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

Date of Decision : 29.05.2019

+ O.M.P. (COMM.) 207/2019

INDIAN PROGRESSIVE CONSTRUCTION PVT. LTD

..... Petitioner

Through: Mr.Raman Kapur, Sr. Adv. with
Mr.Bhaskar Mishra, Mr.Manish Kumar
Choudhary, Ms.Kritika Khurana, Advs.

versus

SIMPLEX INFRASTRUCTURES LTD. Respondent

Through: Mr.Nachiketa Goyal, Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

IA 7388/2019

Exemption allowed subject to all just exceptions.

OMP(Comm.) 207/2019 & IA 7389/2019

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 23.01.2019 passed by the Sole Arbitrator adjudicating the disputes that had arisen between the parties in relation to the Memorandum of Understanding (MOU) dated 18.12.2013 executed between the parties.

2. The State of Jharkhand had granted a mining lease for five years to the respondent on 12.11.2011. Clause 13 of Part VII in the Mining lease Contract allowed the respondent to assign the lease or transfer any right, title or interest thereunder by outright sale to a person approved by the District Magistrate with the previous written sanction of the District Magistrate and on payment of fee of Rs.10,000/-, however, forbade the respondent from subletting any right, title or interest in the lease.

3. In spite of this stipulation, the parties entered into the MOU dated 18.12.2013, whereunder the respondent allowed the petitioner a right to use the said land for mining purposes for a period of 24 months commencing from either the date of payment of Rs.1 crore by the petitioner to the respondent or the date of handing over of the said land by the respondent to the petitioner, whichever is later. In terms of the MOU, the petitioner was to pay monthly payment of Rs.1.50 lacs to the respondent.

4. Clause 5 of the MOU further provided that the petitioner shall purchase the existing stock of material lying on the land at the given rates. The petitioner was to further reimburse the respondent an amount of Rs.60 lacs for the actual expenses incurred by the respondent in terms of acquiring and developing the said land for mining purposes.

5. In terms of Clause 7 of the MOU, the petitioner was to pay a security deposit of Rs.20 lacs to the respondent.

6. Clause 25 of the MOU further reads as under:

“25. The First Party shall facilitate the Second Party with the execution of the required documents for the transfer of the Lease in favour of Second Party on account of the Second Party’s cost and expenses. In consideration of the said transfer the Second Party hereby warranty the First Party that on simple demand from the First Party pertaining to the said Land, the Second Party shall restore the Lease as well as Land in favour of the First Party on its own cost and expenses and without and demur in whatsoever manner. In case the transfer of Lease take place in favour of Second Party then all the terms and condition captioned in this MOU shall be reviewed and redrafted accordingly.”

7. Learned senior counsel for the petitioner submits that the respondent initially delayed in giving the requisite documents for transfer of the lease rights in favour of the petitioner. Though the MOU was executed on 18.12.2013, the said documents were given to the petitioner only on 22.03.2014, that is, after a delay of more than three months. He further submits that in spite of repeated requests, the respondent did not give the requisite documents with respect to the environmental clearances and other clearances required for the mining purpose. He submits that due to the above reasons, the mining rights could never be transferred in favour of the petitioner and the petitioner never carried out any mining activity.

8. Learned senior counsel for the petitioner further submits that as the mining rights were never transferred to the petitioner, the petitioner was entitled to seek refund of the amounts paid under the

MOU. In any case, the petitioner could not have been burdened further by the monthly payments as provided in Clause 5 of the Agreement.

9. As far as the amount paid for the material lying on the site, the learned senior counsel for the petitioner submits that the material at the site was not more than of Rs.6 lacs. The parties were to carry out a joint measurement of the material in terms of the MOU, which was never done by the parties. In spite of the same, the Arbitrator has allowed a sum of Rs.80 lacs for the said material and has not allowed any refund to the petitioner. He submits that the petitioner had even moved an application seeking production of the annual returns that were to be filed before the Mining authorities as the same would have proved the value of stock lying at the site. The respondent, however, took the plea that the same were not traceable. In spite of non-production of any evidence by the respondent, the Arbitrator has rejected the claim of the petitioner.

10. I have considered the submissions made by the learned senior counsel for the petitioner, however, find no merit in the same.

11. The Sole Arbitrator in the Impugned Award has held that the petitioner company is not a novice but had vast experience in the field of mining and had appropriate manpower, machinery, plant, equipments, etc. to carry out the said work. It entered into the MOU with open eyes and could have inspected the condition of the site and the permissions that were required for carrying out the mining activity. Though, there was some confusion about the land that was leased out

by the State of Jharkhand to the respondent company, the Arbitrator found that the same had no effect as far as the MOU is concerned. The Arbitrator further found that non-obtaining of the permission from the competent authority for the transfer of the Mining rights did not stop the petitioner from mining at the land. In terms of the MOU, the respondent was merely to facilitate the transfer of the lease in favour of the petitioner and execute the required documents, which was duly done by the respondent by submitting the required signed documents for transfer of the lease. The Arbitrator therefore, found that this at best could be a case of self-induced frustration as it was the petitioner who was to either submit documents to the mining officer or obtain necessary permissions / complete other formalities under the MOU.

12. The Arbitrator further found that the photographs produced before the Arbitrator reveal that the petitioner, with the help of machinery and other necessary equipment, was carrying out the mining activities at the site, where some temporary hutments were constructed by it. Large number of boulders, stones and stone dust were lying at the spot, as was visible from the photographs.

13. Based on this evidence, the Arbitrator inferred that the petitioner was carrying on the mining activities and extracting stones and sand from the mines at the site though without obtaining the necessary permissions.

14. As far as the material at the site at the time of entering into MOU is concerned, the Arbitrator has held as under:

“20. Coming to the cost of material lying at the site at the time of MOU, the respondent has claimed the cost of the material at Rs. 83,75,177/- which after addition of Vat /service tax @14% has been assessed at Rs.95,47,702/-. As against it, the claimant has alleged that the cost of the material found lying at the site was not more than Rs. 5 to 6 lakhs. However the claimant has not produced any documents in support of the price of material found lying at the site except averments in the SoC for the first time and the oral testimony of its Director Jitesh Raj pal as CW -8. The claimant on the other hand referred to an e-mail dated 27.9.2014 sent by the respondent to the claimant and marked as annexure -R-11 at page 77 of the SoD alongwith the details of the material at page 78 of SoD. The cost of stone and dust per MT was fixed in clause 5 of the MOU and the cost of material mentioned in the details of the material at page 78 of the SoD at the said rate comes to Rs. 83 lakhs plus and this email of the respondent was not replied by the claimant. But there was a condition in clause 5 of the MOU that the exact price of the material shall be assessed after joint measurement of the stock. That joint measurement was admittedly never done. So the approximate value of the material assessed by the parties at the time of MOU will be taken to be the cost of the material. That cost comes to Rs. 80 lakhs because the claimant was asked to give Rs. 1. 40 crore to the claimant at the time of MOU towards the cost of development of land, which was Rs. 60 lakhs, and the cost of material.”

15. The Arbitrator also found that mere non-production of the returns filed by the respondent before the mining department could not justify the claim of the petitioner as far as the material at the site is concerned. The Arbitrator found that if the respondent has carried out any mining activity without filing the necessary returns, it was for the

concerned Authority to take action against the respondent, however, the same has no relevance to the claim of the petitioner. The Arbitrator has therefore, rightly rejected the said claim of the petitioner.

16. As far as the challenge to the amount of development charges is concerned, the same was again mentioned in the Agreement itself.

17. Coming to the monthly payments, once the Arbitrator found that from the evidence it can be inferred that the petitioner was carrying out the mining activities, the Arbitrator has rightly allowed the said claim of the respondent.

18. In a recent judgment in ***Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India (NHAI)***, 2019 SCC OnLine SC 677, the Supreme Court, on the scope of Section 34, has held as under:-

“35. What is clear, therefore, is that the expression “public policy of India”, whether contained in Section 34 or in Section 48, would now mean the “fundamental policy of Indian law” as explained in paragraphs 18 and 27 of Associate Builders (supra), i.e., the fundamental policy of Indian law would be relegated to the “Renusagar” understanding of this expression. This would necessarily mean that the Western Geco (supra) expansion has been done away with. In short, Western Geco (supra), as explained in paragraphs 28 and 29 of Associate Builders (supra), would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court’s intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections

18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of Associate Builders (supra).

36. It is important to notice that the ground for interference insofar as it concerns “interest of India” has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. This again would be in line with paragraphs 36 to 39 of Associate Builders (supra), as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

37. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of Associate Builders (supra), or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of Associate Builders (supra). Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco (supra), as understood in Associate Builders (supra), and paragraphs 28 and 29 in particular, is now done away with.

38. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

39. Secondly, it is also made clear that re-appreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

40. To elucidate, paragraph 42.1 of Associate Builders (*supra*), namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Paragraph 42.2 of Associate Builders (*supra*), however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act that would certainly amount to a patent illegality on the face of the award.

41. The change made in Section 28(3) by the Amendment Act really follows what is stated in paragraphs 42.3 to 45 in Associate Builders (*supra*), namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2A). ”

19. In view of the above, I find no merit in the present petition and the same is dismissed with no order as to costs.

NAVIN CHAWLA, J

MAY 29, 2019

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