

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ FAO(OS) No. 354/2008

National Projects Construction Corporation LimitedAppellant through Mr. S.K. Taneja, Sr. Adv. with Mr. Santosh Kumar & Mr. Azgar Ali, Advs.
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versus

NEC Engineering Pvt. Ltd.Respondent through Mr. Ravi Sikri & Mr. Saket Sikri, Advs.
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% Date of Hearing: January 28, 2010

Date of Decision: February 26, 2010

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE MANMOHAN SINGH

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| 1. Whether reporters of local papers may be allowed to see the Judgment? | No |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the Judgment should be reported in the Digest? | Yes |

VIKRAMAJIT SEN, J.

1. The facts, as they emerge before us, are that the NPCC (hereinafter referred as the 'Appellant') had entered into a contract with NEC Engineering Pvt. Ltd. (hereinafter referred to as the 'Respondent'). The Agreement dated 12.5.1988 contained the following Arbitration Clause:

51.0

Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim right matter or things, or as to any other question, claim right matter or things, whatsoever, in any way arising out or relating to the contract, designs, drawing, specifications, estimates, instructions, order or these conditions or otherwise concerning instructions, order or these conditions or otherwise concerning instructions, order or these conditions or otherwise concerning the works, or the execution or failure to execute the same. Whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole Arbitration of the persons appointed by CMD of the National Project Construction Corporation Ltd. acting as such, at the time of dispute. It will be no objections to any such appointment that the Arbitrator so appointed is a Corporation Officer that he had to deal with the matters to which the contract relates and that in the course of his duties as Corporation Officer he had expressed views on all or any of the matters of dispute or difference.

The Arbitrator to whom the matter is originally referred being transferred or vacating his office or

being unable to act for any reason, the Chairman and Managing Director as aforesaid at the time of such transfer, vacation of office or inability to act, shall appoint another person to act Arbitrator in accordance with the terms of the contract. Such person shall be entitled to proceed with reference from the state at which it has left by his predecessor. It is also a term of this contract that no person other than a person appointed by the CMD as aforesaid should act as Arbitrator may from time to time with the consent of the parties, enlarge the time, for making and publishing the award.

Subject as aforesaid the provisions of the Arbitration Act, or any statutory modification or re-enactment thereof and the rules made thereunder and from the time being in force shall apply to the Arbitration proceedings under the clause.

The court at New Delhi shall have the exclusive jurisdiction in the matter of dispute and any other case relating to this agreement.

2. The disputes arose between the parties in January, 1989. In January, 1991, the Appellant wrote to the Respondent suggesting the names of the two persons, namely, Shri T.S. Murthy and Shri C.R. Chopra, out of which one person was to be chosen as an Expert. On 13.2.1991, the Respondent agreed to the appointment of one of the persons as an Expert for the purpose of giving his opinion on the

aspect of escalation. Later on, the Respondent agreed to the appointment as an Expert of either of the persons mentioned by the Appellant. It appears that Shri Chopra was appointed as an Expert but thereupon he styled himself as the Arbitrator and assumed attendant authority. The Appellant objected to this conduct. Nevertheless, Shri Chopra commenced "arbitration proceedings" which prompted the Appellant to file OMP No.50/1992 in this Court, invoking Section 33 of the Arbitration Act, 1940 (for short 'the Act'). On 19.5.1992, Shri Chopra was prohibited by the Court from announcing any Award till the next date of hearing, which was fixed for 7.7.1992. These Orders had undisputedly been brought to the notice of Shri Chopra in terms of the letter of the Appellant dated 29.6.1992, despite which he published his "Award" on 6.7.1992. Shri Chopra granted Rupees 2,44,73,000/- together with interest quantified at Rupees 25,69,000/- in favour of the Respondent and against the Appellant. We are not surprised with this Award since Shri Chopra had usurped the powers of an Arbitrator in a scenario where the parties were considering his candidature only as an Expert to calculate the escalation; and in the face of the opposition of the Appellant to his exercising the powers of an

Arbitrator. Shri Chopra has also endeavoured to nullify the Orders of this Court, hence making him unsuitable for any further assignments as Arbitrator and/or Expert. The Respondent filed this Award before this Court under Sections 14 and 17 of the Act which was numbered as CS(OS) No.3113/1992. The Appellant filed his Objections (IA No.14140/1992) on 26.11.1992 assailing the Award, not only on the ground that Shri Chopra had no jurisdiction to act as the Arbitrator, but also on the merits of the Award.

3. On 22.6.1992, the Chairman and Managing Director of the Appellant appointed Shri Dharni Dhar as the Arbitrator. A copy of this Order was dispatched to the Respondent. The Respondent, however, did not participate in the arbitration proceedings conducted by Shri Dharni Dhar, who eventually published his Award on 17.10.1992, whereby a sum of Rupees 1,80,62,200/- was adjudicated by him in favour of the Appellant (NPCC) and against the Respondent. Since this Award was forwarded by the Arbitrator to this Court, it was numbered as CS(OS) No.4547/1992. This time around, as is to be expected, it was the Respondent who filed Objections (IA No.2680/1997) under Sections 30 and 33 of the Act in these proceedings, assailing the authority of Shri Dharni

Dhar, as well as the legal propriety of the said Award on its merits. All three proceedings, that is, OMP No.50/1992, CS(OS) No.3113/1992 and CS(OS) No.4547/1992), along with the applications filed therein, were set down for hearing together.

4. All the Suits/Petition were taken up for consideration by the learned Single Judge on 2.5.2005. The Suits, as well as the applications filed therein, were disposed of and the Petition was dismissed. The Order passed by the learned Single Judge on that date is reproduced:-

IA 3421/2005 in CS(OS) 3113/1992

This application has been filed by the counsel for defendant seeking discharge. It is between the counsel and his client and as far as this court is concerned it has no objection in the counsel being discharged from the matter. Vakalatnama in favour of the counsel for the respondent is discharged.

IA stands disposed of.

IA 14140/1992

These are objections filed by the respondent to the award dated 6.7.1992 passed by Shri C.R.Chopra. Since the respondent is not taking any steps to press the objection and counsel has sought discharge, objections stands dismissed.

CS(OS) 3113/1992

No application was filed by the defendant/respondent and accordingly registry did not list the matter in court. Matter has been listed in court today by the registry notifying by publishing in the advance cause list, the counsel for the parties on 25.4.2005 that the matter would be placed in court today.

Since IA 14140/92, being objections to the award have been dismissed for non-prosecution, award dated 6.7.1992 published by Shri C.R.Chopra is made a rule of the court. Principal sum adjudged under the award shall carry interest @ 12% p.a. from date of decree till date of realization.

IA 3405/2005 in CS(OS) 4547/1992

This application has been filed by the counsel for defendant seeking discharge. It is between the counsel and his client and as far as this court is concerned it has no objection in the counsel being discharged from the matter. Vakalatnama in favour of the counsel for the respondent is discharged.

IA stands disposed of.

IA 2680/1997

These are objections filed by the respondent to the award dated 17.10.1992 passed by Shri Dharni Dhar. On 22.4.2003 counsel for the respondent sought discharge and matter was adjourned sine die to be listed as and when such application was filed.

I am little surprised at the conduct of the petitioner for the reason, if counsel for the non-objector was not receiving instructions, counsel for the petitioner

which had filed objections to the award should have pressed its objections.

Since the petitioner is not taking any steps to press the objections, objections are dismissed.

CS(OS) 4547/1992

No application was filed by the defendant/respondent and accordingly registry did not list the matter in court. Matter has been listed in court today by the registry notifying by publishing in the advance cause list, the counsel for the parties on 25.4.2005 that the matter would be placed in court today.

Since IA 2680/97, being objections to the award have been dismissed for non-prosecution, award dated 17.10.1992 published by Shri Dharni Dhar is made a rule of the court. Principal sum adjudged under the award shall carry interest @ 12% p.a. from date of decree till date of realization.

Present : Mr. Rajive Vikram Nath, Adv. for the
Petitioner

IA No.3406/2005 in OMP No.50/1992

No application was filed and accordingly registry notified on 25.4.2005 that matter would be listed in court today. In the meanwhile, IA No.3406/2005 has been filed after 25.4.2005. Prayer made is to discharge the counsel for the petitioner. Prayer is allowed. Vakalatnama in favour of the counsel for the petitioner is discharged.

OMP No.50/1992

Dismissed for non-prosecution.

5. NPCC moved an application for restoration of OMP No.50/1992 in which it had questioned the status of Shri C.R. Chopra as Arbitrator and in which proceedings this Court had restrained Shri Chopra from pronouncing the Award but undeterred, he published his Award one day prior to the Court hearing. The Appellant also prayed for the restoration of the Objections filed by it in CS(OS) No.3113/1992 in which the Award of Shri C.R. Chopra had been received in this Court.

6. It will be recalled that Shri Dharni Dhar had published his Award on 17.10.1992 and since it was forwarded to this Court, it was numbered as CS(OS) No.4547/1992. The Respondent had filed Objections to this Award but, by oversight or otherwise, neglected to take any action for restoration of its Objections filed therein.

7. The learned Single Judge framed the following two questions for determination by him:-

- (1) The validity of arbitration proceedings conducted by Shri Chopra as well as Shri Dharni Dhar.
- (2) The effect of dismissal of IA No.2680/1997 moved by the Respondent to the Award made by Shri Dharnidhar and the consequence of the

application not being restored on the file of the Court.

8. On the first question, the learned Single Judge has held that Shri Chopra had not been chosen as an Arbitrator in accordance with Arbitration Clause. The Award pronounced by him was accordingly set aside. In other words, the Objections filed by the Appellant, which had earlier been dismissed in default and were subsequently restored, came to be allowed/sustained. That put an end to the proceedings in CS(OS) No.3113/1992. Since the Respondent has not filed an Appeal against this part of the Order, it attains finality. Even otherwise, we affirm the Order of the learned Single Judge since, at the highest, Shri Chopra had been considered as an Expert and not as an Arbitrator. An arbitrator could have been appointed only in conformity with the Arbitration Clause reproduced above.

9. As has already been mentioned above, all three actions had been dismissed by the learned Single Judge on 2.5.2005. The Appellant had succeeded in the restoration of OMP No.50/1992 in which it had prayed for and had received appropriate orders staying the proceedings conducted by Shri Chopra in which he had styled himself as the Arbitrator. With

the setting aside of the Award of Shri Chopra by the dismissal of CS(OS) No.3113/1992, these proceedings had been rendered infructuous.

10. The only remaining *lis* was CS(OS) No.4547/1992 which contained the Award passed by Shri Dharni Dhar as Arbitrator. As is to be expected, the Respondent had filed Objections in those proceedings in which the Court would either allow or reject the prayer for the Award being made the Rule of the Court. The Objections filed by the Respondent had been dismissed in default on 2.5.2005 and unlike the action of the Appellant, the Respondent had taken no steps for revival of the Objections. What should not be lost sight of is that in the absence of any application seeking revival, the matter stood closed with the decision in those proceedings passed on 2.5.2005. With respect to the learned Single Judge, who passed the impugned Order, this is exactly what has occurred on the part of the Court. The previous learned Single Judge had noted that the Respondent's Objections to the Award dated 17.10.1992 published by Shri Dharni Dhar had been dismissed for non-prosecution. There is also no scope for doubt that without any further discussion or consideration, the previous learned Single Judge had

proceeded to make the Award published by Shri Dharni Dhar as the Rule of the Court. The previous learned Single Judge had ordered that the Award shall carry interest at the rate of ten per cent per annum from the date of the Decree till the date of realisation. The correctness of this Order could have been considered only by traversing the avenue of an Appeal or a Review filed by the Respondent. This Award is in favour of the Appellant. Nevertheless, the second learned Single Judge has entered upon the legal propriety of the Award passed by Shri Dharni Dhar. The mere fact that the impugned Order was passed in "Open Court" does not lead to the inference that it had the consent of all the parties. In fairness to learned counsel for the Respondent, this argument had not been pressed.

11. The impugned Order has the effect of reversing the Order previously passed by the learned Single Judge. Since neither an Appeal nor a Review had been filed, we had wondered which jurisdiction could have been invoked by the Court to carry-out this change.

12. It seems that the only possibility was the existence of *suo moto* powers of the Court to review an order. This is also the logic contained in *M.M. Thomas -vs- State of Kerala*,

(2000) 1 SCC 666 which has been relied upon before us by learned counsel for the Respondent. After referring to Article 215 of the Constitution of India, the Bench emphasized that the High Court, being a Court of Record, must always possess the inherent powers to correct its records. “A court of record envelopes all such powers whose acts and proceedings are to be enrolled in a perpetual memorial and testimony. A court of record is undoubtedly a superior court which is itself competent to determine the scope of its jurisdiction. The High Court, as a court of record, has a duty to itself to keep all its records correctly and in accordance with law. Hence, if any apparent error is noticed by the High Court in respect of any orders passed by it the High Court has not only power, but a duty to correct it. The High Court’s power in that regard is plenary”. Mr. S.K. Taneja, learned Senior Counsel appearing for the Appellant, has firstly drawn our attention to *State of West Bengal –vs- Kamal Sengupta*, (2008) 8 SCC 612 where their Lordships have enunciated the law to the effect that administrative, as well as other tribunals, possesses the power to review their orders. It was, however, emphasized by the Supreme Court that the power of review does not enable the court/tribunal concerned to sit in an appeal over its own

judgment. In response to the contention raised on behalf of the Respondent that the setting aside of the Order of the first learned Single Judge was on a concession, reliance has been placed by learned Senior Counsel for the Appellant on *Central Council for Research in Ayurveda & Siddha –vs- Dr. K. Santhakumari*, (2001) 5 SCC 60 and *Union of India –vs- Mohanlal Likumal Punjabi*, (2004) 3 SCC 628. Both these Judgments clarify that an incorrect, wrong or unsound concession cannot bind any party. So far as this aspect of the case is concerned, we do not think it proper to even entertain the submission of learned counsel for the Respondent that the impugned Order was passed on the concession of the Appellant before us since this is not borne out from the Order itself.

13. A perusal of the impugned Order does not lead us to the conclusion that the second learned Single Judge was exercising the powers of *suo moto* Review. On the contrary, it appears to us that inadvertently the existence of the prior Order had escaped the attention of the Court. There is no discussion pertaining to the existence of an error apparent on the face of the record. Extant practice, dictated by judicial comity, prescribes that in such circumstances it is the Judge

who passed the Order requiring Review before whom the matter should be placed. Otherwise, it would lead to judicial anarchy. So far as the party adversely affected is concerned, it is not without remedy. It could have filed a Review. It could have equally filed an Appeal. It chose to do neither. We conclude that the second learned Single Judge was not exercising *suo moto* powers.

14. In these circumstances, we arrive at the conclusion that the Appeal is meritorious. The impugned Order dated 8.5.2008 passed by the learned Single Judge inasmuch as it has the effect of reversing the previous Order also passed by the learned Single Judge in CS(OS) No.3113/1992 requires to be set aside. This impasse has occurred because whilst the Appellant had initiated action for the restoration/revival of the applications filed by it, the Respondent has failed to take similar action in seeking restoration of its Objections filed in CS(OS) No.3113/1992. It is accordingly clarified that the Order dated 8.5.2008 is set aside and the Order dated 2.5.2005, making the subject Award the Rule of the Court along with interest thereon, is restored. The consequence is that the Award published by Shri C.R. Chopra remains a

nullity, whereas the Award published by Shri Dharni Dhar is made the Rule of the Court.

15. Appeal is allowed.

16. Trial Court records be sent back.

(VIKRAMAJIT SEN)
JUDGE

February 26, 2010
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(MANMOHAN SINGH)
JUDGE