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

% *Date of decision 04.01.2024.*

+ O.M.P. (COMM) 6/2024, I.A. 147/2024 & I.A. 148/2024

NTPC LTD

..... Petitioner

Through: Mr.Adarsh Tripathi, Mr.Vikram
Singh Baid and Mr.Ajitesh Garg,
advts.

versus

K N INTERNATIONAL LIMITED

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

DINESH KUMAR SHARMA, J. (ORAL)

1. The present petition has been filed under Section 34 of the Arbitration and Conciliation (hereinafter "Arbitration Act") on behalf of the petitioner seeking setting aside of the Arbitral Award dated 30.08.2023 (hereinafter "the Award") passed by Ld. Sole Arbitrator.
2. The impugned award came to be passed in the context of a dispute having arisen between the parties in respect of the Purchase order dated 23.08.2016 bearing No. 4000171798-062-0125 for a total price of INR 6,41,70,700/- (Rupees Six Crores Forty One Lakhs Seventy Thousand and Seven Hundred Only), wherein the petitioner herein issued a notice



inviting tender (NIT) inviting bids for carrying out the works of ***“Filling of Low - lying areas using pond ash above 10 kms up to 20 Kms lead from ash dyke”*** and subsequently after the invitation of bids, the Respondent herein was granted the contract for carrying out the works as mentioned above vide Purchase order dated 23.08.2016 followed by a formal contract being executed between the parties on 26.10.2016. The period of completion for the project as stipulated in the contract was 12 calendar months and the date of completion was 22.08.2017. The cause of action between the parties arose when the respondent failed to complete the work within the stipulated time due to the poor mobilisation of workforce and equipment and the respondent was further irregular in complying with the statutory requirements, thereafter, the petitioner had to extend the contract to enable the petitioner to complete the work. The said project was finally completed by the Respondent on 10.10.2018 after a delay of around 13 months.

3. Pursuant to the completion of the work, the petitioner got to know that the respondent had submitted a fake and fabricated Contractor's All Risk Policy which the respondent was to submit as per the clause 3 of the SCC (Special conditions of Contract) and upon investigation by the petitioner, it came to light that the CAR Policy was not issued by the Insurance Company and therefore, the petitioner issued a show cause notice against the respondents and later the petitioner vide its Banning Order dated 17.07.2021 banned all business dealings with the for a period of 3 years. Aggrieved by the banning order, the Respondent invoked Clause 56 of the GCC vide letter dated 01.09.2021 and the arbitration proceedings



began and the arbitral award was passed by the Learned arbitral tribunal on 30.08.2023.

4. Learned counsel submits that the arbitral award dated 30.08.2023 has been challenged primarily on the following grounds:

A. the Ld. Sole Arbitrator passed the Award by erroneously holding that there has been no fraud committed by the Respondent and holding that the Banning Order is unjustified as it is not in conformity with contractual terms and existing policies and therefore has allowed the claims of the Respondent contrary to the evidence on record.

B. the Ld. Sole Arbitrator has overlooked the fact that the Banning Policy of the Petitioner allowed/authorised the Petitioner to issue a Banning Order for withdrawal of business with the Respondent based on a prima facie view taken by the Petitioner that the Respondent is guilty of an offence involving corrupt, fraudulent practices including misrepresentation of facts. The Ld. Tribunal has erroneously held that the Banning Order is unjustified even though the Policy itself authorises the Petitioner to withhold business dealing with the Respondent on taking a prima facie view that the Respondent has committed any acts which are corrupt, fraudulent or has misrepresented some information to the Petitioner.

C. the Ld. Sole Arbitrator has overlooked the bare facts which led to a conclusive prima facie view taken by the Petitioner for issuing the Banning Order. The gist of such facts, chronologically, which satisfies the issuance of the Banning Order as per the provisions of the Banning Policy are being produced herein below:

a. Learned Tribunal has ignored the Letter dated 03.02.2017 is submitted by the AR of the Respondent Mr. Rohit Singh, on the letterhead of the Respondent thereby making it an official communication from the Respondent to the Petitioner.



b. It has been submitted that The Letter dated 03.02.2017 mentions that the Respondent is attaching the scanned copy of a CAR Policy executed on 03.02.2017. Notwithstanding the error / inadvertance in the date as the Policy was actually dated 23.08.2016, it is undisputed that the content of the letter clearly reflected that the Respondent is submitting a CAR Policy for fulfillment of its contractual obligations.

c. Learned Tribunal ignored that the CAR Policy submitted with Letter dated 03.02.2017 is declared to have never been issued by the Insurance Company on whose letter head the Policy is printed. It has not been disputed by either of the parties nor held by the Ld. Sole Arbitrator that the Policy dated 23.08.2016, submitted with the letter dated 03.02.2017 is not forged, fabricated or fake.

d. The case of the Respondent, as per its letter dated 06.07.2022 issued in response to the Show Cause Notice dated 24.06.2021 is that it had never submitted the either the letter dated 03.02.2017 or the Policy attached with it. The same has been proven wrong during the proceedings where it is conclusively held that the Letter dated 03.02.2017 is issued on the letter head of the Respondent and signed by the AR of the Respondent. Therefore the only fact that remains to be verified is whether the CAR Policy was also submitted by the Respondent with the letter dated 03.02.2017.

e. That the coincidence is uncanny that the PO in dispute and the CAR Policy in dispute are both dated 23.08.2016.

f. The Respondent's Invoices were cleared on the basis of the submission of the CAR Policy by it vide letter dated 03.02.2017. That the Respondent, even if it had not submitted the CAR Policy, had clearly misrepresented facts to the Petitioner that it is submitting the same. This itself got the Invoices of the Respondent cleared.



g. The Petitioner cleared the Invoices of the Respondent on the basis of the CAR Policy submitted by it which turned out to be forged. Even if it is assumed that the forged CAR policy was not submitted by the Respondent, the misrepresentation of facts vide letter dated 03.02.2017 is also a ground for Banning of business with the Respondent.

D. the Ld. Sole Arbitrator has erroneously interpreted the provisions of the Banning Policy, reproduced above, and held that the same is inapplicable and the Banning Order is itself unjustified. The Ld. Sole Arbitrator overlooked the fact that the Banning Policy allowed the Petitioner to withhold business activities with the Respondent on a prima facie view taken by it on misrepresented facts and/or fraud/corrupt practice. The Ld. Sole Arbitrator has held that the Letter dated 03.02.2017 claiming to submit a CAR Policy has been sent by the AR of the Respondent. The CW-1 has itself admitted in that it had never submitted any Policy (Reference to Question No. 26, 27 and 28 from the Cross Examination of CW-1). The case of the Petitioner is that it was in receipt of a Policy dated 23.08.2016 which the Petitioner also sent to be checked to the issuing Insurance Company. Therefore, upon the misrepresented facts in the letter which contradicts with the statements of CW-1 and the CAR Policy in possession of the Petitioner being forged, the Petitioner formed a prima facie view and was correct in withholding the business with the Respondent. The Ld. Sole Arbitrator went into fact finding on whether or not the Banning itself was justified or not based only on the fact that the CAR Policy dated 23.08.2016 could not be proved to have been issued with the Letter dated 03.02.2017 and completely overlooking the contents of the Letter dated 03.02.2017 itself.

5. Learned counsel for the petitioner has submitted that the learned arbitral tribunal has fallen into a grave error by partially allowing only one counterclaim of the petitioner herein and further by holding that there was no fraudulent act done by the respondent herein with respect to the



CAR Policy, therefore the banning order dated 17.07.2021 passed by the petitioner should not have been passed.

6. Learned counsel for the petitioner submits that the finding of the learned arbitral tribunal is totally erroneous and is liable to be set aside. Learned counsel for the petitioner further submits that as per clause 37 of the GCC, the respondent was obligated not to subcontract any portion of the contract without the prior written approval of the petitioner. However, the respondent blatantly subcontracted the works to third parties without ever seeking approval from the petitioner.
7. Learned counsel has submitted that SOC is a gross abuse of law as the primary dispute referred by the claimant stems from the action of the claimant which is fraudulent in nature and as such does not fall within the purview of the present arbitration and is against public policy. Learned counsel for the petitioner further submitted that banning of business dealing is governed by the internal Banning policy and was done after following due procedure.
8. Learned counsel for the petitioner submits that the present case clearly indicates that there is a submission of forged and fabricated documents on behalf of the respondent through documents on records, emails on behalf of the Insurance Company and the letter of the Claimant for submission of forged CAR Policy and therefore it is clearly established that the respondent has indulged in fraudulent practices and also warrants the Banning of business dealing under the relevant provisions of the Banning policy.



9. Learned counsel for the petitioner submits that as per clause 3 of the SCC and clause 34 of the GCC particularly and specifically require the claimant to submit CAR policy for each separate work. Learned counsel for the petitioner submits that the respondent had submitted a CAR policy vide cover letter dated 03.02.2017. However, upon investigation, it was found that the respondent had submitted a fabricated and forged CAR policy dated 23.08.2016 having validity from 23.08.2016 to 22.08.2018 and furthermore, the parties consented to the provisions of the banning policy by signing the contract documents. Hence, the perusal of the award makes it clear that there is a manifest error.
10. Learned Counsel for the petitioner has also submitted that the respondents were served in advance through email. The email has not bounced back. Considering the aforementioned submissions, the respondents are deemed to be served.
11. The mandate of the legislative procedure while deciding the petition under Section 34 of the Arbitration and Conciliation Act is to provide an expeditious and binding dispute resolution process, with minimal court intervention. The proceedings under Section 34 are summary in nature. The scheme and provisions of the Act disclose two significant aspects, i.e. minimal interference by the courts and expeditious disposal of disputes. The scope of enquiry under Section 34 is restricted to a consideration of whether any of the grounds mentioned in Section 34 (2), 13 (5) or 16 (6) are made for setting aside the award. The grounds mentioned under Section 34 (2) of the Act are as follows:

2) An arbitral award may be set aside by the Court only if—



(a) 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: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or (b) the Court finds that— (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or (ii) the arbitral award is in conflict with the public policy of India.

[Explanation 1. —For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if, —

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.



Explanation 2. —For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.] [(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award: Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.]

12. The court has to see the procedural irregularities, either in the arbitral proceedings or in the award itself. The scheme of the Act makes it clear that the Arbitral Tribunal is the sole judge of the quality as the quantity of the evidence. Also, the arbitrator is always considered to be the final judge of the facts and the same cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by it. Reference can be placed upon ***Swan Gold Mining Ltd. vs. Hindustan Copper Ltd.*** (2015) 5 SCC 739.
13. The court at various instances has held that there should be a minimum intervention while deciding an application under Section 34 of the Arbitration and Conciliation Act, 1996. This view has been taken by the court in ***UHL Power Company Ltd. vs. State of Himachal Pradesh 2022 SCC OnLine SC 19*** wherein it was *inter alia* held as under:

“16. As it is, the jurisdiction conferred on Courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an Appellate Court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed. In MMTC Limited v. Vedanta Limited, the reasons



for vesting such a limited jurisdiction on the High Court in the exercise of powers under Section 34 of the Arbitration Act has been explained in the following words:

“11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the —fundamental policy of Indian law would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury [Associated Provincial Picture Houses v. Wednesbury Corpn., [1948] 1 K.B. 223 (CA)] reasonableness. Furthermore, —patent illegality itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.

14. In ***Oil and Natural Gas Corporation Ltd. vs. Saw Pipes Limited*** 2003 SCC online SC 545, it was inter alia held that the award would 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. It was further inter alia held that illegality must go to the root of the matter. If the illegality is of trivial nature it cannot be held that the award is against the public policy. The Apex Court said that the Award could also be set aside if it is so unfair and unreasonable that it



shocks the conscience of the Court and the award is opposed to public policy and is required to be adjudged void.

15. The award can be set if the same is perverse and the same may be covered under the head “patent illegality”. The expression “perverse” refers to findings which are not supported by the evidence on record, or are against the law, or suffer from the vice of procedural irregularity. The court has to see whether some relevant material has been considered or not or that some inadmissible material has been taking into consideration. An award has been defined to be perverse in *Associate Builders vs. DDA* (2015) 3 SCC 49 if (i) it contains a finding based on no evidence or an (ii) the arbitral tribunal takes into account material which is irrelevant or extraneous to the decision; or (iii) it ignores crucial evidence.
16. I do not find any perversity or procedural irregularity in the award of the learned arbitral tribunal. The court is conscious of the fact that the court cannot go into the nitty-gritties and cannot sit as a court of appeal.
17. In view of the facts and circumstances of the petition, this court is of the view that there is no illegality or violation in the collusion arrived at by the arbitral tribunal. I consider that the applicant has failed to make out any case to interfere with the order of the learned arbitrator. Thus, the present petition along with pending application is dismissed accordingly.

**DINESH KUMAR SHARMA
(JUDGE)**

JANUARY 4, 2024/rb..