* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Pronounced on: June 11, 2014*

\+ **O.M.P. No.105/2011**

UNION OF INDIA ..... Petitioner
Through Ms.Geetanjali Mohan, Adv.

versus

M/S TRACK INNOVATIONS (INDIA) PVT LTD ..... Respondent
Through Mr.B.T.Singh, Adv.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The present objections are filed under Section 34 of the Arbitration and Conciliation Act, 1996 (in short, called the "Act") against the Award dated 12th October, 2010 passed by the learned sole Arbitrator Ms.Sharda Aggarwal (a retired Judge of this Court).

2. Brief facts are that the respondent-firm is a Mono Block concrete sleeper manufacturer and supplies Mono Block sleeper to Railways. The General Manager, Northern Railway through Chief Engineer/TSP, Northern Railway entered into an agreement with the respondent firm vide agreement No.187-S/875/TSO/TRACK-INNOV/ REPEAT ORDER dated 8th October, 1997 for the supply of 3,75,000 Mono Block concrete PRC sleepers.

3. Clause 1.12 of the contract agreement stipulated that in case any open tender is invited for manufacture and supply of PRC

sleeper on Northern Railway in future during the currency of the repeat order and low rates are accepted against the new tender, then in that case lower rates would be applicable in the present repeat order from the date of acceptance of such lower rates.

4. It is the case of the petitioner that during the currency of the repeat order Railway Administration floated a fresh open tender being tender NO.CS-120/97 and finalized a rate of Rs.570/- per sleeper. In the new tender No.CS-120/97 the cost per sleeper was fixed at Rs.570/- per sleeper including the cost of HTS wire, whereas in the repeat order HTS wire was being supplied free of cost, thus after deducting the cost of HTS wire the payable amount came to Rs.344.20/- per sleeper, whereas under the repeat order the rate of sleeper was Rs.369.48. The petitioner after applying clause 1.12 of the contract agreement finalized the rate at Rs.344.20/- per sleeper and therefore, applied the lower rate of 344.20 from 8th November, 1997 i.e. the date on which rates got firmed up.

5. The disputes having arisen. The respondent invoked the arbitration. As per arbitration clause of the contract agreement, the General Manager, Northern Railway appointed Mr.Ved Prakash the then Chief Track Engineer, Northern Railway as the sole Arbitrator.

6. The matter was referred to arbitration and consequent thereto an Award dated 5th June, 2000 was passed by Mr.Ved Prakash, sole Arbitrator. The learned Arbitrator came to the conclusion that the date of applicability of the new rates, which were lower, could have been applied only from 11th February, 1998 and not 8th November, 1997. It was concluded by the learned Arbitrator that new lower rates could

be applied for supplies made under the earlier contract only from the date of acceptance of such rates by the tenderer (respondent) and such date of acceptance was decided to be 11th February, 1998 by the learned Arbitrator. On such basis, an award dated 5th June, 2000 was passed in the first instance.

7. The sole Arbitrator, who published his Award on 5th June, 2000, awarding Rs.20,22,733.02 as against claim Nos.1 to 3 and Rs.4,45,001.26 against Claim No.4. The total awarded amount of (Rs.20,22,733.02 + Rs.4,45,001.26) Rs.24,67,734.28 was made payable within 60 days from the date of the award, failing which it was to carry simple interest @ 12% p.a.

The Award made by learned sole Arbitrator Mr.Ved Prakash was dully accepted by the railway administration and the amount of Rs.20,22,733.02/- as awarded by the learned sole Arbitrator Mr.Ved Prakash was duly paid.

8. The award dated 5th June, 2000 passed by Mr.Ved Prakash sole Arbitrator was challenged by the respondent by filing the objections under Section 34 of the Act through OMP No.288/2000 which was disposed off on 26th July, 2007. The award was set-aside on account of failure of the Arbitrator to give reasons as to how the figure of Rs.20,22,733.02 was arrived at and also on account of failure to indicate how this amount was to be apportioned between the three claims against which such amount was awarded. The Court appointed Smt.Sharda Aggarwal, learned retired Judge of this Court as the sole Arbitrator to adjudicate upon the claims of the

respondent in the light of the observations made in the order as well as on the basis of the existing record. The award was set-aside.

9. The learned Court decided that arbitration would commence in terms of Section 43(4) of the Arbitration and Conciliation Act, 1996 and appointed Ms.Justice Sharda Aggarwal (Retd.) as the Arbitrator to adjudicate the claims of the respondent.

10. The petitioner appeared on the first date of hearing, i.e. on 5th September, 2010 and moved an application for stay of the arbitration proceedings on the reason that they had preferred an appeal being FAO No.395/2007 titled as UOI vs. Track Innovations (India) Pvt. Ltd. against the order dated 26th July, 2007 in OMP No.288/2000. The proceedings were adjourned for 20th March, 2008 to await the orders in the appeal (FAO No.395/2007).

11. The respondent sent a letter dated 20th December, 2008 to the learned sole Arbitrator intimating that the High Court had passed an order dated 17th December, 2008 in the appeal, to the effect that there was no impediment in the functioning of the Arbitrator and the arbitration could be proceeded with.

12. Both parties addressed their submissions. Award was reserved but could not be published in view of pendency of the FAO. On being asked, the respondent vide its letter dated 9th August, 2010 certified copy of the order dated 24th August, 2009 passed in the appeal was produced which indicated that the appeal was dismissed for non-prosecution on 24th August, 2009 and no application for setting aside the said order was moved by the petitioner.

13. At the time of passing the award, the learned sole Arbitrator while interpreting the order dated 26th July, 2007 passed in OMP No.288/2007 observed that the award by the earlier Arbitrator Mr.Ved Prakash has been upheld in part and set aside in part. The learned Arbitrator accepted the basis of the earlier Award that lower rates of fresh tender would be applicable to the repeat order from 11th February, 1998 and decides the claims in the light of the observation in the order dated 26th July, 2007 in OMP NO.288/2000.

14. With regard to Claim No.3, the learned Arbitrator held that the said claim is included in Claim No.2 therefore no amount was awarded towards this claim.

15. Against Claim No.4 the learned Arbitrator awarded simple interest @ 10% per annum on the amount claimed under Clause 1, 2 and 3 from the date of invocation/commencement of the arbitration proceedings i.e. 7th April, 1998.

16. The main challenge by the petitioner in respect of the impugned award dated 12th October, 2012 is that the learned Arbitrator despite of upheld that by virtue of Clause 1.12 lower rate of fresh tender would be applicable to repeat order from 11th February, 1998 but committed an error by bifurcating the basic rate and price validation component and applied the basic rate of fresh tender, but calculated the price variation as per formula of repeat order, which completely frustrated the purpose of Clause 1.12 which reads as under:-

> "In case any open tender is invited for manufacture and supply of PRC Sleeper on N.R. in future during the currency of the repeat order is flouted and low rates are

accepted, the same rates would also be applicable in this repeat order from the date of acceptance of such rates."

17. It is alleged by the petitioner that the sole Arbitrator after calculating the difference in amount payable on account of lower rates accepted the rates of CS-120/97 applying Clause 1.12 from 11th February, 1998 instead of 8th November, 1997 and came to the conclusion that the sum of Rs.20,22,733.02 had been awarded only against claim No.1. The said findings are incorrect.

18. It is also submitted by the learned counsel for the petitioner that against claim No.2 the Arbitrator has erroneously awarded a sum of Rs.57,74,095/- by applying the price variation clause of repeat order. Learned Arbitrator wrongly interpreted Clause 1.12 of the contract agreement, frustrating the whole purpose of inserting the clause. Despite agreeing with the contention of the Railway Administration that the basic price of CS-120/97 which was lower than the repeat order was payable, erroneously applied the PVC formula of repeat order instead of PVC formula of CS-120/97 and applied only the basic price of CS-120/97 whereas Clause 1.12 makes no such distinction.

19. It is submitted by the petitioner that the interest was awarded against clause 2401 of the IRS conditions of the contract. Clause 2401 of the contract bars the payment of interest for pre-reference as well as pendentelite interest. The Arbitrator could award interest from the date of award till the date of actual payment only. Reliance was placed on the decision of the Supreme Court in the case of ***M/s.***

Sayeed Ahmed and Co. Vs. State of U.P. and Ors., 2009 (12) SCC 26.

Lastly, it was submitted that against Claim No.5 towards cost of arbitration awarded a sum of Rs.2,00,000/-, though there is no provision in the contract for the payment of cost towards cost of arbitration.

20. It is denied that Clause 2401 of the IRS conditions relied upon by the petitioner can, in any way, debar the learned Arbitrator from granting the interest as awarded in the Award and the learned Arbitrator has rightfully awarded the interest, as the said clause has no applicability in the facts of the present case where it is not a case of withholding of sums of money due to the respondent and admitted as payable by the petitioner. There is no merit in the plea of the petitioner that cost is not liable to be awarded since there is no provision for the same in the terms of the contract. As afore-stated, the petitioner has withheld the material facts from this Court that it failed to pay the sum of Rs.93,500/- being the amount of Arbitrator's fees which had to be paid by the respondent and the cost awarded by the respondent include this sum of money as well.

21. In the impugned award, the learned sole Arbitrator after hearing has come to the following finding arrived at in support of the relief granted to the respondent :

a) In the first order/repeat order, the basic rate was Rs.369.48 per sleeper excluding price of steel which was to be supplied free by railways.

b) In the fresh tender No.CS/120/1997, the basic rate was finalized at Rs.344.20 per sleeper and the same was made applicable by the railways to the earlier repeat order for supplies made thereunder after 8th November, 1997, upon which the award passed by Mr.Ved Prakash, Arbitrator had decided that such rates could be made applicable only after 11th February, 1998.

c) In para 16 of the award, the learned Arbitrator opined that determination of the date from which lower rates of fresh tender would become applicable had been settled by the earlier Arbitrator (Mr.Ved Prakash) and upheld by the High Court in its order dated 26th July, 2007 in OMP NO.288/2000 and hence only "examination is necessary to determine the amount awarded by the earlier Arbitrator consequent to this finding in order to now to decide the amount under each claim."

d) In para 23, the learned Arbitrator came to the finding that the sum of Rs.20,22,733.44 was to be awarded against Claim No.1 and the same amount had been awarded by the earlier Arbitrator also, albeit against Claim No.1 to 4.

e) In paras 24 to 29 of the award, the learned Arbitrator dealt with the Claim No.2 of the respondent and came to the finding in para 25 that both the repeat order and the fresh tender are silent on the formula to be used for calculating escalation after the fresh tender rates come into effect for supplies under the earlier repeat order and hence the escalation formula in the earlier repeat order would continue to operate for all supplies

under the said order even though basic rate for such supplies would be as per lower rate in the fresh tender. Calculations were given in the award by the Arbitrator and Rs.57,74,095/- was awarded to the respondent under Claim No.2.

f) Interest and costs were also awarded in favour of the respondent as set out in paras 31 and 32 of the award. It is pertinent to mention that railways did not even pay the Arbitrator's fee which was paid by the respondent in addition to paying its share of the fee.

g) A total sum of Rs.77,96,828/- was awarded in favour of the respondent with simple interest @10% per annum w.e.f. 7th April, 1998, the date of invocation/commencement of the arbitration along with costs.

22. It has been wrongly stated by the petitioner that the learned Arbitrator agreed with the contention of the Railway Administration that the basic price of CS-120/97 was lower than the repeat order. To the contrary, the learned Arbitrator found merit in the contention of the respondent that they were entitled to the benefit under Note 1 of the 'Instructions to the Tenderers' which formed part of the tender documents of Tender No.CS-120.

23. The learned Arbitrator's interpretation regarding the escalation in price payable on the basis of PVC formula has been duly justified in her Award which is well-reasoned and hence, no case is made out for upsetting the Award.

24. It was admitted by the petitioner before the Court on behalf of the railways that in a similar matter, the Division Bench of this Court

in FAO(OS) No.83/2012 titled ***UOI vs. Hindustan Prefab Ltd.*** had vide order dated 24th February, 2012 settled the disputes on one issue, i.e. the issue with regard to the date on which the lower rates could be applied. If one was to follow the finding in the said order, the date in the present case from which lower rates could be applied would stand extended to 30th September, 1998, the same being the date on which the offer of the respondent was accepted by the railways. The Division Bench order does not deal with other issue which has been decided by the learned Arbitrator in the award under challenge. The Division Bench observed in its order that the appeal being dealt with was filed by the railway merely to "fulfil a ritual and if one may so, seeks to only at the expense of the appellant and consequences places a great strain on public fund." The Division Bench even imposed cost while dismissing appeal of the railway while remarking deprecating the practice of the appellant (Railways) to agitate matters in forum after forum.

25. The scope of section 34 of the Arbitration and Conciliation Act, 1996 is limited to the stipulations contained in Section 34(2) of the Act. The jurisdiction of the Court to interfere with an Award of the Arbitrator is always statutory. Section 34 is of mandatory nature, and an Award can be set aside only on the Court finding the existence of the grounds enumerated therein and in no other way. The words in Section 34(2) that *"An Arbitral Award may be set aside by the Court only if"* are imperative and take away the jurisdiction of the Court to set aside an Award on any ground other than those specified in the Section. The Court is not expected to sit in appeal over the findings of

the Arbitral Tribunal or to re-appreciate evidence as an appellate court. A recent observation of the Supreme Court in the case of ***P.R. Shah, Shares and Stock Brokers Private Limited Vs B.H.H. Securities Private Limited And Others,*** **(2012) 1 SCC 594** is apposite in this regard and the relevant portion, contained in paragraph 21 of the said judgment is, reproduced as under:

> "21. A Court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34 (2) of the Act. Therefore, in the absence of any ground under section 34 (2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at".

26. The case of the petitioner is that instead of the interpretation placed on the contract terms by the Arbitral Tribunal, another interpretation of the contract terms is possible. The respondent's case is that there was only one interpretation possible and the same was resorted to by the Arbitral Tribunal in the arbitral award. However even if it were to be assumed, without admitting, that an alternative interpretation is possible, it is submitted by the respondent that the Supreme Court has repeatedly held that even if two interpretations are possible, if the interpretation given by the Arbitral Tribunal is a possible view, even though the Court may have a different view, the Award will not be interfered with by the Court under Section 34 of the Act. The Supreme Court in the case of ***M/s. Arosan Enterprises Ltd. Vs. Union of India,*** **(1999) 9 SCC 449**, in paragraph 39 of the said judgment, has held as under:

> "39. ….The court as a matter of fact, cannot substitute its evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. If the view of the arbitrator is a possible view the award or the reasoning contained therein cannot be examined."

27. It is settled law that the Award is not open to challenge on the ground that the Arbitral Tribunal has reached a wrong conclusion or that the interpretation given by the Arbitral Tribunal to the provisions of the contract is not correct. The entire objections of the petitioner, as contained in the grounds, are contrary to the scheme of Section 34 of the Arbitration and Conciliation Act, 1996. There is no averment in the petition as to the existence of any illegality that is apparent on the face of the arbitral award.

28. I agree with the submission of the petitioner only to the extent that the learned Arbitrator has erred in awarding interest for the period beginning from invocation commencement of arbitral proceedings in the year 1998 (07.04.1998) till the date of payment at the rate of 10% simple interest as there is a complete ban on payment of interest under Clause 2401 of IRS conditions which form part of the contract. The Arbitrator could award interest from the date of award till the date of actual payment. Reliance in this regard is placed on a judgment of the Supreme Court in the case of ***M/s. Sayeed Ahmed and Co. Vs. State of UP and Ors.***, 2009 (12) SCC 26. In the said judgment the Supreme Court while interpreting clause G-1.09 of the contract which is similar to clause 2401 was pleased to hold:

> "In view of clause (a) of subsection (7) of Section 31 of the Act, it is clear that Arbitrator would not have awarded interest upto the date of the Award, as the agreement between the parties barred payment of interest."

29. Accordingly, simple interest @ 10% is awarded from the date of award till the date of actual payment. The award of cost of arbitration is upheld. The award in this respect is modified.

30. The petition on all other grounds is accordingly dismissed.

31. No costs.

(MANMOHAN SINGH)
JUDGE

JUNE 11, 2014