

(2021) 04 J&K CK 0017

In the Jammu And Kashmir High Court

Case No : Arbitration Application No. 44 Of 2006

J&K Tourism Development Corporation And Anr

APPELLANT

Vs

Indu Dhar Aima And Others

RESPONDENT

Date of Decision : 09-04-2021

Acts Referred:

Jammu And Kashmir Arbitration And Conciliation Act, 1997 — Section 11(4), 34, 34(1)

Citation : (2021) 04 J&K CK 0017

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Advocate : M. K. Bhardwaj, B. S. Bali, U. K. Jalali, Anuj Sawhney, Poonam Koul

Final Decision : Dismissed

Judgement

1. This is an application by the petitioners filed under Section 34 of the Jammu and Kashmir Arbitration & Conciliation Act, 1997 [for short ?the Act of 1997? hereafter] for setting aside the award dated 01.09.2006 passed by Shri A. N. Saraf, retired District & Sessions Judge, sole arbitrator, awarding a sum of ₹ 13.39 lacs on account of escalation costs along with 9% per annum interest from 27.04.2002 till its realization.

2. With a view to appreciating the grounds of challenge taken by the petitioners to assail the impugned award, it is necessary to notice material background facts.

3. In the year 1991, the petitioners awarded the contract of "construction work of Tourist Bungalow Sanasar" in favour of the predecessor-in-interest of the respondents, late Shri J. N. Dhar (for short ? the contractor? hereafter) vide allotment letter dated 09.10.1991. A formal agreement bearing No. 45 dated 31.12.1991 was executed between the petitioners and the contractor, laying down terms and conditions of the contract. As per clause 6 of the terms and conditions of the contract, the time period for completion of the work was stipulated as 9 working months. While the original work in terms of the aforesaid contract agreement was under execution, the work of Phase II was also allotted

to the contractor at the cost of ₹ 29,57,695.10 NP. The 2nd phase of the work was to be executed by the contractor on the same terms and conditions on which the original contract had been allotted to him.

4. To put it in black and white, a supplementary agreement between the parties was executed on 07.07.1997 though both the works had been completed by the contractor and handed over to the petitioners on 04.02.1995. As per the Engineer in-charge, there was a delay of one year and three months in completing the works and the delay was on account of reasons beyond the control of the contractor. It is because of these recommendations of the Engineer in-charge of the work that no penalty was imposed on the contractor. There is no dispute that the contractor was paid the amount of the work for both the phases i.e. ₹ 24,57,304.90 for Phase-I and ₹ 29,57,695.10 for Phase-II i.e. total sum of ₹ 54,13,203/-. The contractor, who was supposed to complete each work within nine working months could complete it much thereafter due to stoppage of work on account of paucity of funds. He thus invoked Clause 43 of the original agreement and laid a claim of ₹ 13.39 lacs along with interest on account of escalation costs. The matter was placed before the Board of Directors in its meeting held on 24.09.1998 in the office chambers of Hon^{ble} the Chief Minister, J&K State, ex-officio Chairman, J&K Tourism Development Corporation, in which the proposal of the Managing Director for entering into negotiations with the contractor for payment of escalation costs of ₹ 13.39 lacs, claimed by the contractor, was approved and the Managing Director was directed to work out the modus operandi of release of payment and inform the Board accordingly.

5. It appears that no further progress was made in the negotiations and, accordingly, the contractor invoked Clause 53 of the contract agreement and sought appointment of Arbitrator to adjudicate the dispute arising out of the contract entered into between the petitioners and the contractor. The application was allowed and the matter was referred to the Arbitration of Shri A. N. Saraf, retired District & Sessions Judge, as sole Arbitrator. The Arbitrator entered the reference immediately on receipt of order dated 24.12.2004 passed by this Court under Section 11(4) of the Act of 1997 and the parties were directed to file their claims. On 02.07.2005, as many as five issues, enumerated at page 2 of the award, were framed and the parties were called upon to lead their evidence on affidavits. The Arbitrator, after evaluating the evidence led before him, oral as well as documentary, held the contractor entitled to recover the sum of ₹ 13.39 lacs along with interest at the rate of 9% per annum to be calculated with effect from 27.04.2002 i.e. the date of application filed before this Court for appointment of arbitrator till its realization. The Arbitrator, while returning findings on issue No.3, however, opined that no doubt the petitioners had not been able to show the period during which the work remained stopped but it was clear that the work, which was required to be completed within nine working months, actually took 40 months to complete. He, therefore, concluded that the circumstances did point out that there was delay in the execution of the work and the delay was not attributable to the contractor. The Arbitrator relied upon

the decision of the Board of Directors taken in the meeting held on 24.09.1998 and also the observations of the Engineer in-charge with regard to the reasons for delayed execution of the works.

6. The petitioners are aggrieved of the award impugned and have assailed the same primarily on the ground that it suffers from patent illegality. Mr. M. K. Bhardwaj, learned senior counsel along with Mr. B. S. Bali, would submit that the Arbitrator has reached his conclusions on the basis of presumptions and conjectures while there was absolutely no evidence to support such conclusion. He would submit that the findings of the Arbitrator and the conclusions arrived at by him suffer from grave perversity and, therefore, a ground for setting aside the award. He would further submit that the interpretation put by the learned Arbitrator on the decision of the Board of Directors, permitting negotiations with the contractor as admission of the claim of escalation of the contractor, is totally illogical and impregnate with complete perversity. He would frankly submit that other than the aforesaid ground the petitioners have not assailed the impugned award either on the ground that the Arbitrator has misconducted himself or misconducted the proceedings. He would also not find any fault with the manner and the procedure adopted by the Arbitrator during the adjudication of the dispute.

7. Learned counsel for the petitioners have relied upon the judgments of Supreme Court rendered in the cases of Tamilnadu Electricity Board v. Bridge Tunnel Constructions, AIR 1997 SC 1376 and M/s Rashtriya Chemicals & Fertilizers Limited v. M/s Chowgule Brothers and others, AIR 2010 SC 3543 to substantiate their submissions that if the award of the Arbitral Tribunal suffers from error apparent on record, it is open to challenge under Section 34 of the Act.

8. Per contra, Mr. U. K. Jalali, learned senior counsel appearing for the respondents, submits that in a reasoned award passed by the Arbitrator under the Act of 1997, it is not open to the Court to go into the merits nor it can probe the mental process of the Arbitrator and speculate as to what impelled the Arbitrator to arrive at its conclusions. It is submitted that once the award of the Arbitrator is supported by reasons, the Court, while hearing an application under Section 34 of the Act, would not go into the sufficiency or plausibility of the reasons unless such reasons are without any evidence and suffer from perversity/patent illegality. He would, therefore, submit that the Arbitrator, taking overall view of the matter, particularly the decision of the Board of Directors taken on 24.09.1998 and the observations of the Engineer in-Charge, that the delay in execution of the work was on account of paucity of funds and other reasons not attributed to the contractor, found the claim of escalation lodged by the contractor justified and accordingly passed the award. He would urge that in the absence of any challenge by the petitioners to the mode and manner in which the escalation charges have been calculated by the contractor and accepted by the Arbitrator, it does not lie in the mouth of the petitioners to now dispute the same in the instant application.

9. Having heard learned counsel for the parties and perused the record, I do not find any patent illegality or perversity in the impugned award.

10. Undoubtedly, there is some ambiguity in the claims preferred and the award passed by the learned Arbitrator and this ambiguity is with regard to the actual period for which the work must have remained stopped either on the directions of the petitioners or otherwise due to paucity of funds for the project. Undoubtedly, in terms of the original agreement executed in the year 1991 the First phase of construction of Dak Bunglow at Sanasar was allotted to the contractor to be completed within a period of nine working months. The agreement executed between the parties does not define "working months". There is also no dispute that while the first phase of work was under execution of the contractor, the petitioners allotted him second phase of the work also to be executed on the same terms and conditions. This necessarily increased the bulk of work and contributed to the delay. As is admitted by the Engineer in-Charge, the delay was for two reasons; one that there was addition of work of second phase; and, second that there was some delay due to financial crunch faced by the corporation during the year 1994-95. In view of the aforesaid observations of the Engineer In-charge of the work and his decision not to impose any penalty on the contractor, and more particularly when these observations of the Engineer In-charge were part of the record and were never refuted by the petitioners, no more evidence was required to be produced before the Arbitrator to prove that there was indeed a delay of one year and three months in completion of the work. That being the position, there should be no denying the fact that in terms of the Clause 43 of the contract agreement the contractor was entitled to escalation price to be worked out as per clause 43 itself.

11. It is also interesting to note that the claim of the contractor for ₹ 13.39 lacs towards escalation cost was never refuted by the petitioners on the ground that it had not been worked out and quantified as per the applicable formula. What was denied by the petitioners was their liability to pay the escalation price under the agreement on the ground that there was no order of stoppage of work from their side. The Arbitrator has taken into consideration all the aspects and has concluded that on account of delay not attributed to the contractor, the contractor was entitled to recover the escalation cost. This view of the Arbitrator cannot be said to be either based on no evidence or perverse.

12. The award passed by the Arbitrator under the Act of 1997 can only be set aside on the grounds mentioned in Section 34 and on no other grounds. The Court, while hearing an application under Section 34 of the Act does not sit in appeal against the Arbitral award and interfere with it on its merits. It is trite that an Arbitrator is a Judge appointed by the parties and, as such, an award passed by him is unlikely to be interfered with. Section 34 provides that an Arbitral award may be set aside by a Court on the following grounds:-

i) Incapacity of a party;

- (ii) the arbitration agreement not being valid ;
- (iii) party making the application not given proper notice of arbitral proceedings ;
- (iv) nature of dispute not falling within the terms of submission to arbitration:
- (v) arbitral procedure not being in accordance with the agreement ;

13. In addition to the aforesaid grounds Section 34 (2) (b) mentions two more grounds, which are left with the Court itself to decide. These are:

(i) dispute is not capable of settlement by arbitral process; and (ii) the award is in conflict with the public policy of India.

14. The scope of interference with the award under Section 34 of the Act is far less than it was under Section 30 or 33 of the Act of 1940. As a matter of fact, the new Act based on UNICITRAL model was brought into being with a view to curtailing judicial intervention. Apart from the grounds mentioned in Section 34 (1) of the Act, the award could also be set aside if it is contrary to the fundamental policy of Indian law or the interest of India or justice or morality or it is patently illegal. The award could also be set aside if it is unfair and unreasonable as to shock the conscience of Court as it is against public policy. [See *Venture Global Engineering v. Satyam Computers Services Limited*, (2008) 4 SCC 190]

15. The scope of public policy as a ground for setting aside the award was discussed for the first time in the case of *Renusagar Power Company Ltd. v. General Electric Co.* 1994 Supp (1) SCC 644. The Supreme Court held that this defence must be invoked only in exceptional circumstances where there is, "contravention of the fundamental policy of Indian law, public interest of India and justice and morality". The scope of expression, "the public policy" as a ground for setting aside the award was widened by the Supreme Court in the case of *Oil & Natural Gas Corpn. Ltd. Vs Western Geco International Ltd*, AIR 2015 SC 363, where the fundamental policy of Indian law was expounded to include the juristic principles of judicial approach, natural justice and the *Wednesbury's* principle of reasonableness. The *Wednesbury's* principle out rightly rejects perverse or irrational defence which cannot satisfy the test of reasonability. The scope of perversity was further extended in the case of *Associate Builders v. Delhi Development Authority*, AIR 2015 SCF 620, wherein it was held by the Supreme Court that a decision would be perverse if it is based on no evidence or evidence which is unreliable and no reasonable person would depend on it. This was the position of law with respect of perversity and patent illegality obtaining at the time when the award in the instant case was passed by the learned Arbitrator.

16. When the instant award is examined and the grounds of challenge urged by the learned counsel for the petitioners are analyzed in the light of legal position adumbrated herein above, it is difficult to say that the impugned award could be placed in the category of the awards which suffer from perversity or patent

illegality and, therefore, against the public policy of India.

17. It is true that the reasoning of the Arbitrator to support his findings, that there was delay in execution of the work not attributed to the contractor but attributable to the petitioners, is not very sound but, looking to the totality of the circumstances and un-assailed observations by the Engineer in-charge that there was delay of one year and three months in execution of the work and that the delay was due to no fault of the contractor, there was no reason or justification to deny compensation to the contractor on account of escalation in terms of Clause 43 of the agreement.

18. It is true that the decision of the Board of Directors is not very clear on the point as to whether the Board had, in principal, accepted the claim of the contractor and directed the parties to negotiate on the modes operandi of releasing the payment or the parties were relegated to negotiations even with respect to admissibility of the claim. The Arbitrator has bonafidely interpreted the decision of the Board of Directors and has come to the conclusion that the Board of Directors has, in principal, accepted the claim of escalation lodged by the contractor. I see no reason to sit in appeal over this finding of fact returned by the Arbitrator by entering into the process of reasoning of the Arbitrator, for that is not the scope of limited inquiry envisaged under Section 34 of the Act of 1997.

19. For the foregoing reasons, I find no merit in this application and the same is, accordingly, dismissed.