IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT: ARBITRATION AND CONCILIATION ACT

O.M.P. No. 231/2007

Judgment reserved on April 25, 2007

Judgment delivered on January 11, 2008

Himachal Joint Venture .... Petitioner

Through : Mr. Raghuvendra Srivastava
with Mr. A. Kumar and
Mr. Rishi Kumar, Advocates.

Versus

Panilpina World Transport
(India) Pvt. Ltd. .... Respondent

Through : Mr. Sandeep Sethi, Sr. Adv.
with Mr. Jasmeet Singh, Advocate.

G.S.SISTANI, J.

1. The petitioner has filed the present petition under section 34 of the Arbitration and Conciliation Act, 1996 challenging the award dated 4.1.2007 passed by the sole arbitrator in favour of the respondent. The respondent has filed a caveat. With the consent of the parties the petition is being finally taken up for hearing.

2. A few incontrovertible facts, giving rise to the lis between the parties and ultimately the present petition, may first be noticed.

3. The petitioner is a joint venture engaged in the business of infrastructural projects. It was awarded the work of constructing a Hydroelectric Power Station at Parbati, District Kullu, Himachal Pradesh by the National Hydroelectric Power Corporation. Pursuant thereto, the petitioner entered into a contract with one NCC, Norway for the supply of a Tunnel Boring Machine (TBM) and other associated equipment required for the completion of the project. The TBM, approximately 1200 MT in weight and 2300 cubic metres in volume, had to be transported safely from Malm, Norway and Spain, Bailbao to the project site at Parbati, District Kullu, Himachal Pradesh. The petitioner thus invited quotations for the award of a contract for transportation of the TBM and other associated equipment. The respondent, in its pursuit to procure the contract of transportation, gave a presentation to the petitioner projecting itself as the largest multinational and multi-cultural company offering transport and logistics services across the globe. The respondent also submitted its quotations to the petitioner first, a preliminary quotation was sent on 29.4.2003, and thereafter, a revised quotation was sent on 19.5.2003. This was followed by an e-mail dated 16.6.2003 whereby the respondent informed the petitioner of its visit to the supplier for taking stock of the modalities involved in the transportation of the TBM

and other associated equipment. The parties finally convened on 24.6.2003 and 25.6.2003 to finalise the proposed contract of transportation, and pursuant to a series of discussions and deliberations that ensued, the petitioner decided to award the said contract to the respondent. The petitioner consequently issued a letter of intent dated 25.6.2003 wherein the work awarded to the respondent was specifically mentioned as (i) Transportation package of Tunnel Boring Machine and associated equipment from Ex-Works (Malm, Norway and Bilbao, Spain) to Adit 2, HEP at Parbati Project in Himachal Pradesh. Although the letter of intent dated 25.6.2003 stipulated the work as EX-Works, the parties, at the time of formalizing the terms and conditions of the contract of transportation, decided to add the expression FOT after the expression Ex-Works. The final agreement between the parties was signed on 15.07.2003 for a total cost of US $ 3,82,891 and INR 1,00,92,925/- adding upto a grand total of Rs.2,77,05,911 /. After signing of the agreement dated 15.07.2003, certain differences accrued between the parties owing to which the contract was eventually terminated on 2.8.2003.

4. The disputes between the parties resulting from the termination of the contract were referred to arbitration. This Court vide order dated 15.3.2004 appointed Justice Usha Mehra (retd.) as the sole arbitrator to resolve the disputes between the parties. The respondent filed a statement of claim before the learned arbitrator in the sum of Rs.10,00,000/- towards cost incurred and for a sum of Rs.28,28,024/- (10% of the total contract value) as damages along with interest on the total sum @ 24% per annum. In response, the petitioner filed its reply to the statement of claims and filed its statement of counter- claims against the respondent.

5. The case of the respondent before the arbitrator was that the petitioner had unilaterally terminated the contract dated 15.7.2003 as a result of which it had to suffer huge costs and losses. It was alleged that the termination of contract by the petitioner was not only illegal but also vitiated by mala fide inasmuch the petitioner wanted to award the contract of transportation to some other freight forwarder by the name of M/s. Jai Hind Roadways.

6. Per contra, the case of the petitioner before the arbitrator was that the respondent had tried to make an unlawful gain at the cost of the petitioner. It was adduced that whereas it was always understood between the parties that the loading and stuffing of cargo would entail no extra cost for the petitioner, however, the respondent eventually made an unlawful and unreasonable demand of a lump sum amount of NOK 7,40,000. It was thus submitted that owing to the fundamental breach of the contract dated 15.7.2003 by the respondent, the agreement dated said contract was mutually terminated by the parties.

7. The learned arbitrator, upon hearing the rival contentions of both parties, framed the following issues: 1)Whether the claims of the claimant are within the scope of Arbitration Clause No.8, and if not, what is the effect of the same 2)If the issue No.1 is decided in favour of the respondent then whether the claims are not maintainable 3)Whether the respondent malafidely and unilaterally terminated the Agreement dated 15.07.2003 4)Whether the Claimant was always ready and willing to perform its part of the contractual obligation as per Agreement dated 15.07.2003 5)To what amount is the Claimant entitled 6)Whether counter-claim filed by the respondent is maintainable 7)Whether the claimant is entitled to interest, if any, at what rate and from what period 8)If respondent succeed in the counter claim then whether respondent would be entitled to interest, at what rate and for what period 9)Whether parties who succeed will be entitled to cost 10)Relief.

8. After hearing both parties at length and upon examination of the evidence brought on record, the learned arbitrator vide order dated 01.03.2006 decided the the preliminary issues qua

jurisdiction and maintainability in favour of the respondent. The subsequent issues qua termination of the contract and arbitrability of the disputes between the parties were also decided in favour of the respondent vide award dated 04.01.2007.

9. Aggrieved, the petitioner has challenged the impugned award on the following grounds:- (1)Firstly, that the imugned award deals with a dispute not contemplated and not falling within the terms of the submission to arbitration. Thus, inasmuch as the contract was not performed at all, there was no question of execution of the contract at all, and therefore, the disputes were not within the scope of the Arbitration Clause. The arbitral award is accordingly liable to be set aside. (2)Secondly, that there is no evidence to show that the respondent had suffered any damage. In view of the fact that the agreement was signed on 15.07.2003 and terminated on 02.08.2003 during this period no work at all was carried out and hence there was no question of loss or profit.

10. This Court, while deciding objections to an arbitral award under the framework of the Arbitration and Conciliation Act, 1996, is not oblivious to the narrow and constricted circumference of its jurisdiction which this speacialised realm of law posits. Judicial dicta is explicit that [t]he arbitrator is a sole judge of the quality as well as quantity of evidence and it will not be for the Court to take upon itself the task of being a judge on the evidence before the arbitrator.

1 The strict and regimented position of law qua judicial intervention in matters pertaining to arbitration does not countenance this Court to re-appreciate evidence or re-examine the arbitral disputes on merits, or far that matter, even question the reasonableness of the reasons afforded by the arbitrator in its arbitral award.

2 The conclusion of an arbitrator on facts, even if erroneous in the subjective opinion of the Court, but otherwise proper in law, cannot be interfered with

3. Further, where the view of the arbitrator is only a plausible view but cannot be ruled as one which is per se impossible to accept, the Court should not substitute its own view in place of that of the arbitration. Even in those cases where an arbitral award is set aside or quashed on any of the explicit grounds provided under clause (2) of section 34 of the Arbitration and Conciliation Act, 1996, the Court should ensure that the process of arbitration does not come to a halt by setting the parties at liberty to resort to arbitration again if it is desired.4

11. The limited jurisdiction of the Court in the process of arbitration is, as a matter of legislative policy, implicit in the avowed and ultimate object of the Arbitration and Conciliation Act, 1996 which is to resolve disputes by an expeditious and cost effective mechanism with minimal and sporadic judicial interference. Let us not forget that arbitration is essentially an alternative dispute resolution mechanism which conflicting parties consciously resort to in order to avoid or truncate the dilatory and cumbersome process of litigation and the inevitable judicial rigmarole entailed therein. It is perhaps with this wisdom that the Arbitration and Conciliation Act, 1996 enjoins the Court to interdict arbitral proceedings with great circumspection and strictly abhors any judicial intervention which has the effect of derailing or scuttling the process of arbitration or pummeling the finality of an arbitral award.

12. The finality accorded to an arbitral award, however, is not absolute. Clause (2) of the Arbitration and Conciliation Act, 1996 lays down seven exclusive grounds for setting aside an arbitral award, namely, incapacity of the arbitrator, invalidity of the arbitral agreement,

procedural impropriety, inapplicability of the arbitration agreement, improper composition of the arbitral tribunal, inarbitrability of the disputes and the award being affront to public policy. Inasmuch as the scope and extent of judicial interference in arbitral proceedings is limited, the correct approach that the Court must adopt while considering the objections to the arbitral award is to examine the reasons afforded therein.

13. Keeping in mind the aforesaid, I shall now advert in extenso to the objections raised herein to the impugned arbitral award dated 4.1.2007. Re: Arbitrability of Disputes

14. The petitioner, at the outset of his case before the arbitrator, objected to the arbitrability of the disputes raised before the arbitrator. It was vehemently argued that disputes, if any, which have arisen between the parties during the execution of the agreement could only be entertained. Learned counsel for the petitioner contends that as per Clause 8 only those disputes which arose during the execution of the contract could have been referred to arbitration. Thus, according to him, Clause 8 presupposes the existence of an agreement which was being executed and the disputes arose while executing the said contract. In this case, however, according to the petitioner, the agreement remained a non-starter, as immediately after signing the agreement which it came to the notice of the petitioner that the respondent herein had played a fraud, the petitioner immediately rescinded the contract. Mere signing of the contract would not constitute execution of the contract.

15. For felicity of reference, Clause 8 of the contract dated 15.7.2003 is reproduced thus:- In the event of any dispute during the execution of this contract, the then HJV and Panalpina will appoint a 3rd party as arbitrator to decide the matter after duly hearing both the parties and the arbitrators decision will be final and binding on both the parties. The expenses of the arbitration will be shared by both the parties (50%-50%). The jurisdiction of this will be Bangalore.

16. The arbitrator, while delving on the aspect of arbitrability of the disputes, observed that the question as to whether the claims raised by the respondent fell within the arbitral clause stipulated under the contract depended on the interpretation of the expression during the execution as appearing in the said clause. It was observed that for the respondent's claims to sustain, it had to ascertained whether the contract dated 15.7.2003 had been executed or not.

17. The petitioner, while relying upon various dictionaries as well as books on arbitration, vehemently contended that mere signing of the contract would not constitute execution. It was argued that Clause 8 of the Contract dated 15.7.2003 pre-supposed the existence of an agreement which was being executed and the disputes arose while executing the said contract. However, as the petitioner had rescinded the contract and owing to which the said contract remained a non-starter, it could not be said that the disputes arose during the execution of the contract.

18. The respondent, on the other hand, relied upon Russell on Arbitration as well as Black's Law Dictionary to canvas the point that the execution commenced from the time the contract dated 15.7.2003 was signed by the parties till the completion of the work. Therefore, every action taken or performed from beginning till completion of the contract will fall under the definition of Execution. The respondent in support of his case, fervently urged the arbitrator not to indulge in hair splitting while interpreting a clause. It was adduced that the intention of the parties had to be gathered from the words used in the clause, and further, if there was a doubt as to whether a dispute formed part of the arbitration clause or not, it was apposite to favour coverage of the dispute rather than non-coverage.

19. The arbitrator, while deciding the aspect of execution observed that the respondent was to move equipment from Norway to Kuller in Himachal Pradesh. It was observed that merely because the equipment had not moved from Norway, it would be a wrong assumption to call the agreement a non-starter. The Arbitrator also took into consideration following facts which testified that contract had been executed:- i. Offer and revised offer was made by the claimant. The same was accepted by the respondent followed by letter of intent. Respondent asked claimant's representative to visit Norway and conduct survey of the entire route from Norway to Kuller in order to find out that roads and position of bridges whether these were strong enough to support in carrying the equipment. Claimant took steps in order to reinforce the week points. This was one step forward towards execution of the contract. Further after signing of the agreement, the claimant made arrangements by booking the vessels and did planning for which he incurred heavy expenditure. ii. Representative of the claimant went to Norway to inspect and to meet Mr. Simon Thorson. after discussion, the representative prepared route summary map with details for carrying the equipment. He gave his remarks and comments. The survey of route though was carried earlier than the signing of the agreement but there was meeting of mind between the parties that the equipment would be carried on the route surveyed by the claimant. This was part of execution of the agreement. Execution commences when claimant took steps which ultimately led to signing of the contract. Letter of intent was prior to the signing of the contract hence contract would relate back to the date of letter of intent.

20. The arbitrator also took into consideration the decision of this Court in Gujarat Optical Communication Ltd. v. Department of Telecommunications and another, (87) DLT 2000 859, wherein this Court has unequivocally opined that execution starts from the time agreement documents are signed till completion of the work. Every action taken or preformed from the beginning till the completion will fall under the definition of execution. It has also been observed in the said case that execution will be qualified in part and full and that any action taken under the contract would constitute execution of the contract.

21. Taking the aforesaid facts as well as considering the settled position of law that the word execute would mean To sign as well as to perform, I find no infirmity in the decision taken by the learned Arbitrator while deciding the preliminary issue nos.1 and 2. Re: Public Policy

22. The second leg of the petitioner's contentions assails the arbitral award dated 4.1.2007 on grounds of public policy. It would be useful to throw light on the scope of the expression public policy. Reliance in this regard may be placed on Oil and Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd. wherein the applicability of the expression public policy on the touchstone of Section 23 of the Indian Contract Act, 1817 and Article 14 of the Constitution came to be considered. The Apex Court postulated four broad parameters on which an award could be set aside, namely:- (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.

23. Learned counsel for the petitioner further contends that the award is opposed to public policy of India as the learned Arbitrator has decided the case contrary to the evidence on record. The respondents claim of loss of profit of 10% of the contract value and in respect of this, the respondent had produced a copy of the balance sheet, according to which, profit was indicated to the extent of 1.25% of the total revenue whereas learned Arbitrator has proceeded to award 10% of the contract value as damages.

24. Learned counsel for the petitioner contends that the agreement dated 15.7.2003 had been unilaterally terminated by the petitioner. Counsel for the petitioner submits that the witness of

the respondent had admitted that as on 02.08.2003 there were unresolved disputes between the parties and the factum of holding a meeting dated 02.08.2003 was also admitted by the said witness.

25. Learned counsel for the petitioner strongly urges that the respondent was represented in the said meeting by Mr. Indroneel Sen and Ms. Preeti Virmani, however, both these persons were not examined by the respondent and in view of the fact that the said witnesses were not produced the Arbitrator should have drawn an adverse inference. This averment of the petitioner has also been also been taken care of by the arbitrator by taking on record the contention of respondent that if at all Mr.Indroneel Sen and Ms.Preeti Virmani had given their consent for termination of the agreement, such an important decision would surely have been recorded. The petitioner herein did not produce any document before the Arbitrator to show that Mr.Indroneel Sen and Ms.Preeti Virmani had consigned to terminate the agreement particularly when all previous dealings were in writing and in case the termination was by a mutual consent, a written document was mandatory. In fact as soon as the letter dated 02.08.2003 terminating the contract was received Mr. Indroneel Sen refuted the allegations vide letter dated 08.03.2003. More so, it is unheard that a written agreement would be terminated verbally.

26 .Learned Arbitrator has while deciding these two issues has taken into consideration the relevant documents and the various judgments in this regard. It will be useful to reproduce Paras 14 and 16 of the award: 14. That written terms of an agreement has sanctity in law. These will prevail over verbal assertions. What transpired prior to reaching a concluded contract cann't alter the terms and conditions of a concluded written contract. Supreme Court in the case of ROOP KUMAR vs. MOHAN THEDANI, ADR 2003 SC 2418 held that Section 91 of the Evidence Act relates to evidence of terms of contract, grants and other disposition of properties reduced to form of document. This section forbids proving the contents of a writing otherwise than by writing itself. Similar view was formed by the Apex Court in the case of M/s.FABRIL GASOSA vs. LABOUR SQEUEIRA VS. LABOUR COMMISSIONER and ORS. JT 1997 (2) SC 171 wherein Apex Court observed that when terms of contract on settlement in the form of document are proved as per Section 91, no evidence of any oral argument of settlement shall be admitted between parties. Similar view was expressed by Supreme Court in the case of NEW INDIA ASSURANCE CO. LTD. VS. KUSUMANDI KANESHWARA RAO (1997) 9 Sec. 170 Delhi High Court also took same view in the case of SMT. GUNMA RAJGARATIA VS. CANARA BANK and ORS. 79 (1999) Delhi Law Times, Page 546. Supreme Court in the case of DRESSOR R AND SA VS. BINDAL AGRO CHEM LTD. (2006) 1 SCC 751 held that a prelude to a contract should not be confused with the contract itself. Parties do enter into discussions, negotiations and deliberations but what ultimately culminate into a contract, terms of the same are binding unless those terms are against law. That is not the case herein. Parties to the contract are bound by the terms of the contract. The agreement dated 15.7.2003 stipulates the scope of work Ex-work-FOT which terms is binding on the parties. It is unbelievable that a company of respondent's repute would insert a material term in the written agreement on a verbal suggestion or assurance of an other party made in a very casual manner. If Mr.Sen had assured that claimant would not claim additional amount for stuffing and loading on trailers then such an assurance ought to have been obtained in writing and incorporated in the agreement. Reading of Para 9 of Ex.CW-1/16, letter of respondent dated 30.07.03 shows the objection to the term FOT was taken for the first time by the supplier (NCC), and thereafter, the respondent in order to wriggle out of the written terms of the agreement set up the story of verbal request and assurance. 16. It is not believable that the claimant agreed verbally to terminate the contract particularly when the claimant had made elaborate arrangement for the execution of this contract. It is unbelievable and unconceivable to accept the argument of the respondent that

verbal consent was given to terminate the contract. Respondent even did not bother to find whether those two personnels of the claimant had the authority to do so. In fact, I find force in the submission of Mr. Sandeep Sethi, Senior Advocate that respondent wanted to terminate this contract because it had made arrangement with another agency i.e. M/s. Jain Hind Roadways. No credence can be attached to the verbal statement of respondent's witness in the absence of any documentary evidence. Hence it can safely be concluded that the agreement was not terminated mutually but was terminated unilaterally.

27. Apropos of the fact that the respondent was ready and willing to perform its part of the contractual obligations, the Arbitrator has taken into consideration the fact that the respondent's representative visited the Head Office at Banglore for giving representation and discussion in connection with this project and also deputed another official to Mumbai for finalization of various issues in connection with the shipment of the cargo to Mumbai. A representative visited the overseas supplier's factory in Norway in June, 2003 to personally meet the supplier and to obtain the first hand information to ascertain special requirements for movement of the cargo.

28. Learned Arbitrator has observed that the respondent had made an e-mail dated 28.7.2003 (Exhibit CW-1/11) wherein the respondent had mentioned that they had already tied up with Vessel owner and had placed the order. What has already been noticed is that during the period the contract was alive with the respondent, the petitioner had started negotiating with another agency i.e. M/s.Jai Hind Roadways transport and had, in fact, even taken their representative to OSLO. I find no infirmity in the reasoning of the learned Arbitrator and these issues have been decided in favour of the respondent on cogent reasons with respect to the claimant on loss of profit or damages. Taken into consideration the judgments in the case of Dwarka Das (supra) the Arbitrator has granted loss of profit to the respondent @ 10% of the contract price.

29. Learned Arbitrator has taken into consideration the objections raised by the petitioner herein as well as the various judgments relied upon by learned counsel for the respondent in the case of State of Kerala Vs. K. Bhaskaran, reported at AIR 1985 Kerala 49; DDA Vs. Polo Singh and Co., reported at 101 (2002) Delhi Law Times 401; Dwarka Das Vs. State of M.P. and Another, (199) 3 SCC 500; A.T.Brij Paul Singh and Bros. Vs. State of Gujarat, reported at AIR 1984 SC; Mohd. Salamatullah and Others Vs. Govt. of Andhra Pradesh, reported at (1997) 7 Supreme Court Cases 590; Union of India Vs. Sugauli Sugar Weorks (P) Ltd., reported at AIR 1976 SC 1414; and Aries Construction Co. Vs. D.D.A. and Ors. Reported at 2001 (4) RAJ 567 (Del.).

30. The reasons adduced by the arbitrator in my view, amply justify the stand taken by her. The award is a well-reasoned award and the arbitrator has taken into consideration all plausible evidence as well as the documents on record. Consequently, no grounds are made for setting aside the award. The petition accordingly stands dismissed.

Sd./-
G.S.SISTANI, J.

January 11, 2008