IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Sr. No. 332 FAO-4050-2003 (O&M)

Date of decision : 14.01.2020

UHBVNL, Panchkula ..... Appellant

VERSUS

M/s M.N.Conductors and another ..... Respondents

CORAM: HON'BLE MR. JUSTICE DEEPAK SIBAL

Present: Mr.Chiranji Lal, Advocate, for the appellant.

Mr.P.S.Rana, Advocate, for respondent No.1.

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DEEPAK SIBAL, J. (ORAL)

The present appeal, filed under Section 37 of the Arbitration and Conciliation Act, 1996 (for short, the Act), is directed against the order dated 04.06.2003 passed by the Additional District Judge, Panchkula, through which objections filed by the appellant under Section 34 of the Act have been partly accepted.

The facts, in brief, which are required to be noticed for adjudicating upon the present appeal are that through purchase order dated 29.07.1994 the appellant placed an order on respondent No.1 for purchase of 817 Kms of ACSR Weasel Conductor. The first 500 Kms of conductor was to be supplied by respondent No.1 @ ₹7,497/- per Km and the remaining 317 Kms @ ₹7,597/- per Km. As per the purchase order disputes arising out of the same were to be settled through the mode of arbitration.

Disputes having arisen between the parties they were referred to be adjudicated upon by a sole Arbitrator who gave his award on 30.03.1999. Against such award the appellant filed objections under Section 34 of the Act which were accepted by the Additional District Judge, Panchkula and the matter was remanded to the Arbitrator for a fresh decision in accordance with law.

Since the earlier Arbitrator had retired, as per consent of both parties, a new Arbitrator was appointed who gave his award on 30.05.2002 against which the appellant again filed objections which were partly accepted by the Additional District Judge, Panchkula through the order under challenge in the present appeal.

Learned counsel for the appellant has assailed the award as also the impugned order on three counts. It is submitted that the Arbitrator's award with regard to price variation was against the terms of the agreement as the parties had agreed that price variation would be calculated as per CACMAI circular after taking the average base price as on 01.03.1994 whereas the Arbitrator awarded price variation after taking into account the delay on the part of the appellant in releasing payments to respondent No.1. It is further submitted that in the absence of any material before him the Arbitrator could have not granted any amount on account of salaries/payments made by respondent No.1 to its idle labour/permanent staff etc. and thirdly that no interest could have been awarded by the Arbitrator as the agreement between the parties did not provide for the same.

Per contra, learned counsel for contesting respondent No.1 submits that the Arbitrator awarded amounts towards price variation and payment of salaries by respondent No.1 to its idle labour/permanent staff after reaching at a conclusion that the appellant had, without reasonable cause, delayed the release of payments to respondent No.1 resulting in the extension of the contract period by about nine months as a result of which respondent No.1 could make supply of the conductors at a higher rate as during the above period of nine months the cost of the conductors had increased and that during such period the permanent staff/labour employed by them sat idle and had unnecessarily to be paid wages. Grant of interest by the Arbitrator was justified after reference to Section 31(7) of the Act which was applicable at the relevant time.

In *Sutlej Construction Ltd. v. Union Territory of Chandigarh*, (2018) 1 SCC 718 the Supreme Court opined as under: -

"10.We are not in agreement with the approach adopted by the learned Single Judge. The dispute in question had resulted in a reasoned award. It is not as if the arbitrator has not appreciated the evidence. The arbitrator has taken a plausible view and, an in our view, as per us the correct view, that the very nature of job to be performed would imply that there has to be an area for unloading and that too in the vicinity of 5 km as that is all that the appellant was to be paid for. The route was also determined. In such a situation to say that the respondent owed no obligation to make available the site cannot be accepted by any stretch of imagination. The unpreparedness of the respondent is also apparent from the fact that even post-termination it took couple of years for the work to be carried out, which was meant to be completed within 45 days. The ability of the appellant to comply with its obligations was interdependent on the respondent meeting its obligations in time to facilitate appropriate areas for unloading of the earth and for its compacting. At least it is certainly a plausible view.

11.It has been opined by this Court that when it comes to setting aside of an award under the public policy ground, it would mean that the award should shock the conscience of the Court and would not include what the Court thinks is unjust on the facts of the case seeking to substitute its view for that of the arbitrator to do what it considers to be "justice". [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]).

12.The approach adopted by the learned Additional District Judge, Chandigarh was, thus, correct in not getting into the act of reappreciating the evidence as the first appellate court from a trial court decree. An arbitrator is a chosen Judge by the parties and it is on limited parameters can the award be interfered with. (*Sudarsan Trading Co.* v. *State of Kerala* (1989) 2 SCC 38: (1989) 1 SCR 665]; [*Harish Chandra & Co.* v. *State of U.P.*, (2016) 9 SCC 478: AIR 2016 SC 4257] and *Swan Gold Mining Ltd.* v. *Hindustan Copper Ltd.* (2015) 5 SCC 739: (2015) 3 SCC (Civ) 27: (2014) 4 Arb LR 1])."

In *Parsa Kente Collieries Limited vs Rajasthan Rajya Vidyut Utpadan Nigam Ltd,* 2019(7) SCC 236 the Supreme Court held that:-

"9.1 In the case of Associate Builders (supra), this Court had an occasion to consider in detail the jurisdiction of the Court to interfere with the award passed by the Arbitrator in exercise of powers under section 34 of the Arbitration Act. In the aforesaid decision, this Court has considered the limits of power of the Court to interfere with the arbitral award. It is observed and held that only when the award is in conflict with the public policy in India, the Court would be justified in interfering with the arbitral award. In the aforesaid decision, this Court considered different heads of "public policy in India" which, inter alia, includes patent illegality. After referring section 28(3) of the Arbitration Act and after considering the decisions of this Court in the cases of *McDermott International Inc. v. Burn Standard Co. Ltd., reported in (2006) 11 SCC 181 (paras 112-113)* and *RashtriyaIspat Nigam Limited v. Dewan Chand Ram Saran, reported in 2012(3) R.C.R.(Civil) 720 : (2012) 5 SCC 306 (paras 43-45)*, it is observed and held that an arbitral tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. It is further observed and held that construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do. It is further observed by this Court in the aforesaid decision in paragraph 33 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. It is further observed that 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 score."

In *M.P. Power Generation Co. Ltd. & Anr.* vs *Ansaldo Energia SPA & Anr*. 2018(4) JT 371 the Supreme Court observed: -

"18. It is necessary to refer to the settled law on the scope of Sections 34 of the Act. In this case we are concerned with the point as to whether an arbitral award can be set aside for being in conflict with the public policy of India. An arbitral award can 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. (*Renusagar Power Co. Ltd. v. General Electric Co., (1994) Supp.1 SCC 644*) Patent illegality was added to the above three grounds in *ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705*. Illegality must go to the root of the matter and incase the illegality is of trivial nature it cannot be held that the award is against the public policy. It was further observed in the said judgment (*ONGC v. Saw Pipes* (supra)) that an award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. In *Delhi Development Authority v. M/s. R.S. Sharma & Co., (2008) 13 SCC 80* it was held that an award can be interfered with by the Court under Section 34 of the Act when it is contrary to :

a) substantive provisions of law; or
b) provisions of the 1996 Act; or
c) against the terms of the respective contract; or
d) patently illegal; or
e) prejudicial to the rights of the parties

The fundamental policy of India was explained in *ONGC Ltd. v. Western Geco International Co. Ltd., (2014) 9 SCC 263* as including all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. It was held inter alia, that a duty is cast on every tribunal or authority exercising powers that affect the rights or obligations of the parties to show a `judicial approach'. It was further held that judicial approach ensures that an authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and its decision is not actuated by any extraneous considerations. It was also held that the requirement of application of mind on the part of the adjudicatory authority is so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law. This Court further observed that the award of the Arbitral Tribunal is open to challenge when the arbitrators fail to draw an inference which ought to be drawn or if they had drawn an inference which on the face of it is untenable resulting in miscarriage of justice. The Court has the power to modify the offending part of the award in case it is severable from the rest according to the said judgment (Western Geco Ltd. (supra)).

19. The limit of exercise of power by Courts under Section 34 of the Act has been comprehensively dealt with by Justice R.F. Nariman in the case of *Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49*. Lack of judicial approach, violation of principles of natural justice, perversity and patent illegality have been identified as grounds for interference with an award of the Arbitrator. The restrictions placed on the exercise of power of a Court under Section 34 of the Act have been analyzed and enumerated in Associated Builders (supra) which are as follows:

a) The Court under Section 34(2) of the Act, does not act as a Court of appeal while applying the ground of "public policy" to an arbitral award and consequently errors of fact cannot be corrected.

b) A possible view by the arbitrator on facts has necessarily to pass muster as the Arbitrator is the sole judge of the quantity and quality of the evidence.

c) Insufficiency of evidence cannot be a ground for interference by the Court. Re-examination of the facts to find out whether a different decision can be

arrived at is impermissible under Section 34 (2) of the Act.
d) An award can be set aside only if it shocks the conscience of the Court.
e) Illegality must go to the root of the matter and cannot be of a trivial nature for interference by a Court. A reasonable construction of the terms of the contract by the arbitrator cannot be interfered with by the Court. Error of construction is within the jurisdiction of the Arbitrator. Hence, no interference is warranted.
f) If there are two possible interpretations of the terms of the contract, the arbitrator's interpretation has to be accepted and the Court under Section 34 cannot substitute its opinion over the Arbitrator's view."

As per the afore referred judgments of the Supreme Court an Arbitrator's award warrants interference by the Court under Section 34 of the Act only when it contravenes a substantive provision of law or is patently illegal or shocks the conscious of the Court or contravenes the terms of the agreement between the parties and that a plausible/reasonable view taken by an Arbitrator, even if the same is based on insufficient evidence, is not to be substituted by the Court.

It is not disputed that there was an abnormal delay of 620 days in releasing of payments by the appellant to respondent No.1 and that on account of such delay the initial contracted delivery period had to be extended from 11 months to 20 months.

In the extended period of the contract the price of the goods to be supplied by respondent No.1 was found by the Arbitrator to have increased for which an average additional increase @ 10% was granted towards price variation. On this count the Arbitrator's award is found to be reasonable.

On the same analogy grant of amounts by the Arbitrator to respondent No.1 towards salaries paid by respondent No.1 to its labour/permanent staff who had to sit idle for the extended period of the contract caused by abnormal delays in releasing of payments by the appellant also warrants no interference as for such period, for no fault on its part, respondent No.1 was unnecessarily required to pay salary to its idle labour/permanent staff etc.

Admittedly, as per the agreement between the parties there was no bar with regard to the grant of interest for delayed payments or claims to be made by either of the parties against each other.

That being so, awarding of interest by the Arbitrator @ 18% per annum on the awarded amount from the date such amount became due till its actual payment is also found to be in consonance with the provisions of Section 31(7) of the Act (as it then stood). Section 31(7)(a) and (b) as it was at the relevant time, reads as under

> "31. **Form and contents of arbitral award**
> (1) to (6) xxx xxx xxx
> (7)(a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.
> (b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment."

In view of the above, the award and the order under challenge warrant no interference.

Dismissed.

14.01.2020 [DEEPAK SIBAL]
shamsher JUDGE

Whether speaking/reasoned : Yes / No
Whether reportable : Yes / No