REPORTABLE

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

+ OMP NO. 241 OF 2006

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Date of Decision : September 22, 2008.

HARJI ENGG. WORKS PVT. LTD .... Petitioner/Objector

Through Mr. S.K.Sharma, Mr.Dhruv Kumra, Advocates.

VERSUS

M/S BHARAT HEAVY ELECTRICALS LTD & ANR. .... Respondents.

Through Mr. B.K. Satija, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not ? YES

3. Whether the judgment should be reported in the Digest ? YES

SANJIV KHANNA, J.:

1. Harji Engineering Works Pvt. Ltd., the objector, was awarded contract for erection, testing and commissioning of eltrostatic precipitators at Ampara “B” Thermal Power Project vide

LOI dated 28.8.91 issued by Bharat Heavy Electrical Ltd., the respondent.

2. Disputes arose between the parties and in terms of the arbitration clause, one Mr. U.C. Gupta, Senior DGM of the respondent was appointed as a Sole Arbitrator. However, on his retirement, Mr. S.K. Sawhney, the then AGM of the respondent was appointed as a Sole Arbitrator in 1997.

3. Mr. S.K. Sawhney has made and published, the award dated 21.2.2006, partly allowing claims of both parties. The objector has challenged the said award in the present petition under Section 34 of the Arbitration and Conciliation Act. 1996 (hereinafter referred to as “Act”, for short).

4. Paragraph 3 of the award reveals that the learned Sole Arbitrator had entered reference on 01.10.1997 and had 27 effective hearings before him. The last effective hearing was held on 14.11.2002. This is apparent from the reading of paragraph 3 of the award dated 21.2.2006, which is as under:-

> “In due compliance of my assignment as the Ld. Sole Arbitrator, the undersigned called for the ninth arbitration proceedings on 01.10.1997 and since then, 27 proceedings were conducted by the undersigned up to 14.11.2002 viz. on 01.10.1997 , 15.10.1997, 29.11.1997,8.12.19997,22.12.1997,07.02.1998,23.04.1998, 08.05.1998, 20.5.1998, 26.5.1998, 20.11.1998, 30.12.1999,

05.04.2000, 02.12.2000, 19.12.2000, 04.01.2001, 13.2.2001, 23.02.2001, 14.03.2001, 13.09.2001, 12.10.2001,18.10.2001, 24.10.2001, 15.1.2002, 08.04.2002, 10.10.2002 & 14.11.2002".

5. The award in question was made on 21.2.2006, 3 years after the last effective hearing was held. Thus, there is substantial delay between the last effective hearing and date on which the learned Arbitrator had made and published this award. The delay was not explained or justified in the impugned award. It was also submitted that even hearings had not concluded. The objector urged that the award was contrary to public policy. It was contented by the respondent that the delay was occasioned by talks of compromise and hearing was also held on 2.12.2003. It was also submitted that hearing had concluded and even written arguments had been filed by the parties. Challenge to the award should be examined on merits alone.

6. Order sheet of the learned Arbitrator dated 14.11.2002, reads as under:-

"1. Representatives of both the claimants as well as Respondents participated in the hearing as per the enclosed attendance sheet.

2. At the outset, Claimants requested that action taken by the Respondents on the set of papers handed over by them prior to the

previous hearing and under study by the Respondents as conveyed in the last hearing be indicated. On this, the Respondents' representative submitted that the same is under scrutiny and can be discussed in the next hearing. However, he discussed various other issues with the Claimants in detail. The Claimants again requested the Respondents for early action in view of the considerable time already elapsed on the matter.

3. Both the parties were directed to come prepared in the next hearing with their claims and counter claims properly recorded with relevant evidence so that the matter can be pursued further.

4. The next date of hearing shall be intimated shortly".

7. Order sheet dated 14.11.2002 reveals that hearing in the arbitration proceedings had not concluded and were still pending consideration before the learned Arbitrator. Time had been taken by the respondent for scrutiny of papers and submitting their reply. Paragraph 3 of the order dated 14.11.2002 is a clear pointer that the learned Arbitrator wanted to have further hearings in the matter. Order dated 14.11.2002 is an answer to the contention of the counsel for the respondent that the parties had filed their written submissions and nothing remained to be urged. Written submissions were filed in 1998; long before the order dated 14.11.2002 was passed. Order dated 14.11.2002 passed by the learned Arbitrator is

a complete answer to the said contention and discloses that the arguments had not concluded and the parties were still required to address and complete submissions. The respondent was to scrutinize certain papers and thereafter file reply. The learned Arbitrator had in paragraph 4 of the said proceedings therefore observed that the next date of hearing shall be intimated to the parties shortly.

8. Counsel for the respondent had drawn my attention to proceedings dated 2.12.2003, which are as under:-

> "38th Hearing held at BHEL PSNR NOIDA on 02.12.2003 at 4.00 PM.
>
> 1) Representatives of both the claimants and Respondents participated in the hearing as per the enclosed attendance sheet.
>
> 2) BHEL informed that they are still working on the compromising proposal given by M/s HEW, which may take some more time. Therefore, they requested for granting some more time for consideration of the proposal of M/s HEW.
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> 3) Both the parties were directed to act fast on the issues so that further modalities are set forth.
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> 4) The next hearing to review the case would be held in due course of time which will be notified accordingly".

9. Order dated 2.12.2003 does not find mention in paragraph 3 of the award dated 21.2.2006 quoted above and rightly so. On the said date, no effective hearing was held as is clear from the said order. This also explains why in paragraph 3 of the award, hearing held on 2.12. 2003 is not mentioned. The said paragraph refers to effective hearings, which had taken place before the learned Arbitrator. Paragraph 4 of the order dated 2.12.2003 is again a pointer that further hearing was required by the learned Arbitrator. Hearings had not concluded.

10. In these circumstances, it is not possible to accept the contention of the counsel for the respondent that after 14.11.2002, further hearing was held on 2.12.2003 and all pending issues were argued before the learned Arbitrator. This is not supported by the award in which the last date of hearing was mentioned as 14.11.2002 and not 2.12.2003. I may also note here that the counsel for the objector was not present on 2.12.2003. It is, therefore, apparent that no hearing had taken place on 2.12.2003, though parties had appeared before the learned Arbitrator on the said date.

11. It is the contention of the objector that Mr. S.K. Sawhney, Ld. Arbitrator, had tendered his resignation as an employee of the respondent, before he had signed the award and within a month

thereafter, he joined a private company. This factual position is not denied.

12. Does this delay of more than three years and thereafter the haste, in which the award was made, make the award contrary to public policy?

13. Way back in 1928, High Court of Bombay in ***Bhogilal Purshottam versus Chimanlal Amritlal***, reported at AIR 1928 Bom. 49, had held that delay in making of an award without any reasonable excuse or cause to explain the said delay, amounts to misconduct. Division Bench did not agree with the view that as there was no express term fixing time period for making an award, it did not amount to misconduct. Unconscionable and unexplained delay amounts to misconduct. Even if no time was fixed for making of an award, it was implied term in an arbitration clause that the award should be made within a reasonable time. It was observed as follows:-

> "On the facts I would hold that it is clear that the award was not made within a reasonable time or anything approaching a reasonable time. Then, does that imply misconduct on the part of the arbitrator? If that delay, is not explained, in my judgment, it does imply misconduct on his part, because it was his duty to make up his mind and decide this dispute. It was his duty to see prima facie that the proceedings were conducted with reasonable diligence, and, if he so far failed in those duties, that he did nothing whatever for

> some five years, then in my judgment he failed in material respects in his ordinary duties as an arbitrator. That being so in my judgment, he was guilty of misconduct within the meaning of para. 15, and, accordingly, the award may be set aside."

14. This view was followed by Nagpur High Court in the case of ***Keshava Lal Ram Dayal Kahar versus Laxman Lal Ram Kishan Lal*** *r*eported in AIR 1940 Nag. 386.

15. Sections 8, 9, 28 read with First Schedule, Clause 3 of the Arbitration Act, 1940 required an Arbitrator to proceed with reasonable dispatch and subject to terms of the arbitration clause, an award was required to be published within four months of entering upon reference. Parties (and not the arbitrator) could extend time by mutual consent or time could be extended by the Courts. But Courts have refused to extend under section 28 of the Arbitration Act, 1940 on the ground of undue delay (See, ***State of Punjab versus Hardyal*** reported in 1985(2) SCC 629 ***and Flowmore Pvt. Ltd. versus National Thermal Power Corpn. Ltd.,*** reported in ILR (1996) 2 Del 476**)**. An arbitrator could be removed on failure to proceed with reasonable dispatch as per provisions of Sections 8 and 11 of the Arbitration Act 1940. There have been cases where arbitrators have been removed for failing to proceed with reasonable dispatch and delay. (Refer, ***Kali Charan Sharma***

versus State of U.P. reported in AIR 1985 Delhi 389, ***W.S. Construction Company versus Hindustan Steel Works Construction Company*** reported in AIR 1990 Delhi 134). Delay in making an award was considered to be a grave misconduct sufficient to set aside an award under Sections 30 and 33 of the Arbitration Act, 1940.

16. The Act based on UNCITRAL Model Law seeks to ensure fast and quick disposal and curtail delays (See, Sections 4,12,13,16, 23 and 34(3) of the Act). Commercial arbitration process should be efficient and disputes decided expeditiously for trade and commerce to prosper and grow. Contractual rights and obligations to have meaning should be enforced. Delay defeats justice and encourages breaches. Arbitration proceedings must be held with reasonable dispatch and promptness. Arbitration proceedings are encouraged because they are speedy alternative to court adjudication. Its primary objective is fast and quick disposal of disputes between parties without delays normally associated with court proceedings. Arbitration implies timeous decisions and promptitude. It is policy of law that arbitration proceedings should not be unduly prolonged. Arbitration proceedings, therefore, are expected to be prompt.

17. Section 28 of the Arbitration Act, 1940 is not incorporated in the Act. The Act does not prescribe specific period for making and publishing the award but the underlying principle and policy of law that arbitration proceedings should not be unduly prolonged and delayed, remains intact and embodied. Section 14 of the Act stipulates that mandate of an arbitrator would terminate if he de juro or de facto is unable to perform his functions or for other reasons fails to act without undue delay. An arbitrator must use reasonable dispatch in conducting the proceedings and making an award. Undue delay leads to termination of the mandate of the arbitrator.

18. I may also note that under Section 14(2) of the Act in case there is controversy whether mandate of an arbitrator stands terminated, a party can apply to the court to decide on the termination of the mandate. Russels on Arbitration, 22nd Edition at pages 140 and 143 has referred to the provisions of the English Arbitration Act, 1996 which stipulates that it is the duty of an arbitration tribunal to avoid unnecessary delay and expense and breach thereof is a ground for removal.

19. Under Section 34 of the Act, an award is void if it is contrary to public policy. The expression 'Public Policy' has been explained in ***ONGC Ltd versus Saw Pipes Ltd.,*** reported in (2003) 5 SCC 705 as under:-

> **"31.** 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 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:
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> (*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."

20. It is natural and normal for any arbitrator to forget contentions and pleas raised by the parties during the course of arguments, if there is a huge gap between the last date of hearing and the date on which the award is made. An Arbitrator should make and publish an

award within a reasonable time. What is reasonable time is flexible and depends upon facts and circumstances of each case. Is case there is delay, it should be explained. Abnormal delay without satisfactory explanation is undue delay and causes prejudice. Each case has an element of public policy in it. Arbitration proceedings to be effective, just & fair, must be concluded expeditiously. Counsel for the respondent had submitted that this Court should examine and go into merits and demerits of the claims and counter claims with reference to the written submissions, claim petition, reply, document etc. for deciding whether the award is justified. In other words, counsel for the respondent wanted the Court to step into the shoes of the Arbitrator or as an appellate court decide the present objections under Section 34 of the Act with reference to the said documents. This should not be permitted and allowed as it will defeat the very purpose of arbitration and would result into full fledged hearing or trial before the Court, while adjudicating objections under Section 34 of the Act. Objections are required to be decided on entirely different principles and an award is not a judgment. Under the Act, an Arbitrator is supposed to be sole judge of facts and law. Courts have limited power to set aside an award as provided in Section 34 of the Act. The Act, therefore, imposes additional responsibility and obligation upon an Arbitrator to make and publish an award within a reasonable time and without undue

delay. Arbitrators are not required to give detailed judgments, but only indicate grounds or reasons for rejecting or accepting claims. A party must have satisfaction that the learned Arbitrator was conscious and had taken into consideration their contentions and pleas before rejecting or partly rejecting their claims. This is a right of a party before an Arbitrator and the same should not be denied. An award which is passed after a period of three years from the date of last effective hearing, without satisfactory explanation for the delay, will be contrary to justice and would defeat justice. It defeats the very purpose and the fundamental basis for alternative dispute redressal. Delay which is patently bad and unexplained, constitutes undue delay and therefore unjust.

21. Moreover in the present case learned Arbitrator has proceeded to make and pronounce the award even without finally concluding the hearings. Order-sheets reveal that hearings and argument had not concluded on 14.11.2002 and thereafter no further arguments were addressed but the matter was adjourned to be heard. Ld. arbitrator was to fix a date for the said purpose and notify parties. No substantial hearing took place on 2.12.2003 and the Arbitrator also did not close the hearing. Learned Arbitrator on 2.12.2003 had stated that he would inform parties about the next date of hearing. Thereafter no date was fixed and no hearing was held. Learned Arbitrator proceeded and has made and published his award. It is

apparent that the ld. Arbitrator was in a hurry as he had resigned and had to take up a new employment. The award in question is contrary to principles of fair play and justice. Justice should not only be done but should manifestly be seen to be done.

22. In view of the above, the award dated 21st February, 2006, is set aside. The objector will be entitled to costs.

(SANJIV KHANNA)

JUDGE

SEPTEMBER 22, 2008.

NA/P