Serial No.01
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Arb.A.No.2/2022

Date of Order: 26.04.2023

North Eastern Electric Power Corporation Ltd.	Vs.	M/s Hindustan Construction Company Limited

Coram:

Hon'ble Mr. Justice Sanjib Banerjee, Chief Justice
Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Appellant : Mr. V.K. Jindal, Sr.Adv with
Mr. V. Kumar, Adv

For the Respondent : Mr. J. Chowdhury, Adv with
Mr. V. Jhunjhunwala, Adv
Ms. D.R. Chowdhury, Adv
Mr. K. Verma, Adv
Mr. J. Shylla, Adv

i) Whether approved for reporting in Law journals etc.: Yes

ii) Whether approved for publication in press: No

JUDGMENT: (per the Hon'ble, the Chief Justice) (Oral)

The appellant herein engaged the respondent for the construction of a power project that goes by the name of Papumpare in Arunachal Pradesh. There is no dispute that the hydroelectric project is now fully functional, though the work was completed some two years beyond the original estimated period of three years.

2. The letter of intent in this case was issued to the respondent contractor on August 31, 2009 indicating that the tenure of the contract would be 36 months from such date. The claim in the arbitral reference was for the period of August 31, 2009 to June 30, 2011, primarily on account of the estimated work projected to be completed during such period not having been undertaken. The various head of claims were on account of idle labour, idle overhead expenditure, idle cost of employees and machinery and the like. The tenure of the contract was extended, first, by a letter of July 28, 2012, till the end of August, 2013; and, next, by a letter of August 27, 2013, till the end of July, 2014.

3. The appellant employer contends that in view of the extension of time given to the contractor to complete the work, additional payments were made on account of cost overruns and other heads and, as such, the contractor could have had no claim on account of the failure to adhere to the extent of the work projected to be completed by the contractor during the original tenure of the contract.

4. On the appellant being pressed as to the specific grounds under Section 34 of the Arbitration and Conciliation Act, 1996 that it invokes to assail the arbitral award of September 15, 2015, it is submitted that in terms of Section 34(2)(b)(ii) of the said statute, the arbitral award is in conflict with the public policy of India. To boot, it is asserted on behalf of

the appellant that the Explanation that governed the provision at the relevant point of time, prior to the Act being amended in 2016, referred to certain specific aspects being covered by the expression "in conflict with the public policy of India" but the opening words of the Explanation did not interfere with the general sense that the relevant sub-clause conveyed. In other words, the appellant submits that whatever may be contained in the rest of the Explanation, the opening words of the Explanation to the relevant sub-clause indicates that the Explanation did not detract from the generality of what the relevant sub-clause implies.

5. The appellant amplifies the argument by referring to Section 28 of the Act and relying on the principle recognised in one of the earlier decisions under Section 34 of the Act rendered in the judgment reported at (2003) 5 SCC 705 *(Oil & Natural Gas Corporation Ltd v. Saw Pipes Ltd)*. According to the appellant, an award will regarded to be opposed to the public policy of India if such award is in conflict with the laws of India. The appellant goes on to suggest that when a contract between the parties prohibits certain claims from being made or entertained, an award in derogation of such contractual prohibition would amount to an act which was opposed to the public policy of India.

6. For such purpose, the appellant refers to its pleadings before the arbitrator, including its written notes of submission submitted in course of

the reference. It appears from a sur-rejoinder filed by the appellant before the arbitrator that it referred to clause 24(vii) of the contract being a bar to the several heads of claim fashioned by the contractor. Such reference is clearly found in paragraph 4 of the relevant document where clause 24(vii) is expressly invoked in conjunction with clause 20 of the matrix contract between the parties. The same objection is repeated in paragraphs 8 and 30 of the relevant document. The appellant also refers to one of its written submissions filed which appears at page 435 of the appeal papers. At paragraph 18 of the relevant document, clauses 24 and 74 of the contract are specifically referred to. The appellant accepts that apart from the aforesaid references, there is nothing else in the pleadings or other documents filed on behalf of the appellant to question the claim of the contractor on any other ground of prohibition incorporated in the contract.

7. In this context, it is necessary to look into the three clauses expressly referred to by the appellant in course of the reference as prohibiting the claimant from making the claim that was carried to the reference and from the arbitrator even taking up such matter for consideration, far less awarding any part of such claim.

8. Clause 20 of the contract pertained to suspension of work. Such clause recorded that if there was any suspension of work at the behest of the engineer-in-charge, certain consequences would follow. These

consequences included extension of the time to complete work and additional payments to be made to the contractor for the suspension of the work. However, it is the admitted position that there was no suspension of work under the contract in the present case. As such, clause 20 of the contract would have no manner of application in the context of the claim that was carried by the contractor to the reference or the award that was rendered thereon.

9. Clause 24 of the contract pertained to completion time and extension. Thus, the scope of the clause was confined to the time by which the tenure of the contract was extended. In such context, clause 24(vii) provided as follows:

> "No compensation is admissible other than whatever provided for in the Clause No.20 (Suspension of Work) for any extension of time, if granted."

10. Quite plainly, the relevant sub-clause would apply only in case of any extension of time, should such extension be granted. Further, the extension of time contemplated in clause 24(vii) would have to be in connection with the suspension of work as clause 20 was specifically referred to in the provision. Thus, since there was no suspension of work and no extension as a consequence of suspension, clause 24(vii) of the contract was not attracted at all.

11. Clause 74 of the contract between the parties pertained to price adjustment and variation. Indeed, the opening limb of such provision referred to fluctuation in the cost of labour, materials, high speed diesel and the like except for materials supplied by the employer to the contractor. The second sub-clause in the relevant clause spelt out a formula for the price adjustment or variation that the contractor would be entitled to consequent upon the fluctuation of the relevant rates. The last limb of clause 74 provided as follows:

> "No claim, whatsoever, for Price Adjustment/Variation, other than those stipulated above, shall be entertained."

12. The above sub-clause (e) was a part of clause 74 of the contract and its effect had necessarily to be confined to the clause rather than to the entirety of the contract. It would have been a completely different kettle of fish if clause 74(e) were to be a stand-alone, independent clause that would have governed by the preceding clauses in the contract. However, as noticed above, clause 74(e) merely clarified the foregoing provisions in clause 74 of the contract.

13. The claim in this case that was carried by the contractor had three main heads: reimbursement for reduced functioning from the inception of the contract till June 30, 2011; reimbursement of entry tax; and, claim on account of reinforced steel used in precast RCC lagging. In respect of the reimbursement of the additional costs incurred, inter alia,

on account of idle hired machinery, under-utilisation of officers and staff, under-utilisation of labour and expenses at site and office or unachieved work, the claim carried to the reference was in excess of Rs.40 crore. The claim for entry tax was in excess of Rs.1.67 crore and that for reinforced steel was in excess of Rs.5 crore. The second and third heads of claim – on account of entry tax and reinforced steel – were rejected and the claim in excess of Rs.40 crore on account of the projected level of work not being done till June 30, 2011 was whittled down to slightly over Rs.23 crore for which an award was made.

14. At this stage, it is necessary to refer to the other aspect, on which there is no dispute. The arbitrator has awarded the principal sum together with interest. The parties agree that the contract contained a clause prohibiting the arbitrator from awarding any interest. As such, the respondent contractor has submitted that it will not press for any interest other than for the post-award period. The respondent will be bound by such submission made in course of the present proceedings.

15. As to the quantification of the claim, the appellant refers to its comments on the quantification and submits that a rather inflated claim was made on such count. The other, more substantial, part of the appellant's challenge to the award is that upon the contractor being paid additional money for the extended period that it was granted to complete

the work, there could have been no claim on account of the original tenure of the contract. In plain words, the assertion of the appellant on such count is that the claim in the reference was nothing but a duplication and the same should not have been allowed by the arbitrator.

16. It is possible that a claimant carries a bad claim to an arbitral reference. However, a claim that is bad on merits may not be a claim that is prohibited by the contract. In the present case, the ground that is urged under Section 34 of the Act is that the award is opposed to the public policy of India on the ground that the arbitrator has exceeded his authority and has entered into a no-go territory despite the arbitrator being a creature of the same agreement which prohibits the very entertainment of the relevant head of claim.

17. It is elementary that in this jurisdiction, the court is more excited with errors of jurisdiction rather than errors within jurisdiction. Indeed, even faulty interpretations of law by an arbitrator are left untouched in course of a challenge to an award, unless the court finds that, as a consequence, there has been a serious miscarriage of justice. Whether the court strikes down any award or a part thereof on the ground that there is serious miscarriage of justice as a consequence of any error committed by the arbitrator or whether any part of the award shocks the conscience of the court, it matters little since the consequence is the same.

However, what the court cannot do in exercise of the limited authority granted to it under Section 34 of the Act is to sit in judgment over the arbitral award as in case of a regular appeal. The reason for this is that since the parties had agreed to take their dispute resolution mechanism outside the sovereign field of a court and to a private forum, the court, on rebound, will not address the issues unless it finds manifest miscarriage of justice or to the extent that it shocks the conscience of the court. Errors of law, or of interpretation, or errors of other kinds are within the authority of the arbitrator and are, more often than not, left uncorrected by the court in exercise of its jurisdiction under Section 34 of the said Act.

18. The appellant herein had, without prejudice to its contention that the entire claim carried by the contractor was inadmissible, asserted that the contractor had attempted to inflate its claim by using a reduction factor of 68 which may not have been appropriate. It appears from the records of the reference that on various aspects, the arbitrator wanted comments or notes to be filed by the parties, including on the aspect of quantification under the first head of claim on account of additional costs incurred for commensurate work not being done. It also appears that upon the employer objecting to the original quantification of the claim by the contractor, the contractor scaled it down to closer to what has been ultimately awarded. Again, the arbitrator gave the employer an

opportunity to deal with the modified quantification, but the employer failed to avail of the opportunity and did not file its comments to the modified quantification on the first head of claim filed by the contractor.

19. In course of appraising the claim and the quantification thereof, the arbitrator referred to a document that was called "the book of hindrances" by the parties. The parties apparently maintained such book to indicate to what extent the work had been impeded on a particular day and the reasons therefor. It is from such book of hindrances that it was discovered whether a day's work or a part of the day's work on any given days was less because of any reason attributable to the contractor or to the employer or otherwise. The contractor founded the claim on the basis that it was entitled to due compensation for the extent of work not being achieved as projected in the contract provided there was no wrongdoing on the part of the contractor. On the other hand, the contention of the employer before the reference was that only the delay attributable to the employer should be considered for the purpose of compensating the contractor. What the employer meant was that if there was any delay that may not have been attributable to either the contractor or the employer, the contractor could not be compensated on such account by penalising the employer.

20. Though not in so many words, the arbitrator reasoned that since a projected level of work had been indicated and such level of work was not met in a given month, on the basis of charts which are appended to the award itself, calculations were made as to the extent of damages that the contractor would be entitled to. It may do well, in this context, to understand the basis of the claim and the award therefor. In simple terms, the contractor claimed that for the purpose of achieving the extent of work that it was required to do within a particular time, the contractor had to engage men and machinery. Upon the work not being done to the expected extent, a part of the labour and machinery that the contractor had hired in anticipation of such resources being required, were left idle for which the contractor had to bear the expenses; but since no commensurate work was done, the contractor was not to be compensated in such regard. It is such claim of the contractor which has been allowed by the arbitrator to a limited extent and without paying heed to the appellant's contention that the delay not attributable to the appellant should not be counted against the appellant.

21. The decision to such extent fell squarely within the domain of the arbitrator's authority and the court, in exercise of power under Section 34 of the Act, does not look for small mistakes with an intention to interfere with the award. In fact, the mantra under Section 34 of the Act –

indeed, as it has always been in this branch of law – is that the court will not interfere unless there is grave injustice occasioned to the party assailing the arbitral award.

22. The court of the first instance noticed that several of the grounds that were sought to be urged in course of the petition under Section 34 of the Act may not have been presented before the arbitrator or may not have been incorporated in the grounds filed along with the petition to challenge the arbitral award. The appellant asserts that it matters little whether a ground has been specifically taken in the petition under Section 34 of the Act as long as it can be demonstrated that a clause in the contract prohibited in a particular head of claim which has been allowed by the arbitrator.

23. In such context, the appellant relies on a recent judgment reported at (2022) 2 SCC 275 *(State of Chhattisgarh v. Sal Udyog (P) Ltd.)* Paragraph 24 of the judgment is pressed into service:

> "24. We are afraid, the plea of waiver taken against the appellant State on the ground that it did not raise such an objection in the grounds spelt out in the Section 34 petition and is, therefore, estopped from taking the same in the appeal preferred under Section 37 or before this Court, would also not be available to the respondent Company having regard to the language used in Section 34(2-A) of the 1996 Act that empowers the Court to set aside an award if it finds that the same is vitiated by patent illegality appearing on the face of the same. Once the appellant State had taken such a ground in the Section 37 petition and it was duly noted in the impugned judgment, the High Court ought to have interfered by resorting

> to Section 34(2-A) of the 1996 Act, a provision which would be equally available for application to an appealable order under Section 37 as it is to a petition filed under Section 34 of the 1996 Act. In other words, the respondent Company cannot be heard to state that the grounds available for setting aside an award under sub-section (2-A) of Section 34 of the 1996 Act could not have been invoked by the Court on its own, in exercise of the jurisdiction vested in it under Section 37 of the 1996 Act. Notably, the expression used in the sub-section is "*the Court finds that*". Therefore, it does not stand to reason that a provision that enables a Court acting on its own in deciding a petition under Section 34 for setting aside an award, would not be available in an appeal preferred under Section 37 of the 1996 Act."

24. What cannot be lost sight of is that paragraph 23 of the report in *Sal Udyog* records that the objection on the ground of prohibition in contract was raised before the arbitral tribunal, but a ground in such regard was not specifically incorporated in the petition challenging the award. It was in such context that the finding as rendered in paragraph 24 of the judgment came to be made. In the present case, it has already been discussed that the only three clauses that were placed by way of prohibitory provisions before the arbitrator were clauses 20, 24 and 74. As already noticed, none of such clauses can be read to amount as a prohibition on the arbitrator to entertain the claim on the first head as carried by the contractor to the reference.

25. In any event, the ratio decidendi in paragraph 24 of the judgment in *Sal Udyog* would be inapplicable in the present case since the award in this case was rendered on September 15. 2015 and this matter

would be governed by the provisions of the said Act of 1996 prior to its 2016 amendment. Sub-section (2-A) was inserted in Section 34 of the Act by the 2016 amendment.

26. As a result, the judgment and order dated October 25, 2022 are left untouched except that the award on account of interest in the award of September 15, 2015 is set aside for the pre-reference period and whatever may have been awarded as pendente lite interest. This will not prevent the respondent herein to claim interest at the indicated rate from the date of the award in accordance with law.

27. To clarify, the award of the principal sum is left undisturbed. The grounds of challenge carried by the appellant are found to be without merit.

28. Arb.A.No.2 of 2022 is disposed of with costs assessed at Rs.50,000/- to be paid by the appellant to the respondent within three months from date, failing which it will carry interest at the same rate as provided by the arbitrator for the post-award period.

(W. Diengdoh)
Judge

(Sanjib Banerjee)
Chief Justice

Meghalaya
26.04.2023
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