HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

S.B. Civil Misc. Appeal No. 2780/2016

Union of India through Chief Engineer, Bhopal Zone, Sultania Infantry Line, Bhopal

----Appellant

Versus

1. M/s Madan Mohan Jain & Sons, No. 4 Central School Scheme, Air Force, Jodhpur
2. Shri Satish Chander, Joint Director General Contracts, Arbitrator Hq. Chief Engineer South Command, Pune

----Respondents

For Appellant(s) : Mr. Sanjeet Purohit, Assistant Solicitor General, with Mr. Rajat Arora

For Respondent(s) : Mr. K.K. Shah

HON'BLE MR. JUSTICE P.K. LOHRA

Judgment

REPORTABLE

17/01/2019

By the instant appeal, under Section 37 of the Arbitration and Conciliation Act, 1996 (for short, 'Act'), appellant has challenged order dated 24th of August, 2016, passed by the Addl. District Judge No.3, Jodhpur Metropolitan, Jodhpur (for short 'learned Court below'). By the impugned order, learned Court below has disallowed the application of appellant-applicant-non-petitioner under Section 34 of the Act (Union of India Vs. M/s. Madan Mohan Jain & Sons & Anr.) and rejected the objections raised therein.

2. The facts, leading to the present misc. appeal, in nutshell, are that a contract was executed between respondent-contractor and the appellant Union of India in respect of extension of runway and the date of completion of work was upto 24.11.2006 but the work was completed at very slow speed on 26.08.2008 and final bill was paid on 26.09.2009 and the same is accepted with demure by the contractor. Later on, the contractor claimed payment as per rates prevailing at the time of completion of work and raised other disputes as such the matter was referred to the arbitrator. The sole Arbitrator after hearing both the sides, passed award dated 27.02.2012 against the appellant Union of India by partly allowing claim of the respondent-contractor. The Arbitrator while partly allowing the Claims No.1, 2, 3, 8, 13, 14 & 16 of the respondent-contractor awarded *pendente-lite* simple interest @10% per annum to be reckoned from 26th May, 2009. Further, the Arbitrator allowed appellant Union of India three months' time to pay the award amount on or before 30th May, 2012 else the amount shall carry simple interest @12% per annum from 1st June 2012 and there shall be no future interest on the awarded amount and *pendent-lite* interest as per clause (a) of Para 166 of the award.

3. Feeling dismayed with the award of the Arbitral Tribunal, appellant Union of India submitted application under Section 34 of the Act before learned Court below. In its application, assailing

the arbitral award on various grounds, Union of India craved for setting aside the same on the anvil of grounds available under Section 34 of the Act. The application is contested by the respondent-contractor by submitting a brief reply. The application submitted on behalf of appellant Union of India did not find favour of the learned Court below and thus entailed its rejection by the impugned order.

4. The case set up by the appellant in the present appeal is that initially, the thickness of runway was 40 mm bitumen but later on it was changed to 155 mm bitumen polymer and the runway was required to be made in two layers; the base layer of 150 mm (wet mix macadam) and second layer of 44 mm bitumen considering the structural safety of the runway, which change was normal within the scope of Condition 7 of IAFW 2249 and the contract, and, accordingly, it was priced on the basis of Condition 62, and the price of polymer modified bitumen was arrived at on prorata rates for increasing thickness by 10 mm and for additional price for polymerization of bitumen, yet the contractor refused to accept the rates and raised dispute before Arbitrator on numerous points but the Arbitrator has not properly decided the matter taking into consideration the terms of contract and while exceeding its jurisdiction, in a partitioned manner passed the award in ignorance of condition No.7 of IAFW 2249 and against the pleadings of the appellant.

5. Mr. Sanjeet Purohit, learned Assistant Solicitor General, appearing for the appellant, has vehemently argued that the phrase "Public Policy of India" has a wide connotation but the learned Court below has failed to consider it in right perspective. Learned counsel would urge that Hon'ble Court has given expansive meaning to the fundamental policy of Indian law or the interest of India or justice or morality by broadening horizons but by construing the same narrowly, rendered the impugned order vulnerable. It is contended by Mr. Purohit that the core question as to whether, as per contract, addition of polymer comes in the category of radical changes or normal change, not at all decided/adjudicated by the Arbitrator and is completely eschewed by the learned Court below. Elaborating his submission in this behalf, learned counsel submits that fundamental basis of adjudication, as the specification adopted were based on consideration of structural safety of the runway and in no case be treated as radical change, is not at all given due credence by the learned Court below.

6. It is also urged by learned counsel for the appellant that the claims were not at all co-related yet were clubbed and without any rationale award was passed without arriving at a clear conclusion about the rate of allowing price but that too was ignored by the learned Court below. Learned counsel further submits that the learned Court below has not recorded any finding worth the name while repudiating the application of the appellant

and on the face of it impugned order is a non-speaking order, which by no stretch of imagination be categorized as proper adjudication. In support of his arguments, Mr. Purohit, learned counsel for the appellant, has placed reliance on following judgments:

- Oil & Natural Gas Corporation Ltd. V/s. SAW Pipes [(2003) 5 SCC 705]
- Radha Chemicals V/s. Union of India [Civil Appeal No.10386/2018, decided by Supreme Court on 10.10.2018]
- Harbhajan Kaur Bhatia V/s. M/s. Aadya Trading & Investment Pvt. Ltd. & Anr. [FAO No.355/2016, decided by the Delhi High Court on 18.07.2017]
- Union of India V/s. Alok Kansal & Anr. [FAO No.29/2016, decided by the Delhi High Court on 08.11.2017]
- Indian Oil Corporation Ltd. V/s. M/s. Aneja Transporters [FAO No.167/2017 – decided by the Delhi High Court on 25.07.2017)]

7. Per contra, Mr. K.K. Shah, learned counsel appearing for the respondent-contractor, has vehemently argued that no ground much less substantial ground is available to the appellant to challenge the impugned order. Stoutly defending the impugned order, Shah contended that the learned Court below has examined the matter threadbare while rejecting the objections raised by the appellant in application under Section 34 of the Act. Mr. Shah further submits that no specific ground is set out by the appellant to challenge the arbitral award in its application under Section 34 of the Act touching fundamental policy of India and therefore no interference with the impugned order is warranted. In support of

his contentions, Mr. Shah has placed reliance on following judgments:

- State of Rajasthan V/s. M/s. Mittal & Company & Anr. [2018 (4) WLN 489 (Raj.)]
- State of Rajasthan V/s. M/s. T.C.I. Infrastructure Finance Ltd. [2019 (1) WLN (Raj.1]
- Oil & Natural Gas Corporation Ltd. V/s. Western Geco International Ltd. [(2014) 9 SCC 263]
- Swan Gold Mining Ltd. V/s. Hindustan Copper Ltd. [2014 (2) WLC (SC) Civil 655]
- J.G. Engineers Pvt. Ltd. V/s. Union of India & Anr. [(2011) 5 SCC 758]
- Union of India V/s. Susaka Pvt. Ltd. & Ors. [2018 (1) Arb. LR 12 (SC)]
- Associate Builders V/s. Delhi Development Authority [(2015) 3 SCC 49]
- Food Corporation of India & Ors. V/s. Niyaz Mohammad & Ors. [2007 (4) R.L.W. 3587]

I have bestowed my considerations to the arguments advanced at Bar and perused the impugned order and other materials available on record.

8. The significant issue which has emerged for judicial scrutiny in the instant appeal is the true meaning of the phrase "Fundamental Policy of India", therefore, it has become imperative for the Court to examine the grounds set out by the appellant in its application under Section 34 of the Act so as to infer as to whether these grounds are satisfying the criteria. Indisputably, in the application, appellant has not specifically pleaded the ground touching Section 34(2)(b)(ii) but then mere mentioning of the phrase cannot be construed as buttressing of the ground by an

aggrieved party against the arbitral award. The Court, while considering the application under Section 34 of the Act cannot shirk from its responsibility of adjudication without meaningful consideration of the grounds set out in the application for setting aside arbitral award. Furthermore, the Court is also expected to examine the true purport of the phrase "Fundamental Policy of India" propounded by the authoritative legal precedents. It is also necessitated in view of the fact that the phrase as such is not defined under the Act. In the instant matter, the learned Court below essentially relied upon some of the legal precedents wherein this phrase as such has not been examined and the matters are decided on facts.

9. Supreme Court, after the promulgation of the Act for the first time in *Saw Pipes Limited* (supra) gave a thoughtful consideration to the phrase "Public Policy of India" for defining the same in furtherance of the intent of legislature. The Court, while issuing a word of caution to construe the term "Fundamental Policy of India" narrowly, held:

> "The aforesaid submission of the learned senior counsel requires to be accepted. From the judgments discussed above, it can be held that the term 'public policy of India' is required to be interpreted in the context of the jurisdiction of the Court where the validity of award is challenged before it becomes final and executable. The concept of enforcement of the award after it becomes final is different and the jurisdiction of the Court at that stage could be limited. Similar is the position with regard to the execution of a decree. It is settled law as well as it is provided under Code of Civil Procedure that once the decree has attained finality, in an execution proceeding, it

> may be challenged only on limited grounds such as the decree being without jurisdiction or a nullity. But in a case where the judgment and decree is challenged before the appellate Court or the Court exercising revisional jurisdiction, the jurisdiction of such Court would be wider. 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. If narrow meaning as contended by the learned Senior Counsel Mr. Dave is given, some of the provisions of the Arbitration Act become nugatory. Take for illustration a case wherein there is a specific provision in the contract that for delayed payment of the amount due and payable, no interest would be payable, still however, if the Arbitrator has passed an award granting interest, it would be against the terms of the contract and thereby against the provision of Section 28(3) of the Act which specifically provides that "arbitral tribunal shall decide in accordance with the terms of the contract". Further, where there is a specific usage of the trade that if the payment is made beyond a period of one month, then the party would be required to pay the said amount with interest at the rate of 15 per cent. Despite the evidence being produced on record for such usage, if the arbitrator refuses to grant such interest on the ground of equity, such award would also be in violation of sub-sections (2) and (3) of Section 28. Section 28(2) specifically provides that the arbitrator shall decide *ex aequo et bono* (according to what is just and good) only if the parties have expressly authorised him to do so. Similarly, if the award is patently against the statutory provisions of substantive law which is in force in India or is passed without giving an opportunity of hearing to the parties as provided under Section 24 or without giving any reason in a case where parties have not agreed that no reasons are to be recorded, it would be against the statutory provisions. In all such cases, the award is required to be set aside on the ground of 'patent illegality'.”

Further emphasizing a need to give phrase “Fundamental Policy of India” an expansive meaning, the Court held:

"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 the 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, it is required to be held that the award could be set aside if it is patently illegal. The result would 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 is so 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."

10. In a later judgment, in the matter of *Associated Builder* (supra), Supreme Court, while reiterating the principles laid down in *Saw Pipes* (supra), issued a word of caution in applying all the heads/sub-heads of Public Policy test, and held:

"A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons, it was held: (SCC p.317, para 7)

"7. ...It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the

> finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

In Kuldeep Singh v. Commr. of Police, it was held: (SCC p.14, para 10)

> "10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd., this Court held: (SCC pp. 601-02, para 21)

> "21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was

> that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. 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."

It is with this very important caveat that the two fundamental principles which form part of the fundamental policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood."

11. In the backdrop of facts and circumstances of the instant case and the *ratio decidendi* of the above-cited judgments, if the grounds set out by the appellant for rescinding arbitral award are objectively examined, then it would *ipso facto* reveal that appellant has taken shelter of a ground castigating Arbitrator to travel beyond the scope of the reference submitted to arbitration. Besides that, it is also challenged on the anvil of Fundamental Policy of India and contrary to the materials available on record. A ground is also set out in the application that findings of the sole arbitrator are perverse and patently illegal. Therefore, while concurring with the submission of learned counsel for the respondent-contractor that scope of judicial review under Section 34 of the Act is not akin to appellate jurisdiction and is very limited one, I may hasten to add that atleast it is expected of the

learned Court below to record its finding negating the grounds set out by the appellant.

12. I am aghast that the learned Court below, after narrating the factual aspects and discussing the legal precedents, rejected all the grounds in an absolutely cursory manner. If the impugned order is subjected to legal scrutiny, then it is clearly apparent that the learned Court below while nixing the application of the appellant has not even whispered that how and in what manner grounds raised by the appellant are not tenable. The entire finding in this regard finds mention in Para 10 which in my view cannot satisfy the test of finding as being bereft of any reason and simply depicts the conclusion of the learned Court below. This sort of situation, in my view, has rendered impugned order vulnerable.

13. May be, jurisdiction under Section 34 is limited but in case where Courts find that arbitrator has acted without jurisdiction and has put an interpretation of the clause of agreement wholly contrary to law, then the Courts are not prohibited from interfering with the arbitral award. Reliance in this behalf can be profitably made to a decision of Supreme Court in *Numaligarh Refinery Ltd. Vs. Daelim Industrial Co. Ltd*. [(2007) 6 Supreme 128], wherein the Supreme Court held:

> ". . So far as the legal proposition as enunciated by this Court in various decisions mentioned above, it is correct that Courts shall not ordinarily substitute its

> interpretation for that of the arbitrator. It is also true that if the parties with their eyes wide open have consented to refer the matter to the arbitration, then normally the finding of the arbitrator should be accepted without demur. There is no quarrel with this legal proposition. But in a case where it is found that the Arbitrator has acted without jurisdiction and has put an interpretation of the clause of the agreement which is wholly contrary to law then in that case, there is no prohibition for the Courts to set things right."

Likewise, Court can also interfere with the arbitral award when its conclusions are perverse. My this view is fortified by a judgment of Supreme Court in the matter of *ONGC Ltd. Vs. Garware Shipping Corporation Limited* [(2007) 13 SCC 434], wherein the Court observed:

> "There is no proposition that the courts could be slow to interfere with the arbitrator's Award, even if the conclusions are perverse, and even when the very basis of the Arbitrator's award is wrong. In any case this is a case where interference is warranted and we set aside the norms prescribed by the Arbitrator as upheld by the learned Single Judge and the Division Bench."

The legal precedents relied upon by the learned counsel for the respondent are examined by me carefully. While concurring with the *ratio decidendi* propounded therein, in my considered opinion, all these judgments are distinguishable on facts of the present case.

14. While refraining to make any comment on the merits of the grounds set out in application under Section 34 of the Act, simply by considering those grounds to be of substantial nature and also

touching the fundamental policy of India, which the learned Court below has not examined and addressed meticulously in the impugned order, I feel persuaded to interfere with the impugned order. The order impugned is *ex-facie* perfunctory inasmuch as it is a clear case of non-consideration of grounds set out in application under Section 34 of the Act by the appellant. The reasons spelt out, for overturning the application of the appellant under Section 34 of the Act, I am afraid, cannot satisfy the test of true meaning of "reasons". Any judicial order is required to be a reasoned order showing application of mind and law is also trite that even purely administrative or quasi judicial order must disclose reasons. Supreme Court in Union of India Vs. Mohanlal Capoor & Ors. [(1973) 2 SCC 836], while examining the true meaning of "reasons", held:

> "Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject matter for a decision whether it is purely administrative or quasi-judicial. They should reveal a rational nexus between the facts considered and the conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable."

15. Now, I propose to examine the appropriate relief which can be granted in the matter. In legal parlance, power of remand by the appellate Court is well known and recognized mode of adjudicating any issue. Principally, the effect of order of remand is that the lower Court and/or the Tribunal, subject to

order/direction of remand, need to reconsider, reopen the case. The jurisdiction, procedure to be adopted after remand and power, therefore, of the lower Court and/or the Tribunal depends upon the order of remand. The Court, may restrict the issue and/or issues for retrial and/or rehearing. The Court may pass the order of remand for the whole case. The Arbitration system is one of the way of settling the dispute through the alternative dispute resolution mechanism. It provides mechanism to settle the disputes/conflicts by the recognized Arbitration modes. The mechanism of remand is specifically available under Section 34(4), which permits the Court under Section 34 of the Arbitration Act to issue appropriate direction, by keeping the matter pending, to re-adjudicate and/or determine particular issue/point so that the grounds so raised for setting aside the award would be eliminated.

16. That means, instead of remanding the matter whole and/or all issues, the Court permits and directs the Arbitral Tribunal to resume the proceedings and take such action to pass additional award and/or modify the award and/or make appropriate correction in the award. Section 33 of the Arbitration Act, also provides and permits, as per the prescribed procedure, to pass additional award and/or correct errors as contemplated under the provisions.

Therefore, as an appellate Court, Court's power to remand the matter back under special circumstances, to prevent ends of justice being defeated, is very much invokable for *de novo*

consideration of application under Section 34 of the Act. Although power of remand is to be exercised with circumspection and very sparingly, yet such power of the appellate Court is well recognized under the law when for proper adjudication in the matter the Court is satisfied to do so. Thus, in the backdrop of glaring facts and circumstances of the instant case and noticing serious legal infirmity in the impugned order, it has become necessary and expedient in the interest of justice to exercise power of remand to facilitate *de novo* decision of the application. The exercise of such power would also prevent miscarriage of justice and multiplicity of proceedings.

17. The Supreme Court, in *Radha Chemicals Vs. Union of India* [Civil Appeal No. 10386 of 2018 (Arising out of SLP (C) No. 2334/2018), decided on 10.10.2018], which was an appeal against Division Bench judgment dismissing the appeal against order of Single Judge remanding the matter back to Arbitrator, finding that point of limitation had not been decided correctly, granted leave and while referring to earlier decision in *Kinnari Mullick and Anr. v. Ghanshyam Das Damani*, [(2018) 11 SCC 328] reiterated that the Court while deciding a petition under Section 34 has no jurisdiction to remand the matter back to Arbitrator for a fresh decision, and held as under:

> "We, therefore, set aside both the judgments and relegate the matter to the stage of the original Section 34 petition, which now has to be heard, on its merits in accordance with the parameters laid down

by this Court for decision Under Section 34 of the Arbitration and Conciliation Act, 1996.

Accordingly, we remand the matter to the Single Judge, who is requested to take up the matter and decide the same at the earliest considering that the Award in this case has been passed over ten years ago."

In view of foregoing discussion, the instant appeal is allowed, the impugned order is set aside and matter is remanded back to learned Court below for deciding application of the appellant under Section 34 of the Act afresh strictly in accordance with law. The learned Court below is also expected to examine the application *de novo* and decide the same by spelling out reasons for arriving at its conclusions. It is further observed that the learned Court below shall examine the application of appellant Union of India under Section 34 of the Act afresh dispassionately and uninfluenced by any observation made in this order. The learned Court below is also requested to decide the same at the earliest considering that arbitral award in the matter was passed way back on 27th February 2012.

The record of the case be sent back to the learned Court below forthwith.

Costs are made easy.

(P.K. LOHRA),J