

(2002) 04 DEL CK 0132
In the Delhi High Court
Case No : OMP 154 of 2000

National Thermal Power Corporation	APPELLANT
Vs	
R.S. Avtar Singh and Co. and Another	RESPONDENT

Date of Decision : 30-04-2002

Acts Referred:

Arbitration Act, 1940 — Section 30, 33
Arbitration and Conciliation Act, 1996 — Section 34, 34(1), 34(2), 34(3), 75

Citation : (2002) 04 DEL CK 0132

Hon'ble Judges : Dr. M.K. Sharma, J

Bench : Single Bench

Advocate : S.K. Taneja, Puneet Taneja and Rajesh Gupta, for the Appellant;
Rajesh Lakhanpal, S.K. Maniktala and Samdarshi Sanjay, for the Respondent

Final Decision : Dismissed

Judgement

Mukundakam Sharma, J.—The petitioner herein was awarded a contract in favor of respondent No. 1 for supply, fabrication and erection of structural steel work for main power house building of the petitioner. Formal contract was executed on 6.4.1992 and the total value of the contract, as per the letter of award, was Rs. 3,53,73,500/- excluding the owner issue material, namely, steel and cement and the period of completion was 42 months from the date of the issue of the letter. While executing the aforesaid contract, disputes arose between the parties and in terms of the arbitration agreement, the same were to be resolved through the process of arbitration.

2. In terms of the arbitration agreement, each of the parties appointed one arbitrator. However, the two arbitrators could not decide upon the name of the third arbitrator. Accordingly the respondent No. 1 approached this court for appointment of an Umpire. This court dismissed the application of respondent No. 1, whereupon a SLP was preferred before the Supreme Court of India.

3. During the course of adjudication of the said case, the Supreme Court appointed Sh. S.C. Agarwal, retired Judge of the Supreme Court as the sole

arbitrator to decide the disputes. The learned arbitrator thereafter entered into the reference, received evidence adduced by the parties and passed his award, on 7.4.2000. The petitioner herein was, however, aggrieved by the award of the learned arbitrator and accordingly filed a petition u/s 34 of the Arbitration and Conciliation Act, 1996, which is placed before me for my consideration and decision.

4. It was submitted by Mr. S.K. Taneja, Senior Advocate, appearing for the petitioner that the award passed by the learned arbitrator is bad in law and is liable to be set aside. It was submitted by him that the arbitral award, awarding escalation for Rs. 1,24,52,619/- instead of Rs. 82,65,179/- is beyond the terms of the agreement. He submitted that as per the contract, particularly Clause No. 7.43 of the Special Conditions of Contract, escalation is payable on quantum of works executed in a billing period. It was also submitted that the date of payment and reconciliation is not an item of the works and that the award made on the basis of entry in reconciliation and payment schedule, and not on the basis of the works done, is illegal. It was also submitted that even in the MOM, the escalation payment was approved as per the work done. He also submitted that the learned arbitrator also went beyond the scope of the arbitration agreement while making the award. In support of the said submission, my attention was drawn towards the counter claim of Rs. 1,73,05,847/- towards recovery on account of access consumption of owner issue material, FQA charges, house rent, electricity and hire charges of equipment. It was submitted that recovery on account of the aforesaid claims, particularly on account of excess consumption of owner issue material, by the arbitral tribunal was because of wrong application of the terms of the contract agreement. It was also contended that the rate of interest awarded by the learned arbitrator is also excessive and, Therefore, the same is also required to be set aside and quashed.

5. Mr. Rajesh Lakhanpal, learned counsel appearing for the respondent however, refuted the aforesaid contention and submitted that none of the contentions raised on behalf of the petitioner, come within any of the conditions specifically mentioned in Section 34 of the Arbitration and Conciliation Act, 1996. He submitted that an award cannot be challenged by a party on the grounds, as sought to be made by the petitioner.

6. In the light of the aforesaid submissions of the learned counsel appearing for the parties, I have also considered the records of the arbitration proceedings.

7. The Arbitration and Conciliation Act, 1996 provides that an award cannot be set aside, except by means of an application filed in a court for setting aside the award on one or more of the grounds referred to in Sub-section 2 of Section 34 of the Arbitration and Conciliation Act, 1996, which shall have to be preferred within the period of limitation as specified in Sub-section 3. The use of expression "only by an application" in Sub-section 1 and Sub-section 2, makes it clear that an arbitral award could be set aside only on the specific grounds as mentioned in Sub-section 2. Sub-section 2(a) of Section 34 of the Arbitration and

Conciliation Act, 1996, mandates filing of an application whereas under Clause (b), the court may also Act suo moto if any of the clauses thereof is attracted.

8. The aforesaid provisions clearly indicate that the scope of interference with an arbitral award is much less under the Arbitration and Conciliation Act of 1996 than Sections 30 & 33 of the Arbitration Act of 1940. That seems to be in consonance with the basic scheme of the new Act as the intention is to limit the judicial interference in the arbitral proceedings.

9. Reference in this connection may be made to the decision of the Supreme Court in Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and Others, . In paragraph 17 of the said judgment, the Supreme Court has specifically observed that under the 1996 Act, the scope and extent of setting aside the award is far less than the same u/s 30 or Section 33 of the Arbitration Act of 1940. Therefore, challenge to the award by the petitioner is to be examined in the light of the aforesaid legal position.

10. In order to get the award set aside under the provisions of Section 34 of the 1996 Act, learned counsel appearing for the petitioner relied upon Clause-IV of Section 34(2)(A). The same reads as follows:-

"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"

.....

.....

11. Section 34(2)(b)(ii) also lays down one of the grounds on which an arbitral award could be set aside. It is provided, that if the court finds that the arbitral award is in conflict with the public policy of India, the same could also be set aside by the court. There is an Explanation added to the aforesaid provisions, wherein it is provided that without prejudice to the generality of Sub-clause (ii) of Clause (b), an award is in conflict with the public policy of India, if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or Section 81.

12. The word "terms of the submission to arbitration" in Section 34(2)(a)(iv) came up for interpretation before the Supreme Court in the decision of Olympus Superstructures (supra), itself and in the context thereof, it was laid down that the word "terms of the submission to arbitration" in Section 34(2)(a)(iv) refer to the terms of the arbitration clause.

13. The expression "Public Policy" is not defined either by the Arbitration Act or the Contract Act. Explanation to Clause (b) clarifies that an award obtained by fraud or corruption, would also be an award against the public policy of India.

14. In Renusagar Power Co. Ltd. Vs. General Electric Co., , the Supreme Court, in the context of enforcement of a foreign award, had occasion to consider the

aforesaid expression "Public Policy" and thereafter held that the enforcement of a foreign award should be reduced on the ground that it is contrary to public policy, if such enforcement would be contrary to (a) fundamental policy of Indian law; (b) Indian interest and (c) morality of justice. Therefore, in order to get an arbitral award set aside on the ground that it is contrary to public policy of India, some such factors must appear on the face of the records and in absence thereof no arbitral award could be set aside on the aforesaid ground.

15. In the context of the aforesaid legal position, I may now proceed to examine the submissions of the learned counsel for the petitioner, on which he seeks for setting aside the arbitral award.

16. It was submitted that the award of the escalation amount for Rs. 1,24,52,619/- instead of Rs. 82,65,179/- is beyond the terms of the agreement and Therefore, Section 34(2)(a)(iv) of the Arbitration and Conciliation Act, 1996 is attracted to the facts of the present case.

17. Three points of determination/issues were framed by the learned arbitrator, which are to the following effect:-

1. Was the amount agreed to be paid by the respondent to the claimant as per the final bill was Rs. 1,52,31,682/- as claimed by the respondent or the said amount was Rs. 1,09,22,309/-, as claimed by the petitioner?

2. Is the respondent liable to pay to the petitioner a sum of Rs. 1,73,05,817/- as per claim Nos. 1,2,3 and 4 of the counter claims?

3. What is the amount payable by way of compensation as interest on the amount i.e. found payable to the either of the parties?

18. The aforesaid submission of the learned counsel appearing for the petitioner arises out of the discussion made by the learned arbitrator in respect of Issue No. 1.

19. The learned arbitrator after considering the entire records awarded escalation. In support of the aforesaid contention, counsel appearing for the petitioner sought to rely upon the formula as re-produced in para 7,4,3 at page 127 of the agreement, wherein the element of "R" has been shown as value of work done for the billing month.

20. Counsel appearing for the respondent however, during the course of arguments, drew my attention to the fact that when the execution of work was getting delayed, the parties arrived at a conscious through the Minutes of Understanding dt. 30.11.94. In the said understanding, it was agreed that the contract price adjustment formula shall be revised after the scheduled date of completion of the contract and fixed component shall be distributed equally among other valuable indices and that a revised chart has been drawn for the work which has been executed beyond the scheduled date and the escalation shall be calculated as per the revised formula on the actual work done/payment

made month-wise.

21. The learned arbitrator considered the aforesaid modification made and it was observed by him that it was agreed that the escalation shall be calculated as per revised formula on the actual work done/payment made month-wise. Therefore, the original formula on which reliance is sought to be placed by the counsel appearing for the petitioner, was superseded and a variation was included as agreed during the minutes of understanding, which is applicable to the facts and circumstances of the present case. The contention of the counsel for the petitioner, Therefore, fails.

22. It was also submitted by the counsel appearing for the petitioner that the execution of work was completed in all respects up to stage three and so the learned arbitrator should not have allowed escalation so far payment relating to stages 4 & 5 as per Clause 48.1.0 of the agreement is concerned. The aforesaid submission relates to interpretation of Clause 48.1.0. of the agreement. It is settled law that the interpretation of the contract is a matter for the arbitrator, on which court cannot substitute its own decision. It is held in a decision of the Supreme Court in Sudershan Trading Co. v. The Govt. of Kerala reported in AIR 1989 SC 809 that if on a view taken by a contract, the decision of the arbitrator on certain amounts awarded, is a possible view though perhaps not the only correct view, the award cannot be examined by the court. Even in the decision of the Supreme Court in Indu Engineering and Textiles Ltd. Vs. Delhi Development Authority, it was held by the Supreme Court that if two views are possible, out of which one view is accepted by the arbitrator, which is plausible, the same cannot be interfered with by the court exercising jurisdiction u/s 30 & 33 of the Arbitration Act of 1940. Therefore, even under the provisions of Sections 30 & 33 of the 1940 Act, such a submission of the counsel for the petitioner could not have been accepted. In the 1996 Act, said interpretation given by the arbitrator cannot be assailed by filing a petition u/s 34 of the Arbitration and Conciliation Act, 1996, as none of the clauses empowers the court to deal with the same.

23. Even the aforesaid issue, which is sought to be raised before the learned arbitrator and the learned arbitrator has dealt with the said proposition and held that it cannot be said that without discharging those obligations, the claimant would be completing 100% of the work required to be done under the contract on completion of the work covered by Sub-clauses (i), (ii) and (iii) of Clause 48.1.10. In what view of the matter, the objection raised as against the aforesaid findings arrived at by the learned arbitrator has no merit and is rejected.

24. Now, having decided the first contention let me now proceed to decide the second limb of arguments of the counsel appearing for the petitioner. It was submitted that the recovery sought to be made by the petitioner at the rate 1.25 times, 2 times and 3 times the maximum JPC rate was wrongly disallowed by the learned arbitrator. It was submitted that the attempt for recovery at the aforesaid rate cannot be said to be penal and the same being part of the agreement, could not have been disallowed by the learned arbitrator. In support

of the aforesaid contention, counsel appearing for the petitioner sought to rely upon the decision of the Supreme Court in *Maula Bux Vs. Union of India (UOI)*, .

25. In order to appreciate the aforesaid contention of the counsel appearing for the petitioner I have examined the award passed by the learned arbitrator. A perusal of the same would also indicate that the aforesaid decision of the Supreme Court in the case of *Maula Bux (supra)* itself has held that recovery of the nature sought to be made by the petitioner was unjustified. The learned arbitrator also referred to the aforesaid decision and various other decisions and on the basis of the ratio laid down in the said decisions, arrived at the conclusions which cannot be assailed by the petitioner in the manner sought to be done in the present petition. There could be two views on certain aspects and if one of the such views is adopted by the learned arbitrator, which is also a plausible view, the same is not open to challenge neither under the Arbitration Act of 1940 nor under the Arbitration and Conciliation Act, 1996. The view taken by the learned Arbitrator must be held to be a plausible and, Therefore, the said plea also accordingly stands rejected.

26. It was also sought to be argued that recovery sought to be made by the petitioner on the basis of the rates was not penal in nature. However, the said contention cannot be said to be valid as a perusal of various clauses like 8.7.2, 8.8.3, 8.9.4 and 8.10.7. clearly indicates that the said rates are penal/deterrent as clearly stipulated in the said clauses. The learned arbitrator also upon consideration of the records has held that the said rates are in the nature of penalty for excess consumption. It was held by him that the NTPC has not adduced any evidence to prove the actual loss or damage suffered by the NTPC, as a result of excess cement. In view of the aforesaid position, no interference could be made to the arbitral award on the aforesaid ground.

27. It was also submitted by the learned counsel appearing for the petitioner that Item Nos. (x) & (xii), as shown in para 9 of the objection petition, which had been matter of claim in letter dt. 23.9.1994, was dropped by the respondent in their letter dt. 15.12.94. It was submitted by the counsel appearing for the petitioner that the said items mentioned at Sr. Nos. (x) & (xii) in para 9 of the objection petition were agreed to be dropped and not pressed in view of MOU dt. 30.11.94.

28. While refuting the aforesaid submissions, counsel appearing for the respondent submitted that, in the first instance, the petitioner cannot take up the aforesaid plea as the petitioner had not acted in pursuance to MOU dt. 30.11.94. It was also submitted by him that the aforesaid two items were not considered and also not adjudicated upon by the learned arbitrator and, Therefore, the same cannot be adjudicated by referring to the documents only. I filed strong force in the aforesaid submission of the counsel appearing for the respondent. No such plea, as sought to be raised, was ever raised before the learned arbitrator as the award does not indicate that any such plea was ever raised before him. The aforesaid contention also cannot be said to be a contention within the meaning of

Section 34(2)(a)(iv) and Section 34(2)(b)(ii) and, Therefore, the said plea stands rejected.

29. There was another objection raised by the counsel appearing for the petitioner which relates to counter claim of Rs. 6,02,017/- and Rs. 6,81,157/- on account of certain recovery. On perusal of the records, I find that the learned arbitrator has considered the facts relating to such recovery and has observed that no material was placed before him with regard to amount of credit that had to be given against the aforesaid amounts, which would show that in the first place as per the final bill, the claimant had not agreed to the figure of Rs. 6,81,157/- and Rs. 6,02,017/- on account of recoveries towards foundation and packages respectively from the counter claim because at the time when the claimant signed the final bill, the figures were Rs. 6,76,680.20 and Rs. 3,05,064.15. It was further held that in absence of any material shown, the extent to which credit has to be given for steel scrap, it is not possible to allow recovery in respect of the contracts for foundation package (iii) & (v) as per the counter claim and on that ground the said counter claim was rejected by the learned arbitrator. As the aforesaid recovery was disallowed on merits by the learned arbitrator for the reasons given, the same cannot be said to be a matter, which falls within the purview of the provisions of Section 34(2) calling for interference by this court.

30. The last submission of the counsel appearing for the petitioner was relating to the rate of interest awarded by the learned arbitrator, which is at 18% p.a. It was sought to be submitted that the learned arbitrator has awarded interest at the rate of 24% p.a., which is excessive. However, a perusal of the award would indicate that rate of interest is not 24% p.a. but the same is 15% p.a. This is a discretionary power of the learned arbitrator, which is exercised after due deliberation and giving reasons for awarding interest at that rate and I am not inclined to interfere with the aforesaid discretion exercised by the learned arbitrator and the contention is found to be without merit.

31. None of the contentions raised by the petitioner/objector makes out a case of setting aside the arbitral award on the ground that it attracts any of the conditions of Section 34(2) of the Act. Accordingly, there is no merit in the objection filed by the petitioner and the same is dismissed but on the facts and circumstances of the present case, I leave the parties to bear their own costs.