

(2018) 10 SHI CK 0010

In the High Court Of Himachal Pradesh

Case No : Civil Arbitration Case No. 1 of 2018

**Himachal Pradesh Power corporation Ltd @APPELLANT@Hash M/s
ORANGE Business Service India Technology Pvt. Ltd**

Date of Decision : 08-10-2018

Acts Referred:

Citation : (2018) LatestHLJ 1324 (HP) : (2018) 3 SimLC 1428

Hon'ble Judges : Sureshwar Thakur, J

Bench : Single Bench

**Advocate : Satyen Vaidya, Vivek Sharma, Devashish Bhoruha, Aditya Singhal,
D.S. Verma**

Final Decision : Dismissed

Judgement

Sureshwar Thakur, J.

1. The instant petition, is, directed against, the, award pronounced, by, the learned Arbitrator, whereunder, he allowed the respondents's claim, comprised, in a sum of Rs. 1,00,30,984/Â, along with 10% interest accruable thereon, for, a period from three months, after, the last import of equipment in January, 2012, till, the date, the pronouncement, of, the award. The afore sums, stood, awarded towards reimbursement of, apt, custom duty, on the imported equipment/items, made by the respondent herein.
2. The learned counsel for the petitioner, has, contended with much vigor before this Court, that the impugned award, suffers from a grave fallacy, given its standing ingrained, with, a, vice of breaching, the, fundamental policy of Indian law. He submits that the fundamental policy of Indian law, upon, breach whereof, being made by the Arbitrator, hence renders, the award to falter, stands encapsulated in a judgment, rendered in case titled Associate Builders vs. Delhi Development Authority (2015)3 SCC 49, wherein,

the Honâ??ble Apex Court, has, split the aforesaid head, in, three categories (i) compliance with statute and judicial proceedings, (ii) need for judicial approach, (iii) compliance with natural justice. The relevant paragraph, occurring, at, paragraphs 17, 19, 28 and 29, therein, are, extracted hereinafter:Â?

â??17. It will be seen that none of the grounds contained in subÂ?section (2) (a) of Section 34 deal with the merits of the decision rendered by an arbitral award. It is only when we come to the award being in conflict with the public policy of India that the merits of an arbitral award are to be looked into under certain specified circumstances.

19. When it come to construing the expression â??the public policy of Indiaâ?? contained in Section 34 (2)(b) (ii) of the Arbitration Act, 1996, this Court in ONGC Ltd. v. Saw Pipes Ltd. Held : (SCC pp. 727Â? 28 & 744Â?45, paras 31 & 74)

â??31. Therefore, in our view, the phrase â??public policy of Indiaâ?? used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term â??public policyâ?? in Renusagar case it is required to be held that the award could be set aside if it is patently illegal. The result would beÂ? 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, or
- (d) in addition, if it is patently illegal. Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

In the result, it is held that:Â?

(A) (1) The court can set aside the arbitral award under Section 34 (2) of the Act if 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.

(2) The court may set aside the award:

(i) (a) if the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties,

(b) failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part I of the Act,

(ii) if the arbitral procedure was not in accordance with:

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part I of the Act.

However, exception for setting aside the award on the ground of composition of Arbitral Tribunal or illegality of arbitral procedure is that the

agreement should not be in conflict with the provisions of Part I of the Act from which parties cannot derogate.

(c) If the award passed by the Arbitral Tribunal is in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality; or

(d) if it is patently illegal.

(4) It could be challenged:

(a) as provided under Section 13 (5); and

(b) Section 16 (6) of the Act.

(B)(1) The impugned award requires to be set aside mainly on the grounds:

(i) there is specific stipulation in the agreement that the time and date of delivery of the goods was of the essence of the contract:

(ii) in case of failure to deliver the goods within the period fixed for such delivery in the schedule, ONGC was entitled to recover from the contractor

liquidated damages as agreed;

(iii) it was also explicitly understood that the agreed liquidated damages were genuine pre-estimate of damages;

(iv) on the request of the respondent to extend the time-limit for supply of goods, ONGC informed specifically that time was extended but stipulated

liquidated damages as agreed would be recovered;

(v) liquidated damages for delay in supply of goods were to be recovered by paying authorities from the bills for payment of cost of material supplied

by the contractor;

(vi) there is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in any way

unreasonable;

(vii) in certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken care of by Section 73 and 74 of the Contract

Act and in the present case by specific terms of the Contract.â??

28. In a recent judgment, ONGC Ltd. v. Western Geco International Ltd. This Court added three other distinct and fundamental juristic principles

which must be understood as a part and parcel of the fundamental policy of Indian law. The court held: (SCC pp. 278-80, paras 35 & 38-40)

â??35. What then would constitute the â??fundamental policy of Indian lawâ?? is the question. The decision in ONGC does not elaborate that

aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and

enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "fundamental policy of Indian

law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental

policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a

citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a "judicial

approach" in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority

does not have to be separately or additionally enjoined upon the for a concerned. What must be remembered is that the importance of a judicial

approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the

rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner.

Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is

not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a

court, tribunal or authority vulnerable to challenge.

38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while

determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated audi alteram

partem rule one of the facets of the principles of natural justice is that the court/ authority deciding the matter must apply its mind to the attendant

facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of

mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the

court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our

jurisprudence that it can be described as a fundamental policy of Indian law.

39. No less important is the principle now recognized as a salutary juristic

fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved

before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it,

untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the

joins in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable

from the rest.â??

29. It is clear that the juristic principle of a â?? judicial approachâ? 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.â??

A reading of the afore extracted paragraphs, as, appertaining to, the (i) necessity of compliance, by the learned Arbitrator, with, statute(s), and, judicial

precedents, (ii) unfolds qua the learned Arbitrator, being, enjoined to mete adherence, to, verdict(s), pronounced by the Honâ??ble Apex Court, and,

upon an evident breach thereof, making upsurings, his award being hence rendered amenable for interference. Furthermore, the head, appertaining

to, the, necessity of the arbitrator, maintaining a dedicated judicial approach, hence enjoins him, to, act (a) bereft of caprice, (b) bereft of arbitrariness,

rather enjoins him, to, act in a fair, reasonable and objective manner rather for ensuring that his decision is not seen, to, stand actuated by any

extraneous consideration, (c) under, the head appertaining to compliance with principle, of, natural justice, the learned Arbitrator, is, enjoined to mete

adherence, to, the principles of audiÂ? alteramÂ?partem.

3. Be that as it may, the afore extracted paragraphs, borne, in, the judgment supra, rendered, by the Honâ??ble Apex Court, and, cullings therefrom,

the, afore trite principles, would not perÂ?se hence coax this Court, to, make an inference

(i) qua the award under challenge before this Court, rather warranting interference, (ii) unless the learned counsel for the petitioner further

demonstrates, from, the material or the evidence, existing on record, qua, the arbitrator evidently not hence meteing adherence, to, the afore principles.

4. In making an endeavor, to, render, a, determination, whether, the, afore extracted principles, hence stand meted compliance by the learned

Arbitrator (i) it is deemed important to allude, to, the material existing on record, (ii) and, to the relevant apt portions, of, the contractual obligations,

cast under the relevant contract, (iii) besides to all materialsâ?? appertaining qua meteing, of, compliance or non compliance hence therewith, (iv)

wherefrom, it would be rather fathomable qua the arguments addressed before this Court, by the learned counsel for the petitioner, being merit worthy

or otherwise. The relevant clauses, of, the contract, respectively borne in 14.2, and, in 21. 4, are, extracted hereinafter:Â?

â??14.2 Notwithstanding GCC SubÂ?Clause 14.1 above, the Employer shall bear and promptly pay all customs and import duties as well as other local

taxes like e.g., a value added tax (VAT), imposed by the law of the country where the site is located on the plant specified in Price Schedule No.1 and

that are to be incorporated into the facilities.

21.4 Customs Clearance The Contractor shall, at its own expense, handle all imported materials and contractor's equipment at the point(s) of import

and shall handle any formalities for customs clearance, subject to the Employerâ??s obligations under GCC SubÂ?Clause 14.2, provided that if

applicable laws or regulations require any application or act to be made by or in the name of the Employer, the Employer shall take all necessary steps

to comply with such laws or regulations. In the event of delays in customs clearance that are not the fault of the contractor, the contractor shall be

entitled to an extension in the Time for completion, pursuant to GCC Clause 40.â??

5. A reading of clause 14.2, occurring, in the relevant contract, (i) enjoins upon the employer to bear all, the, liabilities, arising from levy of custom

duty, on, the imported equipment, (ii) also the employer is enjoined to bear all liabilities, arising, from imposition, of, local tax, including value added tax

(VAT), upon the relevant materials. Though, a, reading of the afore clause, does unveil, qua, the afore liabilities, being, enjoined to be contractually

borne, by the employer, (iii) nonetheless the afore clause, borne in 21.4, is, also to be read in conjunction with clause 14.2, and, on, a, conjoint reading

thereof, and, when a reading of the latter clause, vividly displays, qua an apt contractual obligation rather standing cast, upon, the contractor to at its

expense, rather handle all the imported equipment/items, yet, the afore initial employers' contractual obligation, is under clause 21.4,

hence, contractually made subject thereto.

6. Reiteratedly, a conjoint reading of, the, afore clause 14.2, and, of clause 21.4, (i), and, apparently with the latter clause rather carrying the coinage,

subject to the employer's obligations under GCC sub-clause 14.2, thereupon reiteratedly enjoins, a, conjoint reading of clause 14. 2, and, of

clause 21.4 (ii) besides with, the, existence, of, a further proviso, rather in clause 21.4, and, it explicitly making it incumbent upon the employer, to, in

consonance with the apt laws, and, regulations, hence make any application or to do any act, (iii) hence marshals, an, inference, qua, the liability

appertaining, to discharge, of, all custom duties, upon, the, imported equipment, though, standing initially fastened, upon, the employer, yet, the afore

initial fastening, of, all the afore liabilities, upon, the employer, rather not disobliging, the contractor, to, at its own expenses, (iv) hence handle all

relevant imported material, and, imported equipment, rather it being, contractually obliged, to handle all formalities, appertaining to custom clearance,

(v) discharge, of, contractual obligation whereof, being subject to the employers' afore initially fastened, contractual obligation, given the existence,

of, a proviso in clause 21.4, (vi) wherewithin rather a contractual obligation, stands cast, upon, the employer to within the ambit, of apt laws and

regulations, hence make an application or to do any act, (vii) whereupon the employer stands obligated, to, vis-à-vis, all expenses incurred by the

respondent, appertaining to custom clearance rather, in consonance therewith hence mete the apt compliance(s). It appears that the salutary and

holistic purpose behind, the, afore proviso, is, to ensure that in case, the employer is entitled to apt exemption(s), (vi) thereupon it, with utmost

discharge and expedition, hence obtaining the apposite exemption(s), from, the department concerned, and, to thereafter incontemporaneity with the

import, of, items and equipment(s), rather purvey it to the contractor, for hence its being facilitated, to handle all formalities, as, appertaining to

custom(s) clearance, without, it, bearing the expenses, appertaining therewith.

7. Even though, the afore contractual obligation fastened upon the contractor, respondent herein, vis-à-vis, its bearing all expenses qua handling of,

the, relevant imported equipments, and, also its being obliged, to, handle all formalities appertaining, to, customs clearance, though, stood evidently

meted compliance, by the respondent, (i) thereupon meetings, of, compliance by the contractor, vis-à-vis, the afore contractual obligation(s), when

also for all reasons-à-à afore stated, rather encumbered the employer, whereupon whom, the initial contractual obligation qua therewith, hence stood

fastened, to, in consonance with, clause 21.4, (ii) whereunder the latter was obliged, to, in consonance with, laws and regulations, hence make any

application or to do any act for the relevant purpose, to, hence mete apt compliance therewith, (iii) consequently, the respondent was entitled to insist,

upon, compliance being made by the petitioner, with, the proviso borne in clause 21.4. The compliance, as enjoined to be made, by the petitioner, with

the afore proviso, occurring in 21.4, of, the apt contract, appertains to its entitlement, vis-à-vis, exemption(s) on payment of custom duty(s), upon

imported material, for ensuring completion of the project, by the respondent herein. There is no wrangle inter-à-se the contesting litigants, qua, the apt

exemption certificate, standing not purveyed to the respondent herein, importantly incontemporaneity, to, the occurrence, of, import, of,

material/equipment(s), by the respondent herein, (i) whereupon it may hence have saved all expenses qua bearing, of, custom duties, at the point of

import, (ii) thereupon, since as aforestated, all the afore relevant expenses, appertaining to levy of custom duty, were evidently borne by the

respondent herein, (iii) thereupon the petitioner herein, to make a successful espousal, before this Court qua the afore liabilities being not amenable, for

being fastened upon it, (iv) was rather enjoined, it to adduce material and evidence hence personificatory, qua its purveying, the, afore exemption

certificate, at the apposite stage, to, the respondent herein.

8. Contrarily, certain e-mails existing at page 101, and, at page 102, reveal (i)

that the respondent, had made the requisite requisitions, upon, the petitioner herein, and, communication whereof evidently, stands, received by the petitioner herein, (ii) besides the factum qua the apt exemption certificate, standing not purveyed by the petitioner herein, vis-à-vis the custom departments, at the relevant time, is, also borne from a communication, as, occurring at page 250, of the paper book, (iii) whereunder the request addressed by the respondent herein, to, the custom department, for, hence purveying the apt refund of custom duty, vis-à-vis, it, rather sequelled, a, communication, as, occurring at page 266, of the record, from the customs department, qua, the exemption certificate being enjoined to be submitted incontinuity, of, import, of, equipment/ items, vis-à-vis, the custom department, whereupon, its, apt entitlement(s) rather would secure leverage, (iv) conspicuously, hereat, with, the apt exemption standing not purveyed incontinuity, vis-à-vis, the import, of, materials/ equipments to the respondent herein, (v) thereupon, the claim qua refunding of expenses, as, incurred by the respondent, towards custom duty, at the point of import, hence thereunder stood rather declined, by the custom department.

9. The afore discussion(s) bring to the fore, the, trite factum, (i) qua given the apt exemption certificate, standing not evidently purveyed, to the respondent herein, by the petitioner herein, conspicuously incontinuity, with, the import of goods, and, import of equipment and materials, as, made by the respondent herein, for hence executing, the project, (ii) and, when evidently the respondent herein in consonance with the contractual obligations, was enjoined to bear all expenses, in respect thereof, (iii) and, when as aforestated, in consonance with the afore apt recitals, occurring in the contract, the employer was enjoined to be fastened with the liability, to reimburse the apt expenses, vis-à-vis, the respondent herein, (i) given the initial liability appertaining therewith standing contractually fastened upon the employer, (ii) thereupon the awarding of afore sums of rupees, vis-à-vis, vis, the respondent herein, by the learned arbitrator, does not suffer from any illegality, nor it can be said that the relevant contractual proviso hence stands misappreciated (iii) besides also cannot be said, that, the relevant material has been rather misappreciated or discarded, nor it can be said, that, all the afore alluded principles of law, occurring in the afore verdict(s),

rendered by the Honâ??ble Apex Court, stand meted satiation nor hence any interference is warranted in the impugned award. Contrarily, when in a case reported in *Sutlej Construction Ltd. vs. Union Territory of Chandigarh* (2018) 1 SCC 718, and, in a case reported in *Navodaya Mass Entertainment vs. J.M. Combines* (2015) 5 SCC 698, a, view stands encapsulated qua when the afore view taken by the learned Arbitrator, is, both proper and reasonable, thereupon the view taken by the learned Arbitrator, hence enjoining meteing, of, deference thereto, (iv) whereupon also it is rather not deemed fit, for, this Court, to substitute its view, visÂ?â?? vis, the afore correct view taken by the learned Arbitrator, and, further corollary thereof, is qua, it being not deemed fit to substitute the correct view taken by the learned Arbitrator, with the view if any, of this Court.

10. In view of the above discussion, I find no merit in this petition, which is accordingly dismissed and the award of the learned Arbitrator, is maintained and affirmed. Pending application if any also stand disposed of.