(2016) 03 SHI CK 0028

In the High Court Of Himachal Pradesh

Case No : Arb. Case No. 60 of 2015

Ashok Kumar Thakur APPELLANT

Vs

The State of Himachal Pradesh and Others RESPONDENT

Date of Decision : 09-03-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 18, Section 28(1)(a), Section 28(3), Section 31(3), Section 34, Section 34(2), Section 34(2)(a)(iii), Section 43, Section 5

Citation : (2016) ILRHP 159 : (2016) 2 SimLC 640

Hon'ble Judges : Sanjay Karol, J.

Bench : Single Bench

Advocate : Sumeet Raj Sharma, Advocate, for the Appellant; R.S. Verma, Addl. Advocate General, Ram Murti Bisht and Puneet Rajta, Dy. A.Gs., for the Respondent

Final Decision : Disposed Off

Judgement

Sanjay Karol, J.—1. In this petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act"), Contractor who is the claimant, has assailed the Award dated 17.3.2015 passed by the Arbitrator-cum-Superintending Engineer, Arbitration Circle, H.P. PWD, Solan in Case No. PW-SE-ARB-34/09, arising out of works contract for "C/O road under Package No. HP-03-07 including C.D. Structure pavement side drain and parapets C/o. Sour Dain road km. 0/0 to 3/00. Agreement No. 6 of 2002-2003".

2. The Arbitrator allowed the claims of the Contractor in the following manner:-

Award in favour of the claimant/contractor:

3. It is settled proposition of law that award can be set aside only within the exceptions stipulated under Section 34, which has to be read in conjunction with Section 5 of the Act, wherein it is provided that no judicial authority shall intervene with the award, save and except as provided in Part - I of the Act, wherein Section 34 also finds place.

4. Courts cannot proceed to comparatively adjudicate merits of the decision. What is to be seen is as to whether award is in conflict with the Public Policy of India. Merits are to be looked into only under certain specified circumstances i.e. being against the Public Policy of India, which connotes public good and public interest. Award which is ex facie and patently in violation of the statutory provisions cannot be said to be in public interest.

5. In Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd. , (2003) 5 SCC 705 the Court reiterated the principle laid down in Renusagar Power Co. Ltd. vs. General Electric Co., , 1994 Supp (1) SCC 644 holding that the award can be set aside if it is contrary to: (a) the 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. However, such illegality must go to the root of the matter and if it is trivial in nature, then it cannot be said to be against public policy. Only such of those awards which, being unfair and unreasonable, shocks the conscious of the court can be interfered with.

6. The principles continued to be reiterated by the apex Court in McDermott International Inc. vs. Burn Standard Co. Ltd. , (2006) 11 SCC 181 and Centrotrade Minerals & Metals Inc. vs. Hindustan Copper Ltd. , (2006) 11 SCC 245.

7. Eventually in DDA vs. R.S. Sharma and Co. , (2008) 13 SCC 80 the Court culled out the following principles:

"21. From the above decisions, the following principles emerge:

(a) An award, which is

(i) contrary to substantive provisions of law; or

(ii) the provisions of the Arbitration and Conciliation Act, 1996; or

(iii) against the terms of the respective contract; or

(iv) patently illegal; or

(v) prejudicial to the rights of the parties;

is open to interference by the court under Section 34(2) of the Act.

(b) The 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.

(c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India."

8. Recently the apex Court in Associate Builders vs. Delhi Development Authority , (2015) 3 SCC 49 has further explained the meaning of the words "fundamental policy of Indian law"; "the interest of India"; "justice or morality"; and "patently illegal". Fundamental policy of Indian law has been held to include judicial approach, non violation of principles of natural justice and such decisions which are just, fair and reasonable. Conversely such decisions which are perverse or so irrational that no reasonable person would arrive at, are held to be unsustainable in a court of law. The court observed that:-

"29. It is clear that the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

30. The audi alteram partem principle which is undoubtedly is a fundamental juristic principle in Indian law is also contained in Sections 18 and 34(2)(a)(iii) of the Arbitration and Conciliation Act. These sections read as follows:

"18. Equal treatment of parties. - The parties shall be treated with equality and each party shall be given a full opportunity to present his case.

* * *

34. Application for setting aside arbitral award. - (1) * * *

(2) An arbitral award may be set aside by the court only if-

(a) the party making the application furnishes proof that -

* * *

(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;"

31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

(i) a finding is based on no evidence, or

(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) ignores vital evidence in arriving at its decision,

such decision would necessarily be perverse."

9. Further, in the very same decision, while relying upon Excise and Taxation

Officer-cum-Assessing Authority vs. Gopi Nath & Sons, 1992 Supp (2) SCC 312; Kuldeep Singh vs. Commr. of Police, , (1999) 2 SCC 10; and P.R. Shah, Shares & Stock Brokers (P) Ltd. vs. B.H.H. Securities (P) Ltd., , (2012) 1 SCC 594, the Court clarified the meaning of the expression ''perverse'' so as to include a situation where the Arbitrator proceeds to ignore or exclude relevant material or takes into consideration irrelevant material resulting into findings which are so outrageous, that it defies logic and suffers from the vice of irrationality. What would be "patent illegality" was clarified in the following terms:-

"42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads:

42.1. (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be a of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:

"28. Rules applicable to substance of dispute. - (1) Where the place of arbitration is situated in India-

(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"

42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality - for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.

42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

"28. Rules applicable to substance of dispute. -

(1) - (2) * * *

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

This last contravention must be understood with a caveat. 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. 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.

43. In McDermott International Inc. vs. Burn Standard Co. Ltd. , (2006) 11 SCC

181, this Court held as under:

"112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See: Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission, , (2003) 8 SCC 593 and D.D. Sharma v. Union of India, , (2004) 5 SCC 325].

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award."

44. In MSK Projects (I) (JV) Ltd. v. State of Rajasthan, , (2011) 10 SCC 573, the Court held:

"17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. [See: Gobardhan Das v. Lachhmi Ram, , AIR 1954 (SC) 689, Thawardas Pherumal v. Union of India, , AIR 1955 (SC) 468, Union of India v. Kishorilal Gupta & Bros., , AIR 1959 (SC) 1362, Alopi Parshad & Sons Ltd. v. Union of India, , AIR 1960 (SC) 588, Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji, , AIR 1965 (SC) 214 and Renusagar Power Co. Ltd. v. General Electric Co., , (1984) 4 SCC 679.]"

45. In Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, , (2012) 5 SCC 306, the Court held:

"43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in SAIL v. Gupta Brother Steel Tubes Ltd., , (2009) 10 SCC 63 and which has been referred to above. Similar view has been taken later in Sumitomo Heavy Industries Ltd. v. ONGC Ltd., , (2010) 11 SCC 296 to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.

45. This para 43 reads as follows: (Sumitomo case, , (2010) 11 SCC 296, SCC p. 313)

''43. ... The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one''s own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in Kwality Mfg. Corpn. v. Central Warehousing Corpn., , (2009) 5 SCC 142 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.''"

10. While deciding the present case, the aforesaid propositions of law are required to be considered and applied.

11. Noticeably claims No. 2 to 4 and counter claim No. 1 to 3 stand withdrawn. Only claims No. 1, 5 and 6 require adjudication by this Court.

12. It is not in dispute that vide letter dated 29.5.2002, the works in question stood awarded to the claimant for a sum of Rs. 80,03,705/-. The work could not be completed within the stipulated period of eight months. It is also not in dispute that the final bill for the work was prepared and the balance amount paid to the claimant vide cheque dated 23.3.2006. Significantly it has not come on record that such payments stood received under protest. Noticeably the claim for price escalation was raised by the claimant only after a period of three years and six months from the closure of the work; preparation of the final bill and disbursement of the amount in terms thereof. Thus the claim of the claimant has been rightly held to be barred by limitation. Sub-section (1) of Section 43 specifically makes the provisions of the Limitation Act, 1963 applicable to the arbitral proceedings.

13. Resultantly, the question of payment of interest as also cost of arbitration would not have arisen. In fact, litigation was fastened upon the State without any justifiable reason.

14. The case does not fall within any one of the exceptions provided under

Section 34 of the Act. The award passed by the Arbitrator cannot be said to be perverse, erroneous, illegal or opposed to public policy.

Hence for all the aforesaid reasons, objections preferred by the Claimant under Section 34 of the Act are dismissed. Pending applications, if any, also stand disposed of accordingly.

