Neutral Citation Number 2023:DHC:4682-DB

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

% Judgment reserved on: 25th May, 2023.

Judgment delivered on: 11th July, 2023.

\+ FAO (COMM) 123/2022 & CM APPLs. 36105-36107/2022, 36109/2022

UNION OF INDIA ..... Appellant

versus

INDIAN AGRO MARKETING CO-OPERATIVE LTD

……..Respondent

Advocates who appeared in this case:

For the Appellant: Mr. Rakesh Kumar, CGSC with Mr.Sunil, Advocate and Mr. Tarveen Singh, G.P.

For the Respondent: Mr. Vijay Kasana with Mr. Kshitiz Chhabra and Mr. Chirag Verma, Advocates.

CORAM:-

HON'BLE MR. JUSTICE SANJEEV SACHDEVA
HON'BLE MR. JUSTICE MANOJ JAIN

JUDGMENT

MANOJ JAIN, J.

1. The present appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "said Act") impugns order dated 28.05.2022 passed by learned District Judge (Commercial

Court-02), Patiala House Courts, New Delhi whereby, the objection petition filed by the appellant herein under Section 34 of said Act has been dismissed.

2. Let us refer to the facts germane for the disposal of the present appeal.

3. A tender was floated by the appellant for procurement of 5450 Metric Tons (MT) of 'Gram whole'.

4. The respondent M/s Indian Agro Marketing Co-operative Limited participated in such tender process and was awarded work contract to supply 1125 MT of gram whole at the rate of Rs. 3553/- per quintal.

5. The appellant issued acceptance letter on 09.02.2012. The total value of the work was Rs. 3,99,71,250/- and the delivery was to be made between 01.02.2012 to 15.02.2012.

6. Since substantial part of the 'delivery period' had already elapsed even before the issuance of the acceptance letter, the respondent sent request for extension of delivery period upto 31.03.2012. Such request was acceded to by the appellant and delivery period was extended upto 31.03.2012.

7. The respondent submitted unconditional Bank Guarantee of Rs. 39,97,125/- as per the stipulated terms and conditions of the contract.

8. The respondent could not supply 'Gram Whole' by 31.03.2012.

9. The appellant issued 'performance notice' dated 16.04.2012 directing respondent to perform its contractual obligation to make supply on or before 17.05.2012, supplementing that if such supply was not made, the contract would be cancelled.

10. Since no supply was made, the contract was cancelled on 29.06.2012 and the appellant, in terms of the clause 18(d)(viii) of appendix to tender enquiry and clause 7(4) of DGS&D-68 (Revised), forfeited the Bank Guarantee.

11. The appellant retained Rs. 28,97,988/- as 'general damages'and the balance was refunded to the respondent.

12. Since there was an 'arbitration clause' in the contract, respondent approached the Court for appointment of Arbitrator by filing ARB.P. No.597/2014 and this Court, vide order dated 26.02.2015, was pleased to appoint Shri A.K Garg, Additional District Judge (retired) as Sole Arbitrator to adjudicate the disputes between the parties.

13. The stand of the respondent before the Arbitral Tribunal was that the delivery period mentioned in the contract was superfluous, impossible and impractical as the commodity in question i.e. 'Gram Whole' was not available in the market during the relevant period. The encashment of Bank Guarantee was also challenged on various grounds. It was averred that the contract in question was having restrictive clause that respondent had to arrange 'Gram whole' from wholesale Mandies only and from no other place which also made the

execution impossible since it was a natural crop and not a man-made one. The unilateral extension was meaningless as the crop could not have reached whole-sale Mandies till middle of November. The prime and foremost contention from the side of the respondent was that once the special mode of 'risk-purchase' had been agreed to between the parties, no amount by way of 'general damages' could have been claimed by the appellant. It was also contended that, even otherwise, there was nothing to suggest that the appellant had suffered any losses and that compensation, if any, could only be given for actual damages or loss suffered. If damage or loss is not suffered, the law does not provide for a windfall. Thus, proof of actual damage or loss caused was *sine qua non* and since, it was not even the case of the appellant that they had suffered any losses due to alleged breach of contract, the forfeiture was illegal and without any authority.

14. The appellant refuted all such contentions before the Arbitral Tribunal. It was argued that the terms and conditions of the contract were accepted by the respondent, knowingly and consciously and if the respondent was of the view that it was difficult to fulfill the terms and conditions of the contract and that its performance was impossible, it should not have even entered into any contract. It was claimed that the Bank Guarantee had been encashed as per the terms and conditions of the contract and, therefore, the claim had no substance.

15. The Arbitral Tribunal returned the finding that the forfeiture of the part of Bank Guarantee as 'general damages' was not justified as

recovery of the 'general damages' could only be on the basis of actual losses sustained in the ultimate purchase of the stores. It was observed that no evidence was led to show the rates at which the commodity, if at all, was purchased by the appellant and the omission in this regard would give rise to the presumption that the appellant did not suffer any monetary loss. However, observing that since the procurement was for armed forces, 3% of the contract value was held as reasonable compensation and accordingly, the appellant was directed to refund the balance after deduction of 3% of the contract value.

16. The said award was challenged by the appellant by filing petition under Section 34 of said Act. The objection petition i.e. OMP (COMM.) No. 37/19 has been dismissed by the impugned order which has led to the filing of the present appeal.

17. The appellant claimed before the court of Ld. District Judge (Commercial Court) that the award was bad in law and also against the stipulated terms. The respondent justified the reasonings given by Arbitral Tribunal. It was, *inter alia*, urged by the respondent before the Arbitral Tribunal that the scope of objections under Section 34 of said Act was very limited and confined only to the grounds as specifically stated in Section 34 and that appellant had failed to make out any ground to contend either the award was bad on any of the grounds as stipulated under Section 34 of said Act. It was also contended that it was settled position of law that the findings of fact recorded by Arbitral Tribunal, on the basis of appreciation of evidence, could not be challenged unless the same were patently illegal, perverse or

without any material and that there was nothing to indicate the same, even remotely.

18. As already noticed above, the appellant was unsuccessful before the learned District Judge (Commercial Court-02), Patiala House Courts, New Delhi as its petition under Section 34 of the said Act was dismissed.

19. It is in the aforesaid premise that appellant is before us.

20. According to Sh. Rakesh Kumar, CGSC, learned counsel for the appellant, the award in question is not sustainable in the eyes of law as the same is against the public policy of India, perverse and is patently illegal. It is claimed that it had been passed without considering and appreciating the express provisions of the contract. It is contended that respondent was fully aware about the delivery period which was even extended on its request and despite the same, the supply did not come forward. It is argued that section 74 of Contract Act is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequences of the breach of a contract. It is contended that the impugned award is not sustainable, both on the facts as well as on the law, as it is contrary to express stipulation in the contract, whereby the parties agreed for pre-determined liquidated damages.

21. The attention of the Court has been drawn towards various terms and conditions and clauses of Tender Enquiry and DGS&D-68 (Revised) and it has been argued that since the material was not supplied, the appellant was fully justified in terminating the contract and encashing the Bank Guarantee. It is also reiterated that the entire delivery schedule to the army personnel was disturbed which caused enormous hardship to them and, therefore, it was a fit case where the claim should have been dismissed. Reliance has been placed by appellant upon ***ONGC Vs. Saw Pipes Ltd.*****(2003) 5 SCC 705,*****M/s. Construction & Design Services Vs. Delhi Development Authority*** **(2015) 14 SCC 263** and ***Ministry of Defence, Government of India Vs. Cenrex SP. Z.O.O and Ors.*****2016 (1) ARBLR 81 (Delhi).**

22. The stand of the respondent remains the same and it is reiterated that there is no perversity or patent illegality in the award. It is also supplemented that as per settled proposition of law, the findings on fact as well as on law of Arbitral Tribunal are not amenable to interference either under Section 34 or Section 37 of said Act and this court cannot sit in appeal and re-appreciate the facts. The scope of judicial scrutiny and interference by any appellate court under Section 37 of said Act is even more constricted and restricted.

23. The appellants have, essentially, challenged the impugned award on the ground that it is vitiated by patent illegality. However, they have been unable to establish the same.

24. Reference be made to ***Delhi Airport Metro Express Pvt. Ltd. Vs. Delhi Metro Rail Corporation Ltd.(2022) 1 SCC 131*** which delineates the limited area for judicial interference in such type of appeals where any award is under challenge. It has been observed therein that the Courts are prohibited to re-appreciate evidence for finding out any patent illegality as the Courts do not sit in appeal against such award. It has also, *inter alia*, been observed therein that interference on the ground of patent illegality may arise when the Arbitrator takes a view which is not even a possible one. The Supreme Court, therein, explained the scope and ambit of patent illegality as under:-

> *"29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression "patent illegality". Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression "patent illegality". What is prohibited is for Courts to re-appreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no*

evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression "patent illegality"."

25. We have carefully gone through the entire record and perused the impugned award as well as the impugned order.

26. Appellant relied on ***ONGC Vs Saw Pipes Ltd.*** (supra) and Arbitral Tribunal noted that in that case, the entire amount of security furnished by the contractor was allowed to be forfeited as the parties had 'expressly agreed' that the amount was a *genuine pre-estimate of damages* and that liquidated damages was not by way of penalty. The factual matrix in the instant case was thus found to be different by Arbitral Tribunal. It was also noticed that the relevant clause itself stated that the recovery of general damages should be based on the loss sustained in the ultimate purchase of the stores. Since the appellant failed to prove any loss and no evidence was led, it was held that the appellant did not suffer any monetary loss and, therefore, forfeiture on part of the bank guarantee as 'general damages' was unjustified. Arbitral Tribunal also took note of ***Maula Bax Vs UOI:(1969)2 SCC554, Fateh Chand Vs Balkishan Das (1964) 1 SCR 515*** and ***Kailash Nath Vs DDA (2015) 4 SCC 136.***

27. Admittedly, the appellant did not lead any evidence or place any material to establish that it had suffered any loss or damages on account of non-delivery of commodity in question. It is also not the case of appellant that it had to procure the same from any other source

at a higher value. The appellant, contending that they were not required to establish any loss as the procurement was for public purpose, relied upon the decision of the Supreme Court in ***Construction and Design Services v. Delhi Development Authority: (2015) 14 SCC 263***. In the said case, there was a delay in completing the work in relation to 'sewage plant' and there was no method for quantifying damages caused by such delay and it was, therefore, concluded that the damages were not quantifiable. In the case in hand, the contract relates to the procurement of goods and damage suffered by the appellant, if any, is evidently quantifiable in monetary terms.

28. In ***Ministry of Defence, Govt. of India vs. CENREX SP Z.O.O*** (supra), relying upon ***Oil & Natural Gas Corporation Ltd. Vs Saw Pipes Ltd.(2003) 5 SCC 705***, it was, *inter alia*, held that once the nature of contract was such that losses were incalculable, the amount claimed as liquidated damages could be claimed as per Section 74 of the Indian Contract Act, 1872, without proving and showing how much loss has been caused. The subject matter of the contract therein was supply of 'parachutes' and it was found difficult and impossible to assess about the loss caused to the Ministry of Defence, Government of India towards delay as there was no mechanism to calculate as to how the Army of this country would have got affected due to non-delivery of parachutes in time and what could have been the alternative arrangements due to delayed delivery and also the expenses required to be incurred on account of non-availability

thereof. Here, as is manifest, the damages could have been easily calculated.

29. We thus feel that the relevant judicial pronouncements, including the above, have been rightly appreciated in the impugned order.

30. In ***MMTC Ltd. v. Vedanta Ltd.*** **(2019) 4 SCC 163,** it has been observed that as far as interference with an order made under Section 34 is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of said provision. As far as Section 34 is concerned, the position is well-settled that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited grounds. It thus needs no reiteration that interference u/s 37 of said Act does not entail a review of the merits of the dispute, and is limited to situations where the findings of the Arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with, if the view taken by the Arbitrator is a possible view based on facts. *(See Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49. Also see ONGC Ltd. v. Saw Pipes Ltd. [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705]; Hindustan Zinc Ltd. v. Friends Coal Carbonisation [Hindustan Zinc*

Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445]; National Highway Authority of India v. Progressive-MVR (JV) ((2018) 14 SCC 688); and McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181]).

31. As already noticed above, there is nothing before us which may indicate any patent illegality or absolutely unjustifiable or unreasonable interpretation of contractual terms or where the conclusion has been arrived at by ignoring vital evidence or where it is based on 'no evidence'.

32. Be that as it may, in view of the settled position of law and on consideration of the factual aspects, we do not see any reason to interfere. Resultantly, the appeal stands dismissed

33. No order as to costs.

MANOJ JAIN, J

SANJEEV SACHDEVA, J

JULY 11, 2023/*swati/dr*