* HIGH COURT OF DELHI : NEW DELHI

FAO. No.296/2003

% Judgment reserved on: 18th November, 2009

Judgment delivered on: 29th January, 2010

M/s. Renaissance Aqua Sports P. Ltd.
Through its Director Shri Punish Khanna
A-24, Gulmohar Park
New Delhi-110 049

Also at:

M/s. Renaissance Aqua Sports P. Ltd.
Registered office at:
35/7, Shahbad Daulat Pur,
Delhi- 110034 ….Appellant

Through: Mr. Sanjay Parikh, Mr. Anish R. Shah &
Mr. Abinash K. Mishra, Advs.

Versus

1. M/s. Hotel Marina
   1407-08, Chiranjiv Tower
   Nehru Place, New Delhi-110 019
   Through its Managing Partner.

2. Shri R.K. Mehra, Sole Arbitrator
   33/78, Punjabi Bagh
   New Delhi-110 026 …. Respondents.

Through: Mr. S.K. Maniklata & Mr. Raju K, Advs.

Coram:
HON'BLE MR. JUSTICE V.B. GUPTA

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

V.B.Gupta, J.

Present appeal is against judgment dated 22nd January, 2003 passed by Additional District Judge, Delhi, vide which petition of the appellant, under Section 34 of the Arbitration and Conciliation Act, 1996 (for short as 'Act') was dismissed.

2. Brief facts are that appellant company is engaged in the business of supply, installation and commissioning of Health Club, Swimming Pools and their equipments etc. Respondent No.1, placed an order for supply and installation of certain health club equipments for their hotel at Agra. At the time of supply of first consignment the site was not ready for installation and commissioning of the equipments. The engineers and labour sent by appellant-company had to return back without doing any work.

3. On 20th April, 1999, engineers and technicians went to Agra for doing the work of installation, which was completed by appellant on 24th April, 1999. Appellant requested respondent No.1, to release the payment in respect of work done as well as the advance payment in respect of material left unsupplied, but respondent No.1 avoided the due payment to the appellant.

4. As per terms, respondent No.1 was supposed to make payment of 50% of the value as advance against bank guarantee for a period of six months, 40% at the time of delivery of goods at Agra and 10% after installation and commissioning. Respondent No.1 after release of first payment of 50% against bank guarantee for six months towards the total contract amount, did not release any payment. However, only a sum of Rs.2 lacs

was released subsequently upon great persuasion but no more payment was ever released by respondent No.1.

5. Since dispute arose between the parties, matter was referred to the Arbitrator, who passed the award dated 10th July, 2002.

6. Appellant challenged the award of the Arbitrator on various grounds namely;

(i) the award was not legal and was based upon conjunctures and surmises and was not upon the basis of submissions of the parties, documents and evidence on record;

(ii) that the arbitral award deals with the dispute that was not falling within the terms of submissions to the arbitration and the decision was on the merit beyond the scope of submissions to the arbitration;

(iii) that appellant supplied the first consignment on 3.9.1998 at the hotel site of the respondent No.1 at Agra and sent their engineers and labour and they got installed the equipment but the site was not ready for installation due to continuation of civil work at that period;

(iv) that respondent No.1 in order to mislead the arbitrator as well as the claimant's witness forged and fabricated the sheet of contract and submitted the same before Arbitrator and that point was duly brought to the knowledge of the arbitrator during arguments but arbitrator took it very lightly and had completely ignored;

(v) that arbitrator completely ignored the fact that as per the terms, respondent No.1 was supposed to pay 50% of the value of the project at the time of advance, 40% upon delivery of the goods and 10% upon installation and commissioning of the same. Since respondent had only made payment of 50% against the cost against bank guarantee at the time of advance and thereafter paid only two lacs after great persuation. It was

respondent No.1 who had violated the terms and conditions of the contract and, thus was not entitled to claim any amount;

7. In reply, respondent No.1 raised preliminary objections against the maintainability of the objections stating that the objections were not falling under any of the provisions of Section 34 of the Act and the power of the Court are limited.

8. On merit also, the facts alleged in the grounds for setting aside were disputed stating that the award cannot be set aside on these grounds as none of these grounds constituted the ground that is contemplated under the provisions of Section 34 of the Act.

9. It is contended by learned counsel for appellant that work order dated 16th June, 1998 containing the Arbitration Clause, was not only forged, fabricated and unsigned by the appellant but the same was disputed by appellant during the proceedings before the arbitrator itself. The arbitrator without allowing the parties to lead evidence on this aspect, assumed jurisdiction in the matter and passed the impugned award and thus committed grave jurisdictional error.

10. Other contention is that the arbitrator ought to have relied upon the genuine terms and conditions of the work order dated 16th June, 1998, according to which appellant was to get 40% payment of the goods supplied at Agra Hotel.

11. Another contention is that goods were supplied and were duly received, without any objection but payment was not made as per work order dated 16th June, 1998.

12. The trial court failed to see that the approach of arbitrator in appreciating the evidence was not only perverse but also against the public policy, in as much as the claims based on the forged and fabricated bills were allowed on the basis of unsustainable presumptions.

13. Lastly, it is contended by learned counsel for the appellant that trial court wrongly applied restrictive and narrow view to arbitral mis-conduct, contrary to the view of Supreme Court in ***Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705***, in which it was observed;

> "The phrase "public policy of India" is not defined under the Act. Hence, the said term is required to be given meaning in context and also considering the purpose of the section and scheme of the Act. It has been repeatedly stated by various authorities that the expression "public policy" does not admit of precise definition and may vary from generation to generation and from time to time.
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> Therefore, in a case where the validity of award is challenged, there is no necessity of giving a narrower meaning to the term "public policy of India". On the contrary, wider meaning is required to be given so that the "patently illegal award" passed by the Arbitral Tribunal could be set aside."

14. On the other hand, it is contended by learned counsel for respondent that scope of Section 34 of the Act is limited. It is not open to the Court under Section 34 of the Act, to probe the mental process of the arbitrator and speculate as to what must have impelled the arbitrator to reach a particular conclusion.

15. As a general rule, the reasonableness of the reasons given in the award cannot be challenged. The award in question was passed by the arbitrator after giving full and adequate opportunity of hearing to the parties and parties led their respective evidence in detail before the arbitrator. All the issues on the factual matrixes of the case have been gone into and adjudicated by the arbitrator and the same cannot be re-agitated/reargued by the appellant in the present proceedings.

16. Appellant after taking advance from the respondent, failed to supply the goods as per terms of the contract and also failed to execute the said contract within time and thus, appellant committed breach of the terms of the contract and no fault can be found with the reasoning given by the arbitrator.

17. In support of its contention, learned counsel for respondent cited following judgments;

(i) ***Union of India vs. Peekay Industries, 160 (2009) DLT 735;***

(ii) ***Municipal Corporation of Delhi vs. M/s. Gupta Brothers, 161 (2009) DLT 482;***

(iii) ***Bishumdeo Narain and Anr. vs. Seogeni Rai and Jagernath, 1951 SCR 548;***

(iv) ***Chagan Lal Tiwari vs. Ganga Apartments (P) Ltd. And Ors., 1999 (1) Raj 274 (Del) and;***

(v) ***Rajasthan State Mines & Minerals Ltd. vs. Eastern Engineering Enterprises and Anr., AIR 1999 SC 3627***

18. Section 34 of the Act, read as under:-

> **"34. Application for setting aside arbitral ward-**
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> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub Section (3)
>
> **(2)** An arbitral award may be set aside by the court only if-
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> (a) the party making the application furnishes proof that-
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> (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;

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being n force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation- Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that 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.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal;

Provided that if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application with a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

19. Supreme Court in ***Grid Corporation of Orissa Ltd.& Anr. V . Balasore Technical School***, JT 1999(2) SC 480 observed;

> "The award of the Arbitrator is ordinarily final and conclusive as long as the Arbitrator has acted within its authority and according to the principle of fair play. An Arbitrator's adjudication is generally considered binding between the parties for he is a Tribunal selected by the parties and the power of the court to set aside the award is restricted to cases set out in Section 30 of the Arbitration Act. It is not open to the Court to speculate where no reasons are given by the Arbitrator, as to what impelled him to arrive at his conclusion. If the dispute is within the scope of the arbitration clause it is no part of the province of the court to enter into the merits of the dispute. If the award goes beyond the reference or there is an error apparent on the face of the award it would certainly be open to the court to interfere with such an award."

20. Similarly, in ***Markfed Vanaspati and Allied Industries v. Union of India, JT 2007 (11) SC 141***, Supreme Court observed that scope of interference is extremely limited in a non speaking award. It held;

> "15. The decided cases of this Court demonstrate that this Court has consistently taken the view that scope of interference in a non-speaking award is extremely limited. The Court cannot probe into the mental process of the Arbitrator. The court should endeavour to support a non-speaking arbitration award provided it adhered to the parties agreement and was not invalidated due to Arbitrator's misconduct.
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> 16. Russell on Arbitration 19th Edition at Pages 110-111 described the entire genesis of arbitration as under;

> An Arbitrator is neither more or less than a private judge of a private court (called an arbitral tribunal) who gives a private judgment (called an award). He is a judge in that a dispute is submitted to him: he is not a mere investigator but a person before whom material is placed by the parties, being either or both of evidence and submissions: he gives a decision in accordance with his duty to hold the scales fairly between the disputants in accordance with some recognized system of law and rules of natural justice. He is private in so far as (1) he is chosen and paid by the disputants (2) he does not sit in public (3) he acts in accordance with privately chosen procedure so far as that is not repugnant to public policy (4) so far as the law allows he is set up to the exclusion of the State Courts (5) his authority and powers are only whatsoever he is given by the disputants agreement (6) the effectiveness of his powers derives wholly from the private law of contract and accordingly the nature and exercise of those powers must not be contrary to the proper law of the contract or the public policy of England bearing in mind that the paramount public policy is that freedom of contract is not lightly to be inferred with."

21. In light of above principles, it is to be seen as to whether arbitrator has acted according to the principle of fair play or award goes beyond the reference and whether he has misconducted.

22. The main grievance of the appellant is with regard to work order dated 16th June, 1998. According to appellant it was not only forged, fabricated and unsigned document but the same was disputed by appellant during proceedings before arbitrator itself. The arbitrator without allowing the parties to lead evidence on this aspect, assumed jurisdiction in the matter. A grave jurisdictional error resulting in mis-carriage of justice has been committed by not rejecting the work order dated 16th June, 1998.

23. It would be relevant to quote the finding of the arbitrator, with regard to work contract dated 16th June, 1998, which reads as under;

> "It may also be stated that the contract, dated 16.6.1998 (Ex-P/2) is an admitted document between the parties. The entire case had proceeded on the basis of the said contract filed on record by the claimant and admitted by the respondent by filing its statement of admission and denial of documents. The entire pleadings were made and the evidence was led on the basis of the said admitted document. Even the oral submissions were addressed on the same premise. However, along with its written submissions/arguments, the respondent has placed on record, as Annexure-A thereto, a copy of another contract, also dated 16.6.1998, contending that the said document was the contract between the parties. It is pertinent to note that the claim statement was filed way back in the month of March 2000 and along with it, a copy of the said contract dated 16.6.1998 (Ex-P/2) was placed on record by the claimant. The respondent all along had notice and knowledge of the said document. If at all, there was any other document, it was incumbent upon the respondent to place the same on record at the first opportunity. Filing of the same, as "Annexure" to the written submissions, and that too without leading any evidence in respect thereof or even seeking leave to place on record such a document or lead evidence thereto, in my considered view is wholly inappropriate and impermissible. As such, the said documents cannot be looked into. It would, however, not be out of context to state here that I have compared the two documents and the only difference between two contract documents is with regard to the Terms of Payment inasmuch as in the contract (Ex-P/2), it is stated in terms of amounts that "Rs.5,85,060/- to be paid on delivery of goods at Agra" and "Rs.1,46,265/- to be paid after installation and commissioning". On the other hand, in the contract document filed by the respondent along with its written submissions (as Annexure-A thereto), it is stated "40% on receipt of material at Agra" and "Balance 10% after installation and commissioning". A perusal and comparison of the said clauses would show that when the total contract value is not disputed, the amount computed at 40% and 10% works out to the same figures as given in Ex-P/2. Consequently, there is no great deal of difference between the said two documents.

24. In view of the findings given by Tribunal that work order dated 16th June, 1998 is an admitted document between the parties, all contentions raised by learned counsel for the appellant thus fall to the ground. Under these circumstances, there is no material to hold that the arbitrator did not act according to principles of fair play or award goes beyond reference or the arbitrator has mis-conducted himself.

25. There is no reason to disagree with the findings given by trial court. The present appeal, under these circumstances is not maintainable and same is hereby dismissed with costs of Rs.10,000/-.

26. Appellant is directed to deposit the costs with Registrar General of this Court within one month from today, failing which Registrar General shall recover the same in accordance with law.

27. Award amount lying deposited in the fixed deposit in terms of order dated 16th January, 2004, be paid to respondent No.1, only after expiry of the period of appeal.

28. Trial court record be sent back.

29. List for compliance on 4th March, 2010.

29th January, 2010 V.B.GUPTA, J.
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