

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

FAO-CARB-5-2024 (O&M)

Date of decision: 23.01.2024.

OMML-SPML (JV) through Sh. Deepak Kumar Jain

...Appellant

Vs.

NHPC Limited

...Respondent

CORAM: HON'BLE MR. JUSTICE G.S.SANDHAWALIA

HON'BLE MS. JUSTICE LAPITA BANERJI

Present:- Mr. Ashok Gupta and
Mr. Eklavya Gupta, Advocates,
for the appellant(s).

LAPITA BANERJI, J.

1. In the present appeal, the appellant has prayed for setting aside of the impugned order dated December 16, 2023 passed by the learned Additional District Judge, Faridabad in *CIS No. ARB-63-2020*. The learned Additional District Judge relied on the decision reported in *2009 (5) SCC 142 Kwaliti Mfg. Corpn. Vs. Central Warehousing Corpn.* to come to the finding that the Arbitral Tribunal dated 29.02.2020 by way of majority award took a plausible view which did not merit any interference. The majority award being neither against the public policy of India nor being vitiated by patent illegality or error appearing on the face of the award, on the ground of erroneous application of law and re-appreciation of the evidence, whether oral or documentary, was the reason the award was not interfered with. The relevant portion relied on by the learned Additional

District Judge in ***Central Warehousing Corpn.*** (supra) is reproduced herein below:-

“The Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding.”

2. The learned Additional District Judge also relied on the case of ***Associate Builders Vs. Delhi Development Authority*** reported in (2015) 3 SCC 49 and ***Saanggyong Engineering and Construction Company Limited Vs. National Highways Authority of India*** reported in 2019 (15) SCC 131 to come to the finding that neither any public policy of India has been violated nor has any patent illegality been caused by the Arbitral Tribunal in terms of the Section 34 of the Arbitration and Conciliation Act, 1996. Relevant portion of ***Associate Builders*** (supra) relied upon by him is reproduced herein below:-

“41. In case ‘Associate builders Vs. Delhi Development Authority’ Civil appeal no.10531 of 2014 decided on 25.11.2014, it has been held by Hon’ble Supreme Court of India that an arbitrator is the sole judge of quantity and quality of evidence when he awarded the award. Thus, the award cannot be held invalid unless the court comes to the conclusion that the arbitrator acted arbitrary, capricious or perverse. The Court can interfere, if court comes to the conclusion that the award is against the public policy particularly when it shocked conscious of the court. In case, the Court found that the Arbitrator approach is neither arbitrary nor capricious, then no interference is called for on facts. Further, the Court is permitted to interfere only when arbitrator construes the contract in such a way that no fair minded or reasonable person can do. Further, the Court is not permitted to interfere on the ground that another view is possible, but certainly it can interfere if there is a patent illegality or perversity appear on the face of it.”

3. The relevant extract from ***Saanggyong Engineering and Construction Company Limited*** (supra) is reproduced herein below:-

“42. Similarly, in case of Saanggyong Engineering and Construction Company Limited Vs. National Highways Authority of India, 2019 (15) SCC 131, it has been held by the Hon’ble Supreme Court of India, which was held after the amendment of the Act was carried out and an additional ground of ‘patent illegality’ was incorporated in sub-section 2A of Section 34 of the Act. In that case, the observation of Hon’ble Supreme Court of India is reproduced as under:-

“36. 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 paras 18 and 27 of Associate Builders, or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders. 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, as understood in Associate Builders, and paras 28 and 29 in particular, is now done away with.

37. Insofar as domestic award made in India are concerned, an additional ground is now available under sub- section (2-A), 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 back door when it comes to setting aside an award on the ground of patent illegality.

38. 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."

4. Four issues that were agitated before the learned Additional District Judge in an application under Section 34 of the 1996 Act were as follows:-

- i) *The ground of illegal composition of arbitral.*
- ii) *The presiding arbitrator Shri Anil Razdan did not disclose his relationship with the respondent.*
- iii) *The application filed under Section 12 (5) read with Section 14 of the Act was not properly entertained by the AT.*
- iv) *The findings given on all the issues are not decided strictly in accordance with the construction of the contract and the interpretation thereof is totally biased and beyond the pleadings and evidence of parties, therefore, the majority award may be set aside.*

5. Before this Court in appeal, issue No.1 before the Arbitral Tribunal which related to the statement of claim not being verified or not being signed by the authorized representatives of the claimant was primarily agitated. It was also contended that out of 31 issues only 7 issues were considered to be preliminary issues and considered by the Arbitral Tribunal and the award was passed by the majority of two arbitrators on February 29, 2020.

6. The seven preliminary issues framed by the learned Arbitral Tribunal were as follows:-

- I) *Whether the present Statement of Claim (SOC) has been properly signed and filed by the duly authorized person on behalf of the claimant?*
- II) *Whether the claimant is entitled for such claims mentioned in SOC which have been made without following the due procedure as stipulated in terms of the contract? (OPR)*
- III) *Whether the claimant is entitled for such claims mentioned in SOC, which were never raised either before the Respondent and /or before the Adjudicating Authority in terms of the contract? (OPR)*
- IV) *Whether the claims of the claimant are barred by law of limitation? (OPR)*

- V) *Whether the claimant is stopped from claiming any amount prior to 04.10.2010 in view of the execution of the Compression Agreement dated 24.01.2011? (OPR)*
- VI) *Whether the present statement of claim instituted by M/s. Om Metals-SPML (JV) being an unregistered partnership firm with Om Metals as a lead partner is barred by the provision of Section 69(2) & (3) of the Partnership Act, 1932 from instituting any proceedings to enforce a right arising from a contract against any third party? (OPR)*
- VII) *Whether the claimant delayed the work not only on account of hindrances encountered but due to its own fault on several accounts like lack of resources, expertise/efficiency etc.? (OPR)*

7. The brief facts of the case relate to the agreement entered into between the claimant and the respondent for supply of various equipments and materials for hydro mechanical works of a Hydro Electric Project at Himachal Pradesh and also for performance of a Compression Agreement by the claimant. For performance of the said contracts, various bank guarantees/performance guarantees were given by the claimant from time to time. It was the claimant's case that due to no fault of their own because of various hindrances including '*force majeure*' the schedule of the civil works could not be adhered to by the claimant.

8. Civil disputes arose between the parties as the construction contract could not be completed within the stipulated time and with regard to extension of time for such performance. Under Clause 6 of the general conditions of contract, the disputes were referred to the adjudicator. Adjudicator decided that the delay in completion of the works was not attributable to the claimant and directed the release of bank guarantees worth Rs.3 crores in favour of the claimant which were furnished in favour

of the respondent along with payment of amount raised under the final bill by the claimant.

9. The respondent neither paid dues under the final bill nor released the bank guarantees. Thereafter, the claimant/appellant invoked the arbitration proceedings.

10. Primarily, it was argued on behalf of the appellant that issue No.1 was wrongly determined by the Arbitral Tribunal and the same was perverse and contrary to Public Policy of India. It has been held by the majority of the Arbitral Tribunal that even though non-signing of the pleadings was a curable defect, the question that was required to be examined was whether the claimant was unaware of the “*curable defect*” or did not have sufficient time to “*rectify the defect*”. The Arbitral Tribunal found from records that the claimant was fully aware from the beginning that the Statement of Claim (SOC) was not properly signed. The claimant was given numerous opportunities to rectify the “*curable defect*”. SOC was filed on July 16, 2018 whereas Statement of Defence was filed on August 30, 2018 and issue with regard to non-maintainability of the SOC was taken therein. Despite the matter being brought to the notice of the claimant, it was argued that the SOC was not required to be signed in the rejoinder filed on September 15, 2018. It was argued that the provisions of Code of Civil Procedure was not required to be complied with in arbitration proceedings.

11. The majority of the Arbitral Tribunal was of the opinion from August 2018 till February 2022 despite claimant being fully aware of the SOC not being signed and the authority of one Mr. Kothari to represent the claimant had been questioned and him being made aware on eight distinct occasions about the shortcomings in the SOC, the claimant did not take any

steps for amendment of SOC. Consequently, the “*curable defects*” remained uncured till the very end.

12. Relying on the Apex Court’s judgment in ***SREI Infrastructure Finance Ltd. Vs. Tuff Drilling***, reported in (2018) 11 SCC 470 the learned Arbitral Tribunal came to the finding that the “*curable defect*” could be rectified with due permission till such time the judgment was not pronounced.

13. The Arbitral Tribunal also relied on judgment of Apex Court in ***Uday Shankar Triyar Vs. Ram Kalewar Singh and others*** reported in 2006 (1) SCC 75 to come to the finding that the general principle of “*curable defects*” and irregularities not being allowed to defeat substantive rights or cause injustice to the parties was subject to the exception where the procedural defect was not rectified even after it was pointed out and due opportunity was granted. The claimant instead of moving an application to amend his SOC, contradicted himself in his stand regarding procedural orders of the Tribunal and adopted a pick and choose approach regarding applicability of different legislations to arbitral proceedings. Therefore, the SOC remained unsigned till the date of the judgment/award. Since the SOC was not maintainable in its entirety therefore, the Tribunal came to the conclusion that numerous reliefs sought by the claimant could not be taken up for consideration.

14. This Court finds upon perusal of the documents that the petitioner/claimant has described itself as a joint venture between Om Metals Infra Projects Ltd., a company incorporated in India and Subhash Projects & Marketing Ltd., another company incorporated in India.

15. Neither the constituent companies were before the Tribunal nor did they authorize any representative by way of Board resolution before the Arbitral Tribunal. Also, a valid authorization to said Mr. Kothari was not given by both the constituents.

16. A beneficial reference on the issue of “joint ventures” may be made to the decision in *New Horizons Limited and another Vs Union Of India and others* reported in (1995) 1 SCC 478.

17. The expression ‘joint venture’ has been succinctly described in respect of *companies* which are incorporated for carrying out such joint ventures in New Horizons Limited (supra). Relevant extract is as follows :

“24. The expression "joint venture" is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or **companies** jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject-matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses.

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25. As noticed earlier, in its tender NHL had stated that it is a joint venture **company** established by TPI, LMI and WML and IIPL wherein TPI, LMI and WML and other companies in the same group as well as Mr Aroon Purie own 60% shares and IIPL owns 40% shares. It was also stated that the joint venture has received approval of the Government of India and is currently in operation and that the promoter will increase their capital/contribution to commensurate with the project need and that the company has been established as an information and database management company with expertise in database processing, publishing, sales/marketing and the dissemination of related information. In the tender it is also stated that as a joint venture in the true sense of the phrase, the company will have access to expertise in database management, sales and publishing of its parent group companies. It would thus appear that the Indian group of companies (TPI, LMI and WML) and the Singapore-based company (IIPL) have pooled together their resources in the

*sense that TPI, LMI and WML have made available their equipment and Organisation at various places in the country while IIPL has made available its wide experience in the field as well as the expertise of its managerial staff. All the constituents of NHL have thus contributed to the resources of the Company (NHL). This shows that NHL is an association of **companies** jointly undertaking a commercial enterprise wherein they will all contribute assets and will share risks and have a community of interest. We are, therefore, of the view that NHL has been constituted as a joint venture by the group of Indian companies and IIPL, the Singapore-based company and it would not be correct to say that IIPL which has a substantial stake in the success of the venture, having 40% of shareholding, is a mere shareholder in NHL.*

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*27. The conclusion would not be different even if the matter is approached purely from the legal standpoint. It cannot be disputed that, in law, a **company is a legal entity distinct from its members.**"*

18. Such discussions were made in ***New Horizons Limited*** (supra) while consideration of the issue of lifting of corporate veil. Consequently, it becomes clear that either a corporate entity being separate legal entity has to file the proceedings or all the individual members/participants in a joint venture will have to initiate and carry the proceedings. An unregistered association of the individuals, firms and/or companies is not a legal person or juridical entity, in the eyes of law.

19. Section 69 of the Indian Partnership Act, 1932 may be referred to in this context. The same is reproduced herein below:-

"69. Effect of non-registration.—

(1)No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2)No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third

party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect,—

(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm, or

(b) the powers of an official assignee, receiver or Court under the Presidency-towns Insolvency Act, 1909 (3 of 1909) or the Provincial Insolvency Act, 1920 (5 of 1920) to realise the property of an insolvent partner.

(4) This section shall not apply,—

(a) to firms or to partners in firms which have no place of business in the territories to which this Act extends, or whose places of business in the said territories, are situated in areas to which, by notification under section 56, this Chapter does not apply, or

(b) to any suit or claim of set-off not exceeding one hundred rupees in value which, in the Presidency-towns, is not of a kind specified in section 19 of the Presidency Small Cause Courts Act, 1882 (5 of 1882), or, outside the Presidency-towns, is not of a kind specified in the Second Schedule to the Provincial Small Cause Courts Act, 1887 (9 of 1887), or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim.”

20. There is no averment in the present appeal that the said ‘joint venture’ was a registered association of firms. The petitioner was neither an individual nor a company incorporated under the Companies Act nor a registered partnership firm under the Indian Partnership Act nor the sole proprietor of a Proprietorship Concern.

21. Even assuming that the appellant was a juridical entity for the sake of arguments, still from the dissenting award passed by one of the learned Arbitrators, it becomes clear that the said Bharat Kothari claiming to be an authorized signatory of the claimant was not authorized by a Board Resolution of both the companies which purportedly entered into a joint

venture. The learned dissenting Arbitrator held that authorization through Board resolution or otherwise by the claimants were matters of indoor management and in the absence of a legal requirement or direction by the Tribunal, there was no requirement to present such authorization as a part of SOC, with which neither the Additional District Judge agreed nor this Court respectfully agrees.

22. Therefore, it becomes abundantly clear that till the end there was no authorization by either of the companies by way of Board resolution, authorizing the said Bharat Kothari to be their representative. Furthermore, this Court finds that present appeal has been filed by OMML-SPML (JV) through one Deepak Kumar Jain, authorized representative of OMML-SPML (JV) at NBCC Plaza, Tower III, 4th Floor, Sector-5 Pushp Vihar, Saket New Delhi 1110017. The appellant in the present appeal being FAO-CARB-5 is a different entity from the appellant/claimant before the learned Additional District Judge. From perusal of the documents, it appears that one Sunil Kothari reportedly authorized OMML-SPML (JV) through one Deepak Kumar Jain to continue with the legal proceedings. The said purported authorized signatory (Sunil Kothari) has not stated how and when and by which resolution, he was authorized to nominate or authorize Sh. Deepak Kumar Jain to conduct the present appeal nor any document has been produced to that effect.

23. From the said purported authorization, the names of the authorized representatives of the constituent companies do not come to the fore as none of the names of the Directors of the constituents and partners of the JV, apart from Sunil Kothari appear on the said document.

Accordingly, we are of the view that the appellant has no authority as such

to file the present appeal. The learned Arbitral Tribunal correctly came to the conclusion that the entire SOC was not maintainable as the “*curable defect*” was not cured till the end. The learned Additional District Judge also did not commit any error by refusing to interfere with the Award passed by the arbitral Tribunal. It cannot be said that the Award is against the public policy of India as the appellant sought to argue since the laws which are in force have been taken into due consideration before passing of the Award.

24. Accordingly, the present appeal being FAO-CARB-5 of 2024 along with connected applications, if any, are dismissed.

(G.S. SANDHAWALIA)
JUDGE

(LAPITA BANERJI)
JUDGE

January 23, 2024
vandana

Whether speaking/reasoned:	Yes
Whether reportable:	Yes