

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

ARBITRATION PETITION NO.837 OF 2014

Saifuddin Hajee

And Another

... Petitioners

Versus

Hoshang Bamanshah Bengali

... Respondent

.....

Mr. Shailesh Shah, Senior Advocate a/w Mr. Shardul Singh and Mr. Niranjana Jagtap i/b Niranjana Jagtap & Co. for the Petitioners.

Mr. Satish J. Shah a/w Mr. Michael Saldhana and Ms. Gauri Gandhi Kothari i/b Vigil Juris for the Respondent.

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CORAM : S.C. GUPTE, J.

DATE : 18 FEBRUARY 2019

P. C. :

. Heard learned Counsel for the parties.

2 This arbitration petition challenges an award passed by a sole arbitrator in the matter of reference of disputes arising out of an agreement for takeover of a partnership firm as a going concern.

3 The Respondent was carrying on business of ship repairs in partnership in the firm name of Homa Engineering Works ("Homa"). On 31 August 2007, the other two partners of the Respondent retired from the firm and the Petitioners joined as partners. By an agreement, executed on 17 October 2007, the Respondent retired from the firm and the Petitioners took over the business of Homa from the Respondent as a going concern.

At that time, the parties entered into a separate agreement providing for sharing of profits in on-going or under-tender projects of the firm. This agreement *inter alia* discloses that there were about five existing tenders or contracts under process. The first was of fabrication work of INS AGRAY. Four other contracts, namely, for repair/refit of ICGS Sarang, ICGS Vivek, MDL Barge 578 and Sangram, were under negotiation. It was agreed between the parties that in consideration of the Respondent's agreeing to assist the Petitioners to secure the tenders, particulars whereof were set out in Annexure 'A' to the agreement, the Petitioners agreed and undertook to pay to the Respondent remuneration calculated at 17.5 per cent of the contract value of the tenders awarded to the Petitioners. The agreement provided that in the event of award of all tenders valued at Rs.20,92,73,667, an amount of Rs.3,66,22,891 would become payable to the Respondent. The agreement provided for the manner of payment of such remuneration. The agreement had an arbitration clause. Disputes arose between the parties as a result of non-payment of remuneration by the Petitioners under this agreement to the Respondent. The Respondent invoked the arbitration clause. It was the case of the Respondent, who was the claimant before the sole arbitrator, that a contract for repair/refit of ICGS Vivek was awarded by the Coast Guard to the partnership of Homa. The value of this contract being of Rs.4,39,76,832, the Respondent was entitled to receive Rs.76,95,946 at the rate of 17.5 per cent of the contract value. It is not in dispute that this contract did come to the firm and was fully executed by it and the firm received the entire contract value from Coast Guard. In fact, it is a common case of the parties that this contract was virtually awarded as of the date of the agreement of 17 October 2007. The learned arbitrator, by her impugned award, held that the Petitioners

were entitled to remuneration at the rate of 17.5 per cent of the contract value. After giving credit for a sum of Rs.7,60,000 paid by the Petitioners to the Respondent and adding interest to the remuneration payable, the arbitrator awarded a sum of Rs.87,12,128 along with interest to the Respondent.

4 Mr. Shah, learned Senior Counsel appearing for the Petitioners, advances two submissions before the court in his challenge to the impugned award. Firstly, it is submitted that the Respondent had represented through the Petitioners that there were three tenders of Coast Guard as of the date of the agreement of 17 October 2007. It is submitted that it has been brought out in oral evidence of the Respondent through his cross examination that the Respondent knew that two out of these three tenders, i.e. for repair/refit of Vessels Sarang and Sangram, were not being awarded to Homa. Learned Counsel submits that, in the premises, the Petitioners had made out a case of misrepresentation on the part of the Respondent and therefore, no remuneration was payable to the latter. Learned Counsel submits that this aspect of the matter was altogether missed by the learned arbitrator; it finds no mention in the reasons discussed in her award. Learned Counsel, secondly, submits that the Respondent was contractually bound to render assistance to the Petitioners in securing the tenders as also for completion of the work of repair/refit of ICGS Vivek awarded to the firm. Learned Counsel submits that the Petitioners had produced evidence to show that the Respondent did not render any assistance and that, in the premises, no remuneration could have been awarded to him. Learned Counsel, in the premises, submits that the award contains an impossible view or a view which no fair and

judiciously minded person would take on the material placed before him.

5 There is no merit in either of the two contentions. In the first place, these are all matters of fact and if and so long as the arbitrator's findings on these issues are supported by some evidence and cannot be discribed as award based on no evidence, there is nothing for the challenge court to consider. Sufficiency of evidence by itself cannot be a subject matter of challenge in a petition under Section 34 of the Arbitration and Conciliation Act, 1996 ("Act"). Learned arbitrator, in the present case, has extensively set out the case of the Petitioners on suppression of facts and misrepresentation on the part of the Respondent as also the oral evidence forming part of the Respondent's cross examination. The same is found in paragraphs 86 to 88 of the impugned award. The arbitrator, in the first place, has construed the agreement between the parties, particularly, in the light of clause 1 thereof, which required the Petitioners to pay to the Respondent remuneration at the rate of 17.5 per cent of the value of the tender accepted and contract awarded. Though clause 1 provided that in the event the Petitioners were awarded all tenders, worth over Rs.20,92,73,667, an amount of Rs.3,66,22,891 would be payable to the Respondent, sub-clause (c) of clause 1 stipulated that in the event the contracts awarded were of a lesser value, all that the Respondent would be entitled to would be remuneration calculated at 17.5 per cent of the value of tenders accepted and contracts awarded. On a reasonable construction of the agreement, the learned arbitrator concluded that the agreement was for remuneration at the rate of 17.5 per cent of the tenders awarded, be it five tenders or one tender. On this construction of the agreement, the learned arbitrator concluded that the Respondent would be

entitled to receive 17.5 per cent of the tender value of repair/refit work for Vivek, even though the Respondent was not able to secure the other three tenders. The conclusion of the learned arbitrator is clearly a possible conclusion, which is supported by evidence. It proceeds on a reasonable construction of the suit agreement. There is nothing shocking or patently illegal or unreasonable about such construction or finding. In the entire oral evidence of the Respondent, there is nothing at all to conclude that the Respondent was in fact aware that as of the date of the suit contract, the other two contracts of Coast Guard were either rejected or were not likely to be awarded to Homa to the knowledge of the Respondent. The arbitrator evidently was not impressed with the submission of the Petitioners in this behalf and merely because, though evidence was set out in detail, there is no specific finding or reason in the impugned award in consideration of the Petitioners' case of misrepresentation, the award cannot be faulted under Section 34 of the Act. After all, the award is consistent with the construction of the suit agreement by the arbitrator. The arbitrator has come to a categorical finding that the agreement never pertained to any particular number of tenders awarded or to be awarded to the firm or any commitment of the Respondent in respect thereof. The agreement simply provided for remuneration of 17.5 per cent of the contract value in respect of whichever tender was awarded to the firm.

6 The learned arbitrator also held that the Petitioners did not produce any convincing evidence or even a single recording letter to support their case that the Respondent did not offer any help to the Petitioners or failed and neglected to perform his obligations under the contract. There was at best only oral statement of the Petitioners' witness. This was controverted

by the Respondent in his evidence, which was extensively set out in the impugned award. The Respondent had categorically maintained in his testimony that at no stage, any particular assistance of the Respondent was sought by the Petitioners or that such assistance, though demanded, was denied by him. There is no document on record, as noted by the learned arbitrator, to suggest that the Petitioners, at any time, actually asked for any assistance of the Respondent either in securing the two outstanding tenders of Coast Guards or completing repair/refit work of Vivek. So far as the work of repair/refit of Vivek is concerned, there is oral evidence on record that the work was completed by the Petitioners successfully and within time. So far as the two outstanding tenders of Coast Guards are concerned, there is evidence on record in the form of an admission by the Petitioners' own witness that it was the Petitioners' representative, who attended further negotiations in respect of the Coast Guards contract, which took place in Delhi, and that he did not insist on taking, or infact took, the Respondent along for such negotiations. The arbitrator's view, thus, in this behalf is also a possible view of the material placed by the parties before her.

7 In the premises, there is no merit in the challenge. The Arbitration Petition is, accordingly, dismissed.

8 Learned Counsel for the Petitioners prays for stay of the impugned award. After the Petitioners' challenge to the impugned award has been comprehensively heard and decided against them, there is no question of staying the impugned award. The prayer is rejected.

(S.C. GUPTE, J.)