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

Reserved on: 25.08.2015
Pronounced on: 02.11.2015

\+ **FAO(OS) No.131/2014**

M/S PCL-SUNCON (JV) ..... Appellant

Through: Dr. Amit George with Ms. Omana George, Mr. Swaroop George and Ms. Rajsree Ajay, Advocates.

Versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA ..... Respondent

Through: Ms. Meenakshi Sood with Mr. Mukesh Kumar, Advocates for NHAI.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

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1. This appeal under Section 37 of the Arbitration Act, 1996 is directed against the order of the Learned Single Judge dated 08.01.2014. The impugned judgment set aside the award of an Arbitral Tribunal dated 24.02.2013. The question concerns a claim for compensation by, the appellant (hereinafter PCL), which essentially turned on the interpretation of the contract terms concluded on 20.09.2001 between it and the respondent (hereinafter NHAI).

2. The facts necessary to decide this case are that in February 2001, NHAI invited bids for the work of four landing and

strengthening of the existing two lanes between Km. 320 and Km. 398.75 on NH-2 in the State of Jharkhand (hereafter referred to as the 'subject work'). The documents in the Notice Inviting Tender (hereafter NIT) included inter alia a Bill of Quantities (hereafter BOQ) that specified the various items of work and the corresponding quantities that required to be executed under each particular item of the BOQ. PCL, a Joint venture undertaking, submitted a bid for the subject work on 14.05.2001. After due consideration of the bid submitted by PCL, and on finding the same to be the most competitive, NHAI accepted the bid of the appellant by letter dated 31.07.2001. Pursuant thereto, a formal agreement for the subject work was executed by the PCL and NHAI on 20.09.2001.

3. PCL was executing the various items as had been stipulated in the BOQ and had been receiving payments towards the same in the various Interim Payment Certificates. However during the execution of the work, it so emerged that NHAI had omitted certain items in the BOQ aggregating in value to ₹19,16,83,938.60/- These items remained non-operable throughout, and were never instructed to be operated even till issue of Taking Over Certificate for the whole of the works or any stage thereafter. The Contract in question contains specific provisions dealing with variations that might occur during the execution of the work and also provides for the pricing of such variations. Aggrieved by the omission of the BOQ items, and claiming entitlement to be compensated in terms of contractual provisions, PCL, by its letters dated 04.04.2008 and 22.09.2008 raised the issue of and called upon the Engineer to initiate the necessary variation order

for the same and compensate it for the financial loss suffered by it. In response to the second letter NHAI replied by a communication dated 03.11.2008 rejecting the PCL's claim. After receiving no response to its letter-dated 04.02.2009 insisting upon the justification of its claim, PCL invoked the dispute resolution procedure as contained in the contract. Consequently, a three-member arbitral tribunal was constituted to adjudicate the dispute between the parties.

4. The two principal claims before the Arbitral Tribunal, aside from interest and costs, were pertaining to (i) the refund of labor cess, and (ii) loss of profit and overheads on omitted items. Subsequent thereto, the Tribunal made an award dated 24.02.2013 partially allowing PCL's claims. Aggrieved, NHAI approached this Court by means of a petition under Section 34 of the Act.

5. By impugned order and judgment dated 08.01.2014 (hereafter referred to as the impugned order) the Single Judge allowed the NHAI's objection to the award, to the extent that the claim pertaining to the loss of profits and overheads as awarded by the Arbitral Tribunal was set aside.

Pleas and Submissions of the appellant, PCL

6. The first and primary ground which PCL urges and its counsel, Mr. Amit George argues, is that the impugned judgment overreached in terms of the limited mandate under Section 34. The construction of the Contract by the Arbitral Tribunal, whether right or wrong, is a question that falls exclusively within its domain. It is immaterial how

many possible constructions the Contract is capable of, or that the Court believes that there exists a construction that is more appropriate and preferable that the one adopted by the Tribunal, or even that the construction given to it by the Tribunal is wrong. Section 34 does not confer Appellate jurisdiction upon the Court so admitting re-appreciation of the terms of the Contract. A petition under Section 34 is in no manner analogous to a case in appeal before the Court. The jurisdiction under Section 34 does not have the same or even similar concomitants of the court's appellate jurisdiction. Compared with a Court's appellate jurisdiction, narrow latitude is given to it in terms of its ability to set aside an award under Section 34. The scope of the provision extends to only those cases where there exists some discernable and substantial form of procedural irregularity, irreconcilable with the principles of natural justice or those cases where the award itself suffers from some patent illegality.

7. It is argued that a reading of a contract (by the Tribunal) at odds with the opinion of the Court falls within none of the permissible categories under which an award can be interfered with. This being the settled position of law, the substitution made by the Single Judge of his interpretation of the Contract over the one pronounced by the Tribunal is bad in law for the simple reason that it was not the place of the Court to deduce the implications of the Contract in question. In this regard, learned Counsel cited *Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Ltd.* (2009) 10 SCC 63 to show that an error relatable to interpretation of the Contract by an arbitrator is an error within its jurisdiction and such error is not amenable to

correction by Courts as such error is not an error on the face of the award.

8. It is further urged by PCL and contended by its Counsel that the construction given to the Contract, and by reason of which the Learned Single Judge denied the claim for compensation for the financial loss caused to it by the variation of certain items of the BOQ, is erroneous and incompatible with its terms. Mr. George contends that the valuation of the omitted items ought to have been done in terms of Clause 52.1 of the Contract, independently of Clauses 52.2 and 52.3. The variation made by the Respondent, in the manner of an omission must be valued during the pendency of the Contract, in terms of Clause 52.1. Clause 52.1 speaks to valuation of a variation made during the execution of the subject work, in this case a variation made by way of an omission of certain items of the BOQ, admittedly under Clause 52.1(b) of the Contract. Clause 52.2 on the other hand concerns a situation that is entirely removed from the one asserted by PCL, namely where the variation is of such a nature as to effect the original valuation of the items of the BOQ. In such a case, a re-examination and resultant re-fixation of rates may take place. Learned Counsel argued that while Clause 52.2 entails a potential re-fixation of the rates of even the existing items of the BOQ, predicated on the ability of the purported variation to render the original rates inappropriate, Clause 52.1 concerns *only the stand-alone valuation of the variation* and not the existing items of the BOQ. The two clauses, therefore, serve two different purposes. PCL, it is urged sought compensation on the ground of Clause 52.1 and not Clause 52.2. Ld. Counsel cited

National Highways Authority of India v. ITD Cementation India Ltd. 2009 (3) Arb. LR 268 (Delhi) wherein this Court had taken a view similar to that of the Arbitral Tribunal in the present case.

9. NHAI on the other hand, resisted the appeal. It submits- and its counsel, Ms. Meenakshi Sood urges this Court to uphold the impugned order of the Learned Single Judge, since itis premised on the correct interpretation of the terms of the Contract. Learned Counsel submits that the variation being in the nature of an omission, the valuation could be made either in terms of Clause 52.1 or 52.2 bearing in mind the cap or the limitations provided in Clause 52.3. She contends that 52.3 is in the nature of a restriction or limiting condition, that dictates compliance, while valuing variation made under 52.1.

10. Ms. Sood contends that Clause 52.3 categorically provides that only such additions or deductions of the contract price will be made which are in excess of 15% of the contract price. In other words, unless the valuation of the variation made under either 52.1 or 52.2 leads to an addition or deduction in the contract price in excess of 15 percent, that valuation shall not be given effect to. *JSC Centrodostroy v. National Highways Authority of India* FAO(OS) No. 508/2013, decided on 10.01.2014 was cited as an authority for the application of Clause 52.3. It was contended that a Division Bench of this Court, in the said judgment had favored the interpretation whereby primacy was accorded to Clause 52.3.

Analysis and Conclusions:

11. The core of the dispute between the parties is with regard to the manner of valuation of the omitted items. PCL contends that valuation

is to be done of Clause 52.1 of the Contract; NHAI refutes this submission, relying on Clauses 52.2 and 52.3 to deny PCL its entitlement to compensation for financial loss caused by the omission of items of BOQ. The Arbitral Award accepted PCL's contention stating that valuation must be in terms of Clause 52.1. The Learned Single Judge agrees with the interpretation of NHAI.

12. The dispute in the present case may be condensed into a simple question of entitlement of PCL to compensation for the variation made in the items of the BOQ. The question of entitlement is to be answered with reference to the terms of the contract that govern the agreement between the parties. At this stage, it may perhaps seem passé to reiterate that courts are to exercise restraint when entertaining a challenge against an arbitral award. The principle on which arbitration is based, i.e. as an *alternate* dispute settlement system mandates such restraint from the courts. Nevertheless, are counting of the principles guiding the courts while entertaining such petitions is apposite.

13. The Court's jurisdiction and the depth of its inquiry has been circumscribed by a plethora of judgments. In *McDermott International Inc. v. Burn Standard Co. Ltd. And Ors*(2006) 11 SCC 181 the Court held that intervention is envisaged in very limited situations, for instance when there is the presence of fraud or bias by the arbitrators, or where the principles of natural justice have been disregarded. These principles are illustrated in the landmark case of the Supreme Court in *Union of India v. AL Rallia Ram* AIR 1963 SC 1685 where the Court, held that the award of the arbitrator is ordinarily final and conclusive, unless a contrary intention is disclosed by the agreement. The award is

the decision of a domestic tribunal chosen by the parties, and the civil courts, which are entrusted with the power to facilitate arbitration and effectuate the awards, cannot exercise appellate powers over the decision. *Oil and Natural Gas Commission vs Saw Pipes*, (2003) 5 SCC 705 (hereafter *"ONGC"*) is the basic authority where the Supreme Court clarified that when Section 34(2)(a)(v) states that the arbitral procedure must be in accordance with Part One, it means that the mandatory requirements of Section 28 must be followed by the arbitral tribunal, and failure to do so entails a setting aside of the award (paragraph 12). Therefore, the Court held:

> "*If the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered under Section 34. However, such failure of procedure should be patent affecting the rights of the parties.*" (paragraph 14)

The Court also held that an award can be set aside as contrary to *inter alia*, public policy. The court held that *"public policy"*, under S. 34(2)(b)(ii), was to be given a *"broad meaning"*, and included situations where an award was *"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.*"(paragraph 30)

In *ONGC*, the Supreme Court set aside the arbitral award on the

ground that the tribunal had failed to consider Sections 73 and 74 of the Contract Act, and relevant precedents, in awarding damages. What is *"patent illegality"* has been clarified in subsequent cases.

14. The learned Single Judge, while taking note of the principles above, held that even though interpretation of the terms of a contract was solely within the ambit of the Arbitrator, the same would not be the case if only *one* interpretation of the terms of the contract is possible. While we do not disagree with the statement at the very outset, we hasten to add that unless the interpretation adopted by the arbitrator or tribunal is one that is indisputably misconceived or incongruous and removed from the terms of the contract, it should not be rejected even though the courts believe that there may be only *one* truly rightful interpretation of the Contract. It is perhaps safer to approach a petition challenging an award by first contextualizing the award of the arbitrator and whether given the facts of the case, the interpretation given by it would border on absurdity. The jurisdiction of the Court being limited, it seems as if the purpose would be defeated if the Court first approached the Contract, decided what the possible interpretations in his opinion were and then see if the award was aligned towards any of the conclusions acceptable to the judge. The difference though merely one of approach, is vital, since in the former case, a level of credibility and respect for arbitration as an alternate system is afforded, while in the latter, the role of the court is akin to one sitting in appeal over a decision of a lower court. The primary difference between the two is that errors in the latter of any nature are impermissible and cannot be countenanced, while in the

case of an arbitral award, errors as to law or fact, for instance in the case of interpretation of a contract are errors within the jurisdiction of the arbitral tribunal and are not for the Court to rectify unless the error is one relatable to the ones spoken of in *McDermott* (supra), *Renusagar* (supra) *inter alia*.

15. In *Steel Authority of India Ltd vs Gupta Brothers*, (2009) 10 SCC 63, the Court held that Section 34 would be attracted in cases where an arbitrator "*travels beyond the contract*", or makes an award "*contrary to the terms of the contract*". Section 34 however, the Court stated, cannot be used to set aside awards in which there was an "*error relatable to interpretation of the contract*", or if it was based on a "*possible view of the matter*", or if it was based on a finding of law in a case where a "*specific question of law* [had been] *submitted to the arbitrator*." In short, it was not the task of the superior courts to examine the award as though they were sitting in appeal over it. In that case, the question was whether the breaches of contract alleged by the respondent were covered by the clause in the contract that contained the stipulation for damages under certain conditions. The arbitrator had found that they were not, and this finding was challenged. Refusing to set aside the award under Section 34, the Court held:

> *"The arbitrator's view about non- applicability of Clause 7.2 for refusal to supply materials in July-September, 1988 quarter and delayed supply of materials for October-December, 1988 quarter is founded on diverse grounds elaborately discussed in the award. Whether this is or is not a totally correct view is really immaterial but such view is a possible view that flows from reasonable construction of Clause 7.2. The view of the*

arbitrator being possible view on construction of Clause 7.2, and having not been found absurd or perverse or unreasonable by any of the three Courts, namely , Sub-Judge, District Judge and the High Court, we are afraid, no case for interference is made out in exercise of our jurisdiction under Article 136 of the Constitution… Once the arbitrator has construed Clause 7.2 in a particular manner, and such construction is not absurd and appears to be plausible, it is not open to the courts to interfere with the award of the arbitrator. Legal position is no more res integra that the arbitrator having been made the final arbiter of resolution of disputes between the parties, the award is not open to challenge on the ground that arbitrator has reached at a wrong conclusion. The courts do not interfere with the conclusion of the arbitrator even with regard to construction of a contract, if it is a possible view of the matter." (paragraphs 31 - 32).

16. In *Associated Engineering Co. v. Government of Andhra Pradesh* (1991) 4 SCC 93 the Supreme Court observed that *"if the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction"*. In *Hind Builders vs. Union of India* (1990) 3 SCC 338 the court stated that in matter in which two interpretations of the terms of the contract are possible, it is legitimate for the arbitrator to accept one or the other of the available interpretations and even, if the court may think that the other view is preferable, the resulting award cannot be set aside on the ground that it vitiated by an error that is apparent on its face. (Ref also *Uttar Pradesh Hotels v. Uttar Pradesh State Electricity Board* (1989) 1 SCC 359, *Union of India v. Banwari Lal and Sons (P) Ltd.* (2004) 5 SCC 304,*Tarapore and Co. v. Cochin Shipyard Ltd., Cochin* (1984) 2 SCC 680.

17. In light of this legal position, the question for determination for this Court is whether the interpretation given by the Arbitral Tribunal is so removed from the terms of the Contract that it would warrant a substitution of its view with that of the learned Single Judge's. The relevant Clauses of the Contract are extracted here:

> *"VARIATIONS*
>
> *52.1 The Engineer shall make any variation of the form, quality or quantity of the Works or any part thereof that may, in his opinion, be necessary and for that purpose, or if for any other reason it shall, in his opinion, be appropriate, he shall have the authority to instruct the Contractor to do and the Contractor shall do any of the following:*
> *a) increase or decrease the quantity of any work included in the contract.*
>
> *b) omit any such work (but not if the omitted work is to be carried out by the Employer or by another contractor).*
>
> *c) change the character or quality or kind of any such work*
>
> *d) change the levels, lines, position and dimensions of any part of the works.*
>
> *e) execute additional work of any kind necessary for the completion of the works, or*
>
> *f) change any specified sequence or timing of construction of any part of the Works.*
>
> *No such variation shall in any way vitiate or invalidate the contract, but the effect, if any, of all such variations shall be valued in accordance with Clause 52. Provided, that where the issue of an instruction to vary the works is necessitated by some default of or breach of contract by the contractor or for which he is responsible, any additional cost attributable to such default shall be borne by the*

contractor."

"VALUATION OF VARIATIONS

52.1 All variations referred to in Clause 51 and any additions to the Contract Price which are required to be determined in accordance with Clause 52 (for the purposes of this Clause referred to as "varied work") shall be valued at the rates and prices set out in the Contract if, in the opinion of the Engineer, the same shall be applicable. If the Contract does not contain any rates or prices applicable to the varied work, the rates and prices in the Contract shall be used as the basis for valuation so far as may be reasonable, failing which, after due consultation by the Engineer with the Employer and the Contractor, suitable rates or prices shall be agreed upon between the Engineer and the Contractor. In the event of disagreement the Engineer shall fix such rates or prices as are, in his opinion, appropriate and shall notify the Contractor accordingly, with a copy to the Employer. Until such time as rates or prices are agreed or fixed, the Engineer shall determine provisional rates or prices to enable on account payments to be included in certificates issued in accordance with Clause 60."

52.2 Provided that if the nature or amount of any Engineer varied work relative to the nature or amount of to Fix the whole of the works or to any part thereof, is Rates such that, in the opinion of the Engineer, the rate or price contained in the Contract for any item, of the Works is by reason of such varied work, rendered inappropriate or inapplicable, then, after due consultation by the Engineer with the Employer and the Contractor, a suitable rate or price shall be agreed upon between the Engineer and the Contractor. In the event of disagreement the Engineer shall fix such other rate or price as is, in his opinion, appropriate and shall notify the Contractor accordingly, with a copy to the Employer. Until such time as rates or prices are agreed or fixed, the Engineer shall determine provisional rates or prices to enable on-account payments

to be included in certificates issued in accordance with Clause 60.

Provided also that no varied work instructed to be done by the Engineer pursuant to Clause 51 shall be valued under Sub-Clause 52.1 or under this Sub-Clause unless, within 14 days of the date of such instruction and other than in the case of omitted work, before the commencement of the varied work, notice shall have been given either:

(a) By the Contractor to the Engineer of his intention to claim extra payment or a varied rate or price, or

b) By the Engineer to the Contractor of his intention to vary a rate or price. Provided further that no change in the rate or price for any item contained in the contract shall be considered unless such item accounts for an amount more than 2 percent of the Contract Price, and the actual quantity of work executed under the item excess or falls short of the quantity set out in the Bill of Quantities by more than 25 percent.

52.3 If on the issue of the Taking-Over Certificate for Exceeding the whole of the Works, it is found that as a 15 percent result of:

(a) all varied work valued under Sub-Clauses 52.1 and 52.2, and

(b) all adjustments upon measurement of the estimated quantities set out Bill of Quantities, excluding Provisional Sums, day works and adjusted price made under Clause 70.

But not form any other cause, there have been additions to or deductions Contract Price which taken together are in excess of 15 per cent of the Contract, Price (which for the purposes of this Sub-Clause shall Contract Price, excluding Provisional Sums and allowance for daywork then and in such event (subject to any action already taken under Sub-Clause of this Clause), after due consultation by the

Engineer Employer and the Contractor, there shall be added to or deducted Contract Price such further sum as may be agreed between the Contractor, Engineer or, failing agreement, determined by the Engineer having regard Contractor's Site and general overhead costs of the Contract. The Engineer notify the Contractor of any determination made under this Sub- Clause copy to the Employer. Such sum shall be based only on the amount by additions or deductions shall be in excess of 15 per cent of the Effective Price."

18. The Arbitral Tribunal held that valuation of the omitted items was to be made under Clause 52.1, independent of Clause 52.3. This Court is in agreement with this view. A look at the terms of the contract would show that Clause 52.1 and 52.2 on the one hand and 52.3 on the other contemplate two different points of time in the execution of the contract. Under 51.1, the Engineer is entitled to affect any variation by way of addition or deletion of items from the BOQ. Clause 52.1 mandates that such variations made *during* the execution of the work must be valued at the same time, i.e. *during the subsistence of the contract*, at the time of the variation itself. Clause 52.3 operates at a later point in time, i.e. at the time when the Taking Over Certificate is issued, which necessarily contemplates the *completion* of the work and *the end of the Contract.* It is at this time, that all previously valued variations must be taken into account to ascertain whether the cumulative valuation has either exceeded or fallen below 15 percent of the price of the effective contract price. In other words, the valuation under Clause 52.1 precedes the estimation of the valuation *vis-a-vis* the effective contract price under Clause

52.3. Clause 52.3 therefore does not function as a restriction against the initial mandatory valuation of any variation made in the BOQ. It operates independently of it. Clause 52 can be said to be in three steps,

(i) Clause 52.1 being the sub clause determining initial valuations of the *varied work*,

(ii) Clause 52.2 being the sub clause where when the valuation under 51.1 is of such nature as to effect the price of other items of the BOQ, prices of such affected must be re-negotiated;

(iii) Clause 52.3, which leads to the aggregate estimation of all variations at the time the work, is completed and the contract realized.

Clearly then, 52.3 does not in any manner limit the individual valuations made during the subsistence of the contract. In fact, the wording of Clause 52.3 could not have made the situation clearer; it begins with the words *"if on the issue of the Taking-Over Certificate"* expressly signifying the time at which the threshold of 15% becomes important. If this were not reason enough, Clause 52.3 itself clearly refers to the valuation of the variation having already been carried out under Clause 52.1 and 52.2 by employing the words *"all varied work* ***valued*** *under Sub-Clauses 52.1 and 52.2"*.

19. NHAI had cited *JSC Centrodostroy v. National Highways Authority of India* FAO (OS) No. 508/2013, decided on 10.01.2014 as an authority for the application of Clause 52.3. The terms of the GCC in that case no doubt are identical to the ones we are confronted with the facts of that case are clearly distinguishable. In that case, the

appellant claimed compensation under Clause 52.2, a claim that was been rejected by both the Arbitral Tribunal and the learned Single Judge. Before the Division Bench, the appellant had averred that the variation in the items of the BOQ entitled it to compensation for loss of margin. In the affirming decision, upholding the award and the decision of the Single Judge, the Division Bench agreed with the Arbitral Tribunal's rejection of the claim on the ground that Clause 52.2 was never meant as a claim for compensation but one for re-fixation of the originally stipulated rates for the items of the subject work in the event that the variation was of such magnitude to render these original rates as inappropriate or inapplicable. This is in contradistinction of Clause 52.1, which essentially does function as a ground for claim of compensation for varied items. Moreover in that case, the claim was in the context of the Taking Over Certificate, thereby justifying the application of Clause 52.3. Clearly therefore, in that case, neither was Clause 52.1 ever made the basis for the claim, as is in the case at hand, nor was the claim made during the pendency of the subject work. Therefore, that judgment cannot be relied on to further NHAI's argument, in the present instance.

20. For these reasons this Court holds the award of the Arbitral Tribunal as plausible and are resultantly unable to treat Clause 52.3 as a stipulation, which conditions that compensation for a variation in terms of Clause 52.1 too will be paid only when the valuation crosses the threshold of either a 15% increase or decrease.

21. As a postscript, this Court believes that it is imperative to sound a word of caution. Notwithstanding the considerable jurisprudence

advising the Courts to remain circumspect in denying the enforcement of arbitral awards, interference with the awards challenged in the petitions before them has become a matter of routine, imperceptibly but surely erasing the distinction between arbitral tribunals and courts. Section 34 jurisdiction calls for judicial restraint and an awareness that the process is removed from appellate review. Arbitration as a form of *alternate* dispute resolution, running parallel to the judicial system, attempts to avoid the prolix and lengthy process of the courts and presupposes parties consciously agreeing to submit a potential dispute to arbitration with the object of actively avoiding a confrontation in the precincts of the judicial system. If a court is allowed to review the decision of the arbitral tribunal on the law or on the merits, the speed and, above all, the efficacy of the arbitral process is lost.

For the reasons discussed previously, the impugned judgment and order of the Learned Single Judge is set aside and the award of the Tribunal dated 24.02.2013 is affirmed. The appeal is allowed in the above terms.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

NOVEMBER 2, 2015