MAY 03, 2018

pkv

