

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

Reserved on: 29th May 2019
Pronounced on: 1st July, 2019

+ **O.M.P. (COMM) 229/2019 & I.A. 8092/2019**

PATNA WATER SUPPLY DISTRIBUTION NETWORK PVT. LTD.

..... Petitioner

Through: Mr. Arun Kumar Varma, Senior
Advocate with Mr. Abhay Rajy
Varma and Mr. Vishal Nautiyal,
Advocates.

versus

**BIHAR URBAN INFRASTRUCTURE DEVELOPMENT
CORPORATION LTD.**

..... Respondent

Through: Mr. Shivam Singh, Advocate with
Mr. Aditya Raina, Advocate.

CORAM: JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J

1. The Petitioner by way of the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act') challenges the orders dated 25th April 2019, 4th April 2019 and 6th March 2019, passed by the Arbitral Tribunal in the ongoing arbitration between the parties.

Brief Facts:

2. Petitioner is a Special Purpose Vehicle (SPV) incorporated under the provisions of the Companies Act, 1956, by Gammon India Ltd. (majority

member) and Geo Miller Pvt. Ltd. (minority member, hereinafter referred to as 'Geo Miller'). Gammon India Ltd and Geo Miller are members of the 'Gammon-Geo Miller Consortium', which was awarded the Contract in question by the Respondent. The Petitioner SPV was constituted in terms of clause 1.14 of the Conditions of Contract, for the purposes of execution of the work of designing, building, operating, managing and maintaining the water supply system in Patna, Bihar. Gammon India Ltd., is the lead member of the Gammon-Geo Miller Consortium along with Geo Miller as the minority member. The said Consortium was constituted vide Contract dated 12th January 2012 (hereafter referred as the "Consortium Agreement"). Both consortium members are companies incorporated under the Companies Act, 1956. Gammon-Geo Miller Consortium was awarded the work by the Respondent, vide Letter of Acceptance (hereinafter referred to as 'LOA') dated 27th February 2012.

3. Pursuant to the issuance of the LOA, submission of the Bank Guarantees, mobilization of manpower and equipment, a Formal Agreement dated 28th March 2012 was entered into between the Respondent, both the members of the consortium as aforesaid and Patna Nagar Nigam (as the beneficiary of the Project). By way of the said agreement, it was agreed that on incorporation of the Petitioner SPV, a fresh agreement shall be executed and the present agreement shall form a part of that agreement. Thereafter, on incorporation of the Petitioner SPV on 21st May 2012, a fresh Agreement dated 24th September 2012 was executed between the parties. All the aforesaid agreements form part of the Contract between the parties (referred to as 'the contract').

4. Respondent terminated the Contract on account of alleged delay and breaches and blacklisted and de-barred both the consortium members and the consortium from participating in any future tender processes etc. The said blacklisting of the consortium members was done allegedly on account of breaches by Petitioner SPV in performance of its obligations under the Contract. Petitioner claims that Respondent wrongfully invoked the bank guarantee and restrained / blacklisted it from participating in future tender process. Various petitions were filed against the said termination and blacklisting orders, including but not limited to CWJC No. 4758/2018 filed by Geo Miller and CWJC No. 5826 filed by Petitioner along with Gammon Indian Pvt. Ltd., against the blacklisting order. Petitioner also filed Arbitration Petition No. 157 of 2016 before this court, whereby a three member arbitral tribunal was constituted vide order dated 25th October 2016. This order was challenged by the Respondent in SLP (c) No. 36529 of 2016, whereby, the Supreme Court constituted the present Arbitral Tribunal and referred the parties to arbitration before Hon'ble Mr. Justice Shiva Kirti Singh (Retd.), for adjudication of the disputes pertaining to the contract.

5. The learned Arbitrator has vide interim order dated 25th April 2019 rejected the additional claims of the Petitioner, arising out of the blacklisting order of the Respondent. The arbitrator refused to adjudicate the disputes pertaining to blacklisting and debarment of the Petitioner on the ground of non-compliance of a pre-emptory condition. Thus, Petitioner's additional claims have been finally decided without a final adjudication on the merits of the claims. Aggrieved with the interim award, Petitioner has filed the

present petition.

Proceedings before the Tribunal:

6. The genesis of the impugned interim award is the blacklisting / debarment action of the Respondent that forms the basis of the additional claims raised before the Arbitral Tribunal. This action was impugned in Writ Petition being CWJC No. 5826/2016 preferred by the Petitioner and one of the consortium members- Gammon India Ltd. Later, on a prayer made by the Petitioner, the High Court of Patna vide its order dated 25th July 2018, permitted the Petitioner to withdraw the writ petition and raise the issue of blacklisting before the Arbitral Tribunal. Accordingly, Petitioner filed the application under Section 23(3) of the Act before the learned Arbitrator and sought to challenge the blacklisting order and raise additional claims. The said application was opposed by the Respondent on the ground that one of the Consortium members of the Petitioner- Geo Miller was still pursuing its remedy against the order of blacklisting before the Patna High Court in another writ petition being CWJC No. 4758/2018. It was argued before the Arbitral Tribunal that the order of blacklisting cannot be assailed by way of amendment, since the challenge was still pending adjudication before the Patna High Court. After considering the submissions of the parties, the Arbitral Tribunal allowed the application vide order dated 6th March 2019 and held that the order of the Patna High Court dated 25th July 2018 permitted the Petitioner to raise the issue of blacklisting before the Arbitral Tribunal. However, at the same time, the Arbitral Tribunal put a condition that the consortium member - Geo Miller Pvt. Ltd. should submit an undertaking before the Tribunal that it shall withdraw the challenge to the

blacklisting order pending before the Patna High Court in CWJC No. 4758/2018. It was further directed that in case the writ petition is not withdrawn, the Tribunal shall not go into the issue with respect to the order of blacklisting as averred in the additional statement of claim. Subject to the above condition, the additional claims were permitted to be taken on record. The Respondent was also directed to file their statement of defense in respect of the additional statement of claims. The relevant portion of the order dated 6th March 2019 reads as under:-

“This Tribunal finds it prudent to treat the order of Patna High Court dated 25.7.2018 as a clear indicator that it is proper and appropriate for Claimant to raise the issue of blacklisting before this Tribunal. Hon'ble Delhi High Court's views are similar in the judgment noted earlier. Accordingly, the application is allowed but on the condition that one of the consortium members, namely, M/s Geo Miller & Company Pvt Ltd shall submit an undertaking by the next date that, they shall withdraw their challenge to the blacklisting order pending before the Patna High Court through CWJC 4758/2018 without any delay. It will be for the Claimant to obtain such an undertaking and file it before this Arbitral Tribunal otherwise this order shall be ignored for the simple reason that one of the consortium members constituting the Claimant cannot be permitted to pursue two parallel proceedings against the order of blacklisting dated 27.2.2012. Thus, it is made clear that if the Writ Petition noted above is not shown to have been withdrawn, this Tribunal shall not go into the issues raised in respect of order of blacklisting as averred in the additional Statement of Claims. The issue as to the effect of non-challenge to the appellate order confirming blacklisting is left open for adjudication on merits. Subject to these conditions, the additional Statement of Claims is permitted to be taken on record. It will be open for the respondent to file Statement of Defense in respect of the additional Statement of Claim, if necessary.”

7. Thereafter, on 4th April 2019, the cross-examination of the Respondents' witness was resumed and concluded. The Arbitral Tribunal also noted that the Geo Miller had not withdrawn the writ petition and no intimation on that account had been received. The Arbitral Tribunal granted two weeks 'pre-emptory time' for complying with the order and directed that in case of non compliance, the application for amendment shall stand rejected in terms of the directions passed in the order dated 6th March 2019. Respondent was also granted time to file reply to the amended petition, in case an intimation was received regarding the withdrawal of the writ petition. On 25th April 2019, the Arbitral Tribunal taking note of the previous orders dated 6th March 2019 and 4th April 2019 held that since the undertaking had not been furnished by the consortium member Geo Miller, there was no justification for the Tribunal to grant further time. However, it was ordered that in case the writ petition was not withdrawn by Geo Miller by 2nd May 2019, the additional statement of claim shall be rejected and the Tribunal shall not decide the issue of legality of the blacklisting order. The relevant portion of the impugned order reads as under:-

4. In terms of the conditional order passed on 6.3.2019 the order allowing the Claimant to challenge the blacklisting order has to be ignored because of not filing of the undertaking by 12.3.2019. No prayer was made for extension of time nor the undertaking had been filed, yet, in the interest of justice the time was extended by two weeks vide order dated 4.4.2019 with peremptory condition that in default, the application of the Claimant shall stand rejected in terms of order passed on 6.3.2019.

5. The Claimant's prayer for extension of time till 20.5.2019 does not show any real difficulty in complying with the order dated 6.3.2019 as relaxed on 4.4.2019. The undertaking has not been furnished only because the Claimant and its consortium member, M/s. G.O. Miller & Co. are in two minds as to whether the writ petition before the Patna High Court should be withdrawn or not. In such circumstances, this Tribunal finds no justification for granting unnecessary large time till 20.5.2019. However, in the interest of justice and by way of last opportunity one week's further time i.e., till 02.05.2019 is granted to withdraw the writ petition and inform this Tribunal. This is peremptory and failure shall lead to rejection of the additional Statement of Claims and then this Tribunal shall not go into the issue of legality of the blacklisting order.

8. Learned Senior Counsel for the Petitioner argued that as on date, by virtue of the interim award dated 25th April 2019, the additional claims qua the blacklisting / debarment stand rejected finally as the writ petition has not been withdrawn by Geo Miller. It is further argued that the award is liable to be set aside, as the rejection of the additional claim is not a reasoned order. The rejection of claims on account of the failure on part of Geo Miller to withdraw the writ petition is contrary to the settled principles of fair play, justice and equity and the impugned award is against the Public Policy of India. It was further argued that the impugned award is perverse and the condition imposed by the Arbitrator is against the principles of natural justice.

9. Learned counsel for the Respondent, on the other hand argued that the Arbitral Tribunal had passed the pre-emptory order allowing the Petitioner to raise the additional statement of claims and such condition was in consonance with the scheme of the Act. The Petitioner accepted the

condition that its consortium member Geo Miller Pvt. Ltd would withdraw the writ petition CWJC No. 4758/2018 but failed to comply with the pre-emptory order of the Tribunal, and now it cannot be permitted to challenge the same before this Court. The jurisdiction of the Court under Section 34 of the Act is limited and order of the Tribunal can be set aside only if it is against the Public Policy of India or if there exists a patent illegality in the award/order. Reliance is placed on the judgment of the Supreme Court in *Associate Builder v. Delhi Development Authority, (2015) 3 SCC 49*. Learned counsel for the Respondent further argued that the Petitioner Corporation and the Petitioner are different entities than the members of the consortium who were joint bidders and have been blacklisted by separate orders of the Respondent. The Petitioner is a Special Purpose Vehicle (SPV) for executing the Contract and does not have locus to challenge the orders of blacklisting passed against Geo Miller Pvt. Ltd. and Gammon India Pvt. Ltd.

10. It was further argued that the pre-emptory order compels the party to do something within a time frame and if the condition is not complied, the necessary consequences will follow. Since the Petitioner was in default of the pre-emptory order it has resulted in the rejection of the additional claims of the Petitioner. The Petitioner had sought time to comply with the pre-emptory order and this is an acknowledgment and admission of acceptance of the order dated 6th March 2019. The amendment of the claim allowed conditionally, was accepted by the Petitioner, who sought time to comply with the condition. This means that the interim orders were accepted in totality.

11. It was also argued that the Doctrine of Approbate and Reprobate would also apply. The Petitioner had sought extension of time for compliance of the order hence he should be estopped from challenging the same. The conduct of the parties is critically important and they are bound by the procedure laid down by the Arbitral Tribunal. Finally, it was argued that the Petitioner is seeking to change the character of the claim. Petitioner-SPV is seeking monetary claims on account of the blacklisting order and if the challenge is to be considered by the Arbitral Tribunal, only the issue of blacklisting should be adjudicated and not the monetary damages.

Analysis and Findings:

12. This court has given its thoughtful consideration to the rival contentions of the parties.

13. The undisputed fact is that the impugned interim award dated 25th April 2019 rejects the additional claims of the Petitioner arising out of the blacklisting order. This rejection is because of non-fulfillment of the pre-emptory direction/condition that was required to be complied with by 2nd May 2019.

14. The dismissal of the additional claims is thus without reason or any finding on merits. It is premised on the fact that the Petitioner's consortium partner Geo Miller contravened the direction given by the Tribunal in its order dated 6th March 2019. Concededly, on 6th March 2019, the learned Arbitrator allowed the application of the Petitioner for raising additional claim. In fact, directions were given to the Respondent to file the reply to

the said additional claim. The said order was not challenged by the Respondent. The order put an onerous condition that the Petitioner's consortium partner – Geo Miller Pvt. Ltd should withdraw its writ petition CWJC No. 4758/2018. This direction was given qua a party who was not before the Arbitral Tribunal. Petitioner was thus certainly not in a position to comply with the said direction.

15. The order dated 6th March 2019 noted that on behalf of Geo Miller Pvt. Ltd, the required intimation shall be sent to the Tribunal within two weeks from the date of the order. The said direction was apparently not complied with and on 25th April 2019, the pre-emptory order was passed, as a result, the additional claims presently stands rejected. The learned Arbitrator while allowing the application for raising additional claims, could not have imposed a condition that was legally untenable and perverse. The condition imposed on a party not before the Tribunal, was unwarranted. In so far as the Petitioner is concerned, undisputedly it had withdrawn the writ petition challenging the blacklisting order before making additional claims before the Arbitral Tribunal. Thus, the pending writ petition of Geo Miller and the additional claims of the Petitioner were separate and distinct and operated in different fields. The impugned interim award has resulted in depriving the Petitioner of the opportunity to seek adjudication of the monetary loss suffered by it on account of the alleged blacklisting by the Respondent. In the impugned interim award, the Arbitral Tribunal has conclusively and finally determined the claims arising out of the blacklisting and debarment. Such condition has resultantly rejected Petitioner's claim for alleged losses amounting to Rs. 455.95 crores, caused to it on account of the blacklisting

order of the Respondent.

16. The Supreme Court in *Associate Builders* (supra) has held as under:-

“19. When it came to construing the expression “the public policy of India” contained in Section 34(2)(b)(ii) of the Arbitration Act, 1996, this Court in *ONGC Ltd. v. Saw Pipes Ltd.* [(2003) 5 SCC 705 : AIR 2003 SC 2629] held: (SCC pp. 727-28 & 744-45, paras 31 & 74)

“31. Therefore, in our view, the phrase ‘public policy of India’ used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term ‘public policy’ in *Renusagar case* [*Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be—award could be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or
- (b) the interest of India; or
- (c) justice or morality, or
- (d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

74. In the result, it is held that:

(A)(I) The court can set aside the arbitral award under Section 34(2) of the Act if the party making the application furnishes proof that:

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

(2) The court may set aside the award:

(i)(a) if the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties,

(b) failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part I of the Act,

(ii) if the arbitral procedure was not in accordance with:

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part I of the Act.

However, exception for setting aside the award on the ground of composition of Arbitral Tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part I of the Act from which parties cannot derogate.

(c) If the award passed by the Arbitral Tribunal is in contravention of the provisions of the Act or any other substantive law governing the parties or is against the

terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality; or

(d) if it is patently illegal.

(4) It could be challenged:

(a) as provided under Section 13(5); and

(b) Section 16(6) of the Act.

(B)(1) The impugned award requires to be set aside mainly on the grounds:

(i) there is specific stipulation in the agreement that the time and date of delivery of the goods was of the essence of the contract;

(ii) in case of failure to deliver the goods within the period fixed for such delivery in the schedule, ONGC was entitled to recover from the contractor liquidated damages as agreed;

(iii) it was also explicitly understood that the agreed liquidated damages were genuine pre-estimate of damages;

(iv) on the request of the respondent to extend the time-limit for supply of goods, ONGC informed specifically that time was extended but stipulated liquidated damages as agreed would be recovered;

(v) liquidated damages for delay in supply of goods were to be recovered by paying authorities from the bills for payment of cost of material supplied by the contractor;

(vi) there is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in any way unreasonable;

(vii) in certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken care of by Sections 73 and 74 of the Contract Act and in the present case by specific terms of the contract.”

Now recently the Supreme Court in *Ssangyong Engineering & Construction Co. Ltd v. National Highways Authority of India (NHAI)*, 2019 SCC OnLine SC 677, has referred to the earlier decision and

observed 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.”

17. The findings of the learned Arbitrator for rejecting the claims in the award shocks the conscience of the Court. The approach of the Arbitrator was arbitrary and patently illegal and goes to the root of the matter. The condition of withdrawal of the writ petition at the first instance, could not have been imposed upon the Petitioner. Geo Miller may have been a part of the consortium, but it has an independent right to challenge the blacklisting order. Forbidding the adjudication of the additional claims by linking it with a factor that is extraneous to the outcome of the arbitration proceedings was wholly improper, illegal and is liable to be set aside. This is a fit case for the Court to interfere under Section 34 of the Act and set aside the award. Though the Respondent, in its written submission, has not raised any objection regarding the maintainability of the present petition, however, the Court has also heard the learned Senior Counsel for the Petitioner on this question and the Court finds the argument of the Petitioner to be convincing that the order dated 25th April 2019 qualifies to be an interim award, inasmuch as it finally adjudicates the additional claims by rejecting them by way of a pre-emptory order.

18. The submissions of the learned counsel for the Respondent qua the merits of the case are not required to be examined as the impugned award does not go into the merits of the case. It is clarified that the Court has not gone into the merits of the additional claims that were allowed to be raised under Section 23(3) of the Act. Accordingly, the present petition is allowed. The interim award dated 25th April 2019 rejecting the additional claims is set aside. The additional claims would now be adjudicated by the learned Arbitrator in accordance with law, after affording adequate opportunity to both the parties.

19. The matter is remitted to the learned Arbitrator for adjudication of the disputes between the parties on merits on the additional claims.

20. The petition is allowed in the above terms.

July 01, 2019

Ss

SANJEEV NARULA, J.