IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Sr. No. 205 FAO-752-2014 (O&M)

Date of decision : 18.02.2020

M/s A.K.Precast Concrit
Pipe Corporation ..... Appellant

VERSUS

The State of Haryana ..... Respondent

CORAM: HON'BLE MR. JUSTICE DEEPAK SIBAL

Present: Mr.R.S.Rana Advocate, for the appellant.

Mr.Vishal Garg, Addl.A.G., Haryana.

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DEEPAK SIBAL, J. (ORAL)

The present appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short, the Act) is directed against the order dated 28.09.2013 passed by the Additional District Judge, Chandigarh dismissing an application filed by the appellant under Section 34 of the Act.

The facts, in brief, which are required to be noticed for adjudicating upon the present appeal are that the respondent invited bids for supply of RCC pipes of four dimensions i.e. 500 mm, 600 mm, 700 mm and 1200 mm. The appellant quoted the lowest rates which were approved by the High Powered Purchase Committee of the respondent and resultantly a letter of acceptance dated 03.02.1995 was issued to the appellant to which the appellant raised certain objections which were clarified by the respondent through letter dated 27.03.1995. Thereafter the appellant deposited ₹20,000/- as security and signed schedule 'B' which was sent through its letter dated 15.06.1995 to the respondent. On 22.06.1995 the respondent issued a supply order to the appellant but the same was for supply of pipes measuring 500 mm and 600 mm. No supply order was issued for pipes measuring 700 mm and 1200 mm. When the appellant did not supply the pipes measuring 500 mm and 600 mm a notice was issued to it by the respondent in response to which on 04.12.1995 Mr.B.M.Gupta, the appellant's authorised representative, appeared before the Director, Supplies & Disposals, Haryana and submitted a letter on behalf of the appellant through which the respondent was requested to make three amendments in the supply order dated 22.06.1995 to the following effect: -

> “a) To clear in the supply order that material is to be supplied by Road Transport.
> b) The payment/drafts of each consignment should be payable at Charkhi Dadri
> c) The Delivery period from January, 1996 to April, 1996 in evenly spread out manner should be allowed.”

Through memo dated 04.12.1995, which was personally handed over to the appellant's aforesaid authorised representative, the respondent accepted the afore three amendments requested for by the appellant but in spite of the same no supplies were made by the appellant. Due to the afore inaction on the part of the appellant the respondent had to place the order with another firm which resulted in purchase by the respondent at a higher rate causing to the respondent a loss of ₹1,73,568.12. Such loss on account of recovery of risk purchase, was claimed by the respondent from the appellant. When the appellant refused to make such payment the dispute was referred to be adjudicated upon by an Arbitrator who through his Award dated 18.10.2006 held the respondent entitled to recover the claimed amount from the appellant alongwith interest. The appellant filed an application under Section 34 of the Act for setting aside the aforesaid award. Through the order impugned in the present appeal such application was dismissed by the Additional District Judge, Chandigarh.

Learned counsel for the parties have been heard and with their able assistance the record has also been perused.

In *Sutlej Construction Ltd. vs. 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.

Initially the respondent had decided to place the supply order on the appellant for supply of pipes of four sizes i.e. 500 mm, 600 mm, 700 mm and 1200 mm but later on reconsideration, through supply order dated 22.06.1995, pipes measuring 500 mm and 600 mm only were only sought to be supplied by the appellant. When such supply was not made the appellant was issued notice in pursuance to which Mr.B.M.Gupta, authorised representative of the appellant, appeared before the Director, Supplies & Disposals, Haryana and submitted a written communication on behalf of the appellant through which the following three amendments in the aforesaid supply order dated 22.06.1995 were sought: -

> "a) To clear in the supply order that material is to be supplied by Road Transport.
> b) The payment/drafts of each consignment should be payable at Charkhi Dadri
> c) The Delivery period from January, 1996 to April, 1996 in evenly spread out manner should be allowed."

The respondent accepted the appellant's above request and handed over to aforesaid Mr.B.M.Gupta an amended supply order dated 04.12.1995 which was for supply of pipes measuring 500 mm and 600 mm on terms including the above quoted amended terms. However, in spite of the same no supplies were made by the appellant resulting in purchase of these pipes by the respondent from M/s D.K.Spun Pipe, Ballabgarh at a higher rate. The loss caused due to the inaction on the part of the appellant was sought to be recovered from the appellant as per agreed terms.

Once on 04.12.1995 no objection was raised by the appellant with regard to the supply order for only two out of the four types of pipes, the supply order for which had initially been made on the appellant, there was no reason whatsoever with the appellant for not supplying pipes measuring 500 mm and 600 mm especially when all the amendments so sought by the appellant, pertaining to the supply of 500 mm and 600 mm pipes, had been accepted by the appellant.

No material was placed on the record by the appellant that due to inaction on the appellant's part the respondent did not suffer loss which had been claimed by the respondent or that the claim had not been made by the respondent as per agreed terms.

That being so, this Court finds that the impugned award to be reasonable and that it does not contravene any substantive provision of law or shocks the conscious of the Court or contravenes the terms of the agreement between the parties.

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

Dismissed.

18.02.2020 [DEEPAK SIBAL]
shamsher JUDGE

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