

(2020) 05 DEL CK 0133

In the Delhi High Court

Case No : Civil Suit (OS) No. 3299 Of 2012

M/S. Nangia Construction (I) Pvt. Ltd

APPELLANT

Vs

National Buildings Construction Corporation Ltd

RESPONDENT

Date of Decision : 28-05-2020

Acts Referred:

Arbitration Act, 1940 — Section 20, 30, 30(a), 33, 41

Citation : (2020) 05 DEL CK 0133

Hon'ble Judges : Prateek Jalan, J

Bench : Single Bench

Advocate : Raman Kapur, Aviral Tiwari, Rajinder Wali

Final Decision : Allowed

Judgement

Prateek Jalan, J

1. These proceedings have been instituted by M/s Nangia Construction India Pvt. Ltd. (hereinafter, "Nangia") under Sections 30 and 33 of the Arbitration Act, 1940 (hereinafter, "the 1940 Act") for setting aside an award dated 18.10.2012 made by a Sole Arbitrator. (Although the award placed on record bears the printed date of 19.08.2012, the arbitral record indicates that it was in fact signed and announced on 18.10.2012.

Facts

2. The arbitral proceedings arose out of an agreement dated 26.10.1987 between Nangia and National Buildings Construction Corporation Ltd. (hereinafter, "NBCC"). By an agreement dated 24.08.1987, the State of Haryana (hereinafter, "SOH") had awarded to NBCC the work of widening and strengthening of an existing national highway (NH-1). NBCC in turn awarded the work to Nangia on a back to back basis. Nangia was to receive 95% of the remuneration paid by SOH and NBCC was to retain 5% thereof. The value of the contract between NBCC and SOH was ₹ 9,43,92,969/-, and the contract between Nangia and NBCC was for ₹ 8,96,73,320/-.

3. In terms of the contract between Nangia and NBCC, 10% of the total value [₹ 89,67,332/-] was paid by NBCC to Nangia as mobilization advance, which was secured by a bank guarantee. The mobilization advance was to be recovered by NBCC in installments by deduction from Nangia's running bills. A second bank guarantee for a similar amount was also furnished by Nangia as a performance guarantee. The underlying contract between SOH and NBCC also had similar clauses.

4. Nangia claims to have spent the entire amount of the mobilization advance in execution of the contract. According to it, this fact was also acknowledged by NBCC in a communication dated 10/11.10.1988 addressed to SOH. It appears from the record that a controversy arose between NBCC and SOH as to whether NBCC was at all entitled to sub-contract the work. In any event, NBCC terminated the agreement with Nangia by letter dated 19.05.1989 and also invoked the bank guarantee towards mobilization advance as well as the performance bank guarantee submitted by Nangia. Nangia's contention is that this was a result of the dispute between SOH and NBCC, whereas NBCC asserts that delays and defaults on the part of Nangia led to the termination. As NBCC had, in the meantime, recovered a sum of ₹ 22,42,832/- against the mobilisation advance from the bills submitted by Nangia, the bank guarantee against the mobilisation advance was invoked for a balance amount of ₹ 67,25,500/-.

5. Nangia invoked Sections 20 and 41 of the 1940 Act, and applied to this Court (by way of Suit No. 1375/1989) for reference to arbitration and for an injunction against the invocation of the bank guarantees. By a judgment dated 23.04.1990 [reported in 41 (1990) DLT 359], this Court inter alia returned a prima facie finding of fraud on the part of NBCC in obtaining the bank guarantees and consequently, granted an injunction against invocation. The said judgment was challenged before the Supreme Court, but special leave to appeal was declined vide order dated 30.04.1990 in SLP (Civil) No. 4809/1990. Despite the injunction granted by this Court, Nangia was unable to keep the bank guarantees alive, as a result of which they were ultimately encashed on 17.06.2008.

6. It also appears that SOH terminated its contract with NBCC and retendered the remaining work relating to strengthening and widening of NH-1. As it happens, Nangia participated in the tender floated by SOH, and was successful. Resultantly, it entered into a contract with SOH and resumed work on the site sometime in 1993, albeit under a different contractual arrangement.

7. In the meantime, NBCC appointed one Mr. P.N. Gadi as the arbitrator to adjudicate the disputes between the parties on 21.02.1991. Mr. Gadi passed away while the arbitration remained pending and Mr. P.B. Vijay was appointed as the sole arbitrator in his place.

8. Mr. Vijay made an award on 30.10.2010 (hereinafter referred to as "the first award"). Significantly, the termination of the contract by NBCC was declared to be illegal. Under claim nos. 5A and 5B, Nangia sought refund of the amount

invoked under the bank guarantees. The arbitrator found in favour of Nangia and directed NBCC to refund the amount invoked under the two bank guarantees. NBCC's counterclaim no. 1 (for ₹ 27,23,800/- by way of interest on the unrecovered part of the mobilization advance) was consequently rejected.

9. NBCC challenged the first award before this Court in CS(OS) 1375/1989, invoking the provisions of Sections 30 and 33 of the 1940 Act. The learned Single Judge, by a judgment dated 14.03.2012, rejected the objections except in respect of two claims, which are not of relevance to the present petition.

10. The judgment of the learned Single Judge was challenged by NBCC in FAO(OS) 276/2012 restricted to the award on claim no. 5B/ counter claim no. 1 relating to refund of the mobilization advance. The Division Bench, by an order dated 08.08.2012, recorded that the issue of mobilization advance had not been considered in the first award and therefore, remanded the said claim for adjudication by a new arbitrator viz., Mr. Dinesh Dayal, a former District and Sessions Judge. During the course of proceedings in the appeal, the decretal amount was deposited by NBCC in this Court. Pursuant to the order dated 08.08.2012, the amount relating to the mobilization advance was segregated and retained in this Court while the balance amount was released to Nangia.

11. The newly appointed arbitrator made the impugned award on 18.10.2012, rejecting Nangia's claim, and directing the refund of the unrecovered amount of mobilization advance to NBCC, alongwith interest at the rate of 12% per annum from 01.08.1991 until the date of encashment of the bank guarantee. (It is common ground between the parties that the impugned award was made and pronounced on 18.10.2012. Although the printed version of the arbitral record and the last minutes recorded by the arbitrator bear different dates, this also appears consistent with the dates recorded in the earlier minutes.)

12. In the impugned award, the arbitrator has come to this conclusion in favour of NBCC upon an interpretation of the corresponding clause [Clause 60(7)] in the agreement between NBCC and the State of Haryana. The finding of the arbitrator is as follows:-

"It will be clear from this clause that mobilisation advance is in fact a loan given by the client to the contractor to mobilise resources at the time of commencement of the work. This amount of loan is recovered from the running bills of the contractor till the entire loan is paid back. In case of misappropriation the entire loan becomes recoverable at once. There are no allegations of misappropriation either by the Haryana Government against NBCC or by the NBCC against NCIPL. The loan advance was therefore to be recovered from the running bills. Since the contract could not be completed only a part of the loan advance could be recovered from the running bills. In the case of Haryana Government the unrecovered part of the loan was Rs.70,79,472/- which was awarded in favour of Haryana Government by the Committee of Arbitrators. In the case of NBCC the unrecovered portion of the loan advance was

Rs.67,25,500/- which has been recovered by the NBCC by encashing the Bank Guarantee. To that extent I find that there is no ground to allow the claim of the claimant."

13. The arbitrator has thereafter considered Nangia's submissions that the machinery purchased by it from the mobilization advance was taken over by NBCC consequent to the termination of the contract. On this issue, the arbitrator has noticed that the work was ultimately retendered by SOH and awarded to Nangia. He has relied upon an observation in the first award with relation to claim nos. 4 and 6 that Nangia would have utilized the machinery and resources purchased earlier when it resumed work under the retendered contract. Adopting the same reasoning, the impugned award rejects Nangia's claim for refund of the amount recovered by NBCC under the bank guarantee.

14. On the question of interest, the arbitrator has recorded as follows:-

"In case the contractor had carried out the entire work the Mobilisation Loan Advance would have been recovered from his bills. The stipulated date of completion of the contract was 30.04.1991. The claimant cannot be held liable for payment of any interest prior to that date as the advance amount was an interest free loan. Three months period after the date of termination of the contract has been granted to the respondents before the liability of interest starts against them.

I, therefore allow the respondent interest on the amount of Rs.67,25,500/- @ 12% per annum from 01.08.1991 till the date of encashment of the bank guarantee i.e. 17.07.2008."

Submissions

15. Mr. Raman Kapur, learned Senior Counsel for Nangia assailed the award both on the refund of the mobilization advance and on the question of interest. He submitted that the arbitrator's reliance upon the observations in the first award (to the effect that Nangia would have utilized the resources and machinery purchased by it earlier after resumption of the work) is unsupported by evidence. He pointed out that these observations in the first award were in relation to claims 4 and 6 and not in relation claim no. 5B, which was the only issue to be adjudicated pursuant to remand. In fact, in the first award claim no. 5B was allowed, which makes it clear that the reasoning employed in relation to claim nos. 4 and 6 was not applicable to claim no. 5B. Mr. Kapur further submitted that the evidence on the point is in fact contrary to the arbitrator's finding. In this connection, he referred to a letter dated 27.09.1988 addressed by Nangia to NBCC detailing the expenditure incurred against the mobilization advance, and NBCC's letter dated 10/11.10.1998 to SOH confirming the utilization of the mobilization advance. According to Mr. Kapur, many of the items mentioned therein could not have been retained and re-appropriated by Nangia four years after its contract with NBCC was terminated. Further, when the subject contract was terminated by NBCC, by a letter dated 09.06.1989, it specifically prohibited

Nangia from removing any materials and machinery and stated that the same was confiscated in anticipation of recoveries to be made from it. In view of these circumstances, Mr. Kapur submitted that the impugned award was liable to be set aside under Sections 30 and 33 of the 1940 Act.

16. Mr. Rajinder Wali, learned counsel for NBCC defended the impugned award principally by relying upon the observations made in the first award, regarding utilization of the materials and machinery by Nangia when the work was awarded to it in 1993. Mr. Wali points out that these observations in the first award pertain to claim nos. 4, 6 and 7 therein, all of which were affirmed by this Court. Mr. Wali referred to the report of a Local Commissioner dated 18.09.1989 appointed by this Court, vide order dated 31.05.1995 in Suit No. 1375/1989, wherein an inventory of the machinery available at the project site was made.

Analysis

17. The limited scope of interference with an arbitral award in a petition under Sections 30 and 33 of the 1940 Act is established by a long line of authority, right from the judgment of the Privy Council in *Champsey Bhara and Company vs. Jivraj Balloo Spinning and Weaving Company Limited* [1923] A.C. 480 to Supreme Court judgments of relatively recent vintage.

18. The following formulation laid down by the Court in *K.P. Poulouse vs. State of Kerala* (1975) 2 SCC 236 has been cited in several later decisions:

"6. Under Section 30(a) of the Arbitration Act an award can be set aside when an arbitrator has misconducted himself or the proceedings. Misconduct under Section 30(a) has not a connotation of moral lapse. It comprises legal misconduct which is complete if the arbitrator on the face of the award arrives at an inconsistent conclusion even on his own finding or arrives at a decision by ignoring very material documents which throw abundant light on the controversy to help a just and fair decision. It is in this sense that the arbitrator has misconducted the proceedings in this case. We have, therefore, no hesitation in setting aside such an award. In the result the judgment of the High Court is set aside and that of the Subordinate Judge is restored. The award of the arbitrator thus stands quashed. The arbitrator will complete the proceedings after considering all the relevant documents including Ext. P-11 and Ext. P-16 after giving opportunity to the parties. The appeal is allowed with costs."

In *Union of India vs. Jain Associates* (1994) 4 SCC 665, the Court applied this test to hold that failure to consider material documents, leading to inconsistent findings in an award, would render it vulnerable to challenge.

19. In *State of Rajasthan vs. Puri Construction Co. Ltd.* (1994) 6 SCC 485, the Supreme Court explained the position thus:

"31. ...Precisely for the aforesaid reasons, the erroneous application of law constituting the very basis of the award and improper and incorrect findings of fact, which without closer and intrinsic scrutiny, are demonstrable on the face of

the materials on record, have been held, very rightly, as legal misconduct rendering the award as invalid. It is necessary, however, to put a note of caution that in the anxiety to render justice to the party to arbitration, the court should not reappraise the evidences intrinsically with a close scrutiny for finding out that the conclusion drawn from some facts, by the arbitrator is, according to the understanding of the court, erroneous.

...Where the error of finding of facts having a bearing on the award is patent and is easily demonstrable without the necessity of carefully weighing the various possible viewpoints, the interference with award based on erroneous finding of fact is permissible. Similarly, if an award is based by applying a principle of law which is patently erroneous, and but for such erroneous application of legal principle, the award could not have been made, such award is liable to be set aside by holding that there has been a legal misconduct on the part of the arbitrator. In ultimate analysis, it is a question of delicate balancing between the permissible limit of error of law and fact and patently erroneous finding easily demonstrable from the materials on record and application of principle of law forming the basis of the award which is patently erroneous."

(Emphasis supplied.)

20. In *Arosan Enterprises Ltd. vs. Union of India* (1999) 9 SCC 449 (paragraphs 36 and 37), the Court has inter alia reiterated that, absent a finding of perversity, reappraisal of evidence is not permitted in an action for setting aside an award. The standard to determine whether a finding in an award is in fact perverse is indicated in *Sikkim Subba Associates vs. State of Sikkim* (2001) 5 SCC 629 (paragraph 14):

"14. ...If there are two equally possible or plausible views or interpretations, it was considered to be legitimate for the arbitrator to accept one or the other of the available interpretations. It would be difficult for the courts to either exhaustively define the word "misconduct" or likewise enumerate the line of cases in which alone interference either could or could not be made. Courts of law have a duty and obligation in order to maintain purity of standards and preserve full faith and credit as well as to inspire confidence in alternate dispute redressal method of arbitration, when on the face of the award it is shown to be based upon a proposition of law which is unsound or findings recorded which are absurd or so unreasonable and irrational that no reasonable or right-thinking person or authority could have reasonably come to such a conclusion on the basis of the materials on record or the governing position of law to interfere..."

A similar view is taken in *P. Radhakrishna Murthy vs. National Buildings Construction Corporation Limited* (2013) 3 SCC 747.

21. Applying these tests to the impugned award in the present case, I am of the view that the award is unsustainable. The impugned award has proceeded primarily on the basis that the mobilization advance was in the nature of a loan recoverable by NBCC, and had not been fully recovered. The reasoning to this

extent is somewhat simplistic. It does not account for the fact that premature termination of the agreement by NBCC was declared to be illegal by a competent forum. The finding that the resources mobilized by Nangia from the mobilization advance was used by it after it resumed the work (consequent upon retendering) is wholly unsupported by evidence. While re-appreciation of the evidence is not within the scope of an application for setting aside an award, the deference to be accorded to the arbitrator cannot extend to a conclusion which is based on no evidence at all.

22. The arbitrator has also misdirected himself in relying upon the first award with regard to claim nos. 4 and 6. The first award does not disclose any similar finding in respect of claim no. 5B. In fact, claim no. 5B was allowed in the first award indicating that the same reasoning did not apply to the claim. In these circumstances, the same reasoning cannot be borrowed to justify the rejection of claim no. 5B in the impugned award. The reasoning of the arbitrator in this award is, as submitted by Mr. Kapur, entirely speculative.

23. Mr. Kapur has argued, on the basis of correspondence dated 27.09.1988, 10/11.10.1988 and 09.06.1989, that the mobilisation advance was used to procure materials and machinery, several items of which could not have been available to Nangia when it resumed the work in 1993. As re-appreciation of evidence is beyond the scope of the present proceedings, I do not consider it necessary to deal with the correspondence in detail. Suffice it to say that the letter dated 09.06.1989 issued by NBCC to Nangia demonstrates a significant infirmity in the impugned award. By the said communication, NBCC while terminating the contract, prohibited Nangia from removing its material and machinery and asserted that the said material and machinery "stood confiscated" in the anticipation of recoveries to be made by NBCC from Nangia. Mr. Wali was unable to identify any material to demonstrate that the "confiscated" machinery was in fact made available to Nangia in 1993.

24. On the award of interest also, the impugned award is unsustainable. The arbitrator has granted interest at the rate of 12% per annum in favour of NBCC from 01.08.1991 (three months after the stipulated completion of the project) until 17.07.2008, when the bank guarantee was invoked. However, the amount was actually paid by the NBCC to the State [under the principal contract] only in 2001. Interest from the period 1991 to 2001 was therefore in any event unjustified.

25. For the reasons aforesaid, I am of the view that the impugned award is liable to be set aside. Unfortunately, a third round of arbitration on the subject claim is inevitable. The bank guarantee had been invoked by NBCC, and Nangia's claim on refund of the amount was allowed in the first award, but remitted for fresh arbitration by the Division Bench. The ensuing second arbitration led to the impugned award rejecting Nangia's claim, which is hereby set aside. Nangia is at liberty to reagitate its claim in fresh proceedings, which will be determined in accordance with law.

Conclusion

26. In view of the above, the petition is allowed and the impugned award dated 18.10.2012 is set aside. The registry is directed to retain the amount lying deposited pursuant to the order of the Division Bench dated 03.08.2012 in FAO(OS) 276/2012, alongwith interest accrued thereupon, which will be disbursed subject to the result of any proceedings instituted by Nangia in terms of this order. In the event Nangia does not take steps to invoke the arbitration clause afresh within the period of three months from today, the amount lying in this Court will be released to NBCC.