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* IN THE HIGH COURT OF DELHI

\+ **OMP 431/2005**

% Date of decision : 24.11.2005

M/s National Highway Authority of India ... ... Petitioner

through : Mr. Rajeshwar K. Gupta, Advocate

- V E R S U S -

M/s Lanco Infratech Ltd. ... ... Respondent

through : None

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

JUSTICE SANJAY KISHAN KAUL (Oral)

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1. This is a petition under Section 34 read with Section 28 (3) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act) for setting aside the arbitral award dated 20.08.2005 as modified by the order dated 03.10.2005. The

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subsequent order has been passed by the Tribunal on an application filed by the respondent under Section 33 of the said Act.

2. It was put to learned counsel for the petitioner at the inception of the hearing itself that unless the grounds fall strictly within the parameters of sub-section (2) of Section 34 of the said Act as expounded by the Apex Court in *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd., AIR 2003 SC 2629,* it is not the function of the Court to go into the matter *and* sit in appeal over the award. This was not even the scope of consideration under the Indian Arbitration Act, 1940, while considering objections under Section 30 of the said Act much less under the provisions of Section 34 of the present Act. The Apex Court had repeatedly observed while analysing the scope of consideration of objections under Section 30 of the Old Act that this Court is not to sit as a Court of appeal, not to re-appraise evidence or facts and merely because the Court would come to a different conclusion on the material available would be no ground to interfere with an award. An award, unless is absurd would not required to be interfered with. As long as the arbitrator has taken a plausible view, though

perhaps not the only correct view, an award cannot be examined by the Court. In this behalf, reference may be made to the judgment of the Apex Court in *Food Corporation of India v. Joginderpal Mohinderpal & Anr., (1989) 2 SCC 347* and *Gujarat Water Supply & Sewerage Board v. Unique Erectors (Gujarat) (P) Ltd. & Anr., AIR 1989 SC 973, Sudarsan Trading Co. Vs. The Govt. of Kerala and Another*, AIR 1989 SC 890.

3. The Act was substituted by the new Act with the object of reducing the scrutiny of the Court. However, in certain matters the Supreme Court expanded the scope of interference of the Court by the judgment in *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd(supra)* . It was held that if an award is contrary to the substantive provision of law or the provision of Act or against the terms of contract it would be patently illegal and could be interfered with under Section 34 of the said Act. It was, however, clarified that such failure of procedure should be patent affecting the rights of the parties.

4. In so far as the issue of interference under the ground of violation of public policy of India is concerned, the Apex Court observed in para 31 as under :

"31. Therefore, in our view, the phrase `public policy of India' 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 th 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 `public policy in Renusagar's case (supra) (AIR 1996 Supreme Court 860), it is required to be held that the award could be set aside if it is patently illegal. Result wold be - 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 s o 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."

5. The petition filed by the petitioner thus has to be considered within the aforesaid parameters.

6. A reading of the grounds show that most of the grounds are really in the nature of an appeal against the award of the

arbitrator. This is not permissible in so far as petition under Section 34 of the said Act is concerned.

7. Learned counsel for the petitioner, however, seeks to contend that the principal question to be examined arises from the claim of the respondent that the boulders and stones to be crushed and used could have been procured from Balason/Matigara while the respondents were compelled to procure Pakur aggregates. The amount has been awarded in terms of the extra distance as well as for the extra price. Learned counsel submits that the report of IIT was available which supported the stand of the petitioner that the material available from Balason/Matigara was not of the requisite quality. It would thus be seen that plea is purely one of only appreciation of material available and as to whether it was possible for the respondent to procure the material of requisite quality in terms of the contract from Balason/Matigara or in the absence of the same it had to procure the Pakur aggregates. There is no dispute about the quality standard which had to be met but the dispute is about the source from which the quality standards could be met.

8. The arbitrators have come to the conclusion that the

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respondent is entitled to extra amount based on the availability of requisite material at Balason/Matigara. This can hardly call for interference under Section 34 of the Act.

9. Learned counsel advanced a second plea based on Section 34(2) (a)(iv) on the modification of the award in terms of the order of the arbitrators dated 03.10.2005. In this behalf, learned counsel has submitted that the original claim being claim No.1 dealt with extra cost incurred by using Pakur aggregates while awarding the amount and calculating the same extra transportation cost was considered and Dense Bituminous Macadum (DBM) calculated was also taken into account. However, while making the award in para 4.0, the payment was directed per cubic meter of Bituminous work (DBM) and the word used BC into bracket was scored out. BC stands for `Bituminous Concrete'. Learned counsel has referred to a part of the contract dealing with specifications where clause 507.2 deal with DBM while 512 deals with BC. In terms of the order dated 03.10.2005 the plea of the respondent was considered on an application under Section 33 of the Act. The plea made is as under :

> "2.0 The claim is for bituminous works using Pakur aggregates and the award also is for bituminous

> works using Pakur aggregates. However, in Para 4.0(iii) at page 23 of the award. The word "BC" is scored out retaining "DBM" in brackets, although, the words within the brackets are prefaced with bituminous works Ld. Arbitration Tribunal therefore, are requested to remove the said scoring out in the said Para 4.0 (iii) at page 23 of the said Award, so that the award is applicable for bituminous works using Pakur aggregates, item Nos. Of BOQ indicated in the same Para 4.0 (iii) at line 3 of the said award may also be deleted for the same reason."

10. On consideration of the application, the arbitrators amended the relevant paragraphs of the final award as under :

> "(vi) For Bituminous Works (BC) additional expenditure incurred on transportation of aggregate from Pakur shall be worked out on the same principles as indicated in pages 19 and 20 of the award."

11. Learned counsel submits that this award is beyond the claims made by the claimant.

12. The arbitrators in their wisdom have considered the aspect arising from the two clauses of the agreement dealing the DBM and BC. The claim was for the consequences arising from the requirement of the respondent to procure the material only from Pakur aggregates. It is in view thereof that the arbitrators came to the conclusion that even in so far as BC is concerned, the same principle should be applied to compensate the

respondent/claimant. In my considered view, it cannot thus be said that the award is outside the contract but is actually based on appreciation of the terms and conditions in a technical award.

13. Learned counsel states that another aspect arising from the Pakur aggregates has been rejected and thus this claim could not have been awarded. This can hardly be the reason to set aside the award on the basis that some part has been awarded while some part has not been awarded.

14. Learned counsel for the petitioner lastly contends that it is only a majority award. I fail to see the basis of the submission whereby the effect of the award is reduced by reason of the fact that one of the arbitrators has given a dissenting award.

15. There is no merit in the petition.

16. Dismissed.

IA No 9450/2005

Allowed, subject to all just exceptions.

November 24, 2005 SANJAY KISHAN KAUL, J.
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