In the High Court at Calcutta
Original Civil Jurisdiction
Commercial Division

The Hon'ble Justice Sabyasachi Bhattacharyya

AP-COM No. 231 of 2024

Damodar Valley Corporation
Vs
BLA Projects Pvt. Ltd.

For the petitioner	:	Mr. K. Kejriwal, Adv. Ms. Paramita Banerjee, Adv. Mr. Tamoghna Chattopadhyay, Adv.
For the respondent	:	Mr. Jaydip Kar, Sr. Adv. Mr. Suman Kr. Dutt, Adv. Mr. S. Roy, Adv. Mr. Debdeep Sinha, Adv.
Hearing concluded on	:	08.08.2024
Judgment on	:	13.08.2024

Sabyasachi Bhattacharyya, J:-

1. The present challenge under Section 34 of the Arbitration and Conciliation 1996 (hereinafter refer to as "the 1996 Act) has been preferred against the award dated August 14, 2021 passed in an arbitral proceedings between the parties. BLA Projects Private Limited (the respondent herein) was the claimant. Out of the seven heads of claim, four were allowed by the learned arbitrator. Counter claims on two counts made by the Damodar Valley Corporation (DVC), the respondent before the learned arbitrator and the petitioner herein, were turned down.

2. Learned counsel for the petitioner argues that the award is contrary to the terms of the contract. As per the contract, DVC was entitled to terminate the contract if the claimant/BLA indulged in corrupt and fraudulent practices. The relevant clauses relating to termination were Clause 15 of the General Terms and Conditions, Clause 17 of the General Conditions of Contract (GCC), Clause 14 of the Annual Rates Contract (ARC) and Clause 24.2.1 of the Additional/Special Conditions of Contract.

3. It is argued that all the clauses are almost identical and permit termination in the event of corrupt or fraudulent practices in executing the contract. Some of the said clauses also contemplate termination at the sole discretion of the DVC, albeit with a 60 days' prior notice. It is argued that the learned arbitrator erred in holding that 'corrupt' and 'fraudulent' practice were intended to cover malpractice indulged in by the contractor in the matter of procurement of the contract only and not activity in performance of the contract. Thus, the other conditions of contract were overlooked by the learned arbitrator.

4. In the present case, the first notice of termination was issued, after which the matter came up to this Court and upon a direction being passed by this Court, a hearing was given to both sides and a reasoned order was passed by the Executive Director of the DVC. The said reasoned order granted liberty to the DVC to issue termination notice. In pursuance thereof, the termination notice was issued, contemplating forthwith termination.

5. It is argued that the learned arbitrator failed to take into consideration all the provisions of termination under the agreement between the parties and stuck to Clause 24.2.1 only, thus rendering the award contrary to the terms of the contract and violative of Section 21(3) of the 1996 Act.

6. Learned counsel for the petitioner next argues that the claimants/respondent indulged in corrupt and fraudulent practice. The relevant documents show that fraud was perpetuated by the BLA (claimant). The unloaded coal was contaminated with mud. The contaminated coal was loaded at the siding. The defence taken by the claimant was heavy rain, due to which the coal allegedly got mixed with the mud and soil at the loading point (*kaccha* point). Thus, inferior quality of coal was mixed with extraneous materials, which was admitted by the claimant, thus making the claimant liable for termination of its contract. It is argued that contamination of coal is an admitted fact in the reply dated June 5, 2018 by the claimant to the show- se notice dated June 2, 2018 and even in the statement of claims and the cross-examination of the Claimant's Witness (CW).

7. With regard to claim nos.1 and 2, pertaining to the Running Account (RA) bills, the learned arbitrator erroneously directed payment of such bills since the BLA had indulged in a corrupt and fraudulent practice. Under Clause 13 of the Annual Rates Contract, the DVC is, in fact, entitled to impose penalty for carrying stones, shortages and in respect of quantity etc, which was required to be adjusted from the running bills.

8. Further, the Engineer-in-Charge of the DVC was to pass the bills after scrutiny and final bill was to be made payable only after the reconciliation of the bills, outstanding penalties etc. at the end of the contract period. The running bills in the present case were not processed by the DVC in terms of the contract and have not been proved by the BLA.

9. The BLA, it is argued, did not raise the bills in terms of the contract. Learned counsel appearing for the petitioner submits that it is preposterous to contend that the claim can be allowed even without proof merely because the provisions of the Evidence Act are not applicable.

10. Regarding claim no.3 in respect of bank guarantee, since the claimant indulged in corrupt and fraudulent practice, it is argued that the DVC was entitled to retain the security deposit and bank guarantee.

11. Claim no.5 in respect of loss of profits was also erroneously awarded by the arbitrator, it is contended. It is argued by the petitioner that the contract was for a period of one year whereas it had to be terminated after about two months' performance. However, BLA has been awarded loss of profit for the entire balance period of the contract which amounts to specific enforcement of the contract which is determinable at the will of the DVC with 60 days' notice.

12. Learned counsel appearing for the petitioner argues that the learned arbitrator has allowed the claim on the basis of the affidavit evidence of CW which contains self-serving statements. A certificate by a Chartered Accountant (CA) was relied upon, which was not proved

properly because the CA did not depose as witness. Mere production of the certificate of a CA is not proved enough, it is argued.

13. Learned counsel submits that Question No. 500 was put to the CW in cross-examination and the witness agreed that he cannot testify to the contents of the CA certificate. As the BLA was under a legal obligation to prove its claim with credible and adequate evidence, failure to do so of its part made the claim of loss of profits liable to be rejected. The statement of the CW simpliciter could not be sufficient basis to allow the claim.

14. In respect of loss of reputation (claim no.6), it is argued that the BLA itself had breached the contract, resulting in termination and invocation of bank guarantee, and no evidence was led to prove that the claimant suffered any loss of reputation. The said claim was awarded as a matter of course.

15. The rejection of the counter claims of DVC, it is argued, was on the sole basis that termination was held to be wrongful by the arbitrator. However, the contamination of coal in at least 3 tippers was admitted. The learned arbitrator also ignored that there was evidence of shortage in the transported coal which was evinced from the cross-examination of the CW. There was admitted shortage of about 1700 MT of coal which equals to 1.14% of the coal delivered to the DVC.

16. Under Clause 13 of the ARC, the DVC is entitled to impose penalty for slippage, carrying stone, shortage and for quantity etc.

17. Learned counsel for the DVC place reliance on *Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express (P) Ltd* reported at

(2024) SCC Online SC 522, *Ssangyong Engineering & Construction Co. Ltd. v. National Highway Aruthority of India (NHAI)* reported *at (2019) 15 SCC 131* and *Associate Builders v. Delhi Development Authority* reported at *(2015) 3 SCC 49* for the proposition that an award that is contrary to the terms of the contract is perverse and should be set aside.

18. In order to substantiate the argument that if there is a contractual clause allowing termination without reason, even if termination is held to be wrongful/invalid on the basis of another clause, damages must be limited to the notice period under the clause of termination at will, learned counsel for the petitioner cites *Indian Oil Corporation. Ltd. v. Amritsar Gas Service and Others,* reported at *(1991) 1 SCC 533.*

19. It is also argued that award for loss of profit should be based on credible and adequate evidence and should not result in the windfall/unjust enrichment of the claimant. In support of the said contention, learned counsel cites *Unibros v. All India Radio* reported at *(2023) SCC OnLine SC 1366, Batliboi Environmental Engineers Ltd. v. Hindustan Petroleum Corpn. Ltd.* reported at *(2024) 2 SCC 375 and Executive Engineer v. Modi Project Ltd* reported at *(2024) SCC OnLine Jhar 115.*

20. Learned senior counsel for the claimant/respondent BLA, on the other hand, argues that the scope of Section 34 of the 1996 Act after the 2015 amendment is extremely limited. It is argued that none of the grounds of the said provision have been made out by the DVC.

21. An arbitral award cannot be challenged on its merits, it is argued, as the court exercising power under Section 34 does not sit in appeal over the order of the arbitral tribunal.

22. The 2015 amendment to the 1996 Act further narrowed the grounds for setting aside the arbitral award. In *Associate Builders (supra),* it was reiterated that merits of the decision rendered by an arbitral award cannot be gone into in a challenge under Section 34. Only when the award is in conflict with the public policy of India that the merits can be looked into.

23. The Supreme Court, in its landmark judgments such as *Renusagar Power Co. Ltd. V. General Electric co.* reported at *(1994) Supp (1) SCC 644,* etc. set out what would constitute a conflict with the fundamental policy of Indian law, which is a *sine qua non* for an award to be in conflict with the public policy of India.

24. It is argued that none of the said conditions are satisfied in the present case. A possible view of 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 at the time of delivering the arbitral award.

25. Learned senior counsel for the claimant next argues that in *Ssangyong Engineering (supra)* it was recognised that the public policy of India means the fundamental policy of Indian Law and the previous tests of *Associate builders (supra*) will no longer apply.

26. Patent illegality has also been introduced as a ground by the 2015 amendment Act, under sub-section (2-A) of Section 34. However, such

patent illegality must go to the root of the matter and not amount to mere erroneous application of the law.

27. The concept of patent illegality following the 2015 amendment has been explained by the Supreme Court. Reappreciation of evidence is specifically barred under the said ground.

28. Learned senior counsel next cites *Patel Engineering Ltd. v. North Eastern Electric Power Corporation. Ltd* reported at *(2020) 7 SCC 167* where a three-judge Bench of the Supreme Court dealt extensively with the history of patent illegality as a ground for setting aside domestic awards. The Supreme Court noted that the said ground is available if the arbitrator's decision is found to be perverse or so irrational that no reasonable person would have arrived at the said decision.

29. In *UHL Power Company Ltd. v. State of Himachal Pradesh* reported at *(2022) 4 SCC 116,* another three-judge Bench reiterated the settled law that if there are two plausible interpretations of the terms and conditions of the contract, the learned arbitrator can proceed to accept one, which would not be interfered with under Section 34, unlike the normal appellate jurisdiction.

30. Learned counsel next takes the court through the provisions of termination of contract and argues that fraudulent or corrupt practice as defined under the contract does not include contamination of coal, which has been correctly explained by the learned arbitrator in his award.

31. Learned senior counsel for the claimant/respondent submits that no admission as to breach of contract has been made by the claimant in any of its letters/documents, contrary to the arguments of the present petitioner. In the two letters dated June 5, 2018 and June 29, 2018, the respondent had only stated that the alleged incident of mixing of mud with coal was due to circumstances beyond the control of the respondent and that the contract contemplated such situation up to a percentage. Mixing beyond the same might attract penalty if it is found to be beyond the permissible level. The context of its admission has been explained by the respondent in course of the arbitral proceedings.

32. The view expressed by the learned arbitrator, being a plausible view on appreciation of evidence, ought not to be interfered with under Section 34.

33. With regard to the alleged corrupt/fraudulent practice, the respondent argues that the DVC did not refer to any particular phenomenon but to a sequence of isolated disjointed events. A single test report of coal sample analysis has been produced by the petitioner which indicates that coal was collected on June 2, 2018 but was tested as late as on September 29, 2019, that is, after the first sitting of the arbitrator, which palpably makes it clear that the same was an afterthought.

34. Even the GCV (Gross Calorific Value) of coal was shown in the report to be 3894. In a reply to a query made by the respondent under the Right to Information Act, the DVC had admitted that the GCV of coal

received at the plant for the period April 2017 to December 2017 and September 2018 was less than GCV 3894. Therefore, the quality of coal received in the three tippers on June 2, 2018, by no stretch of imagination, can be called "contaminated". If DVC could run the Raghunathpur Thermal Power Plant with coal of GCV less than 3894 for the period from April to December 2017 without any complaint and/or allegation of contamination, it is argued that it did not have any case of contamination in respect of the test result of coal sample with GCV 3894.

35. In the Statement of Claims, the claimant had also challenged the order dated September 5, 2018 passed by the Executive Director (Projects) of the DVC, in support of which various grounds and pleadings were made. Upon considering the same, the learned Arbitrator arrived at his findings and such appreciation of evidence cannot be reopened under Section 34 of the 1996 Act.

36. Regarding the claim on account of unpaid RA Bills, that is, Claim No. 1, learned senior counsel for the claimant/respondent argues that the works performed by the respondent had duly been certified by the SDE (M) FM and SE (M) FM of the DVC. Despite the same, the DVC released only a part of the claim, to the tune of Rs. 2,22,96,973/-, withholding a sum of Rs. 3,38,31,962/- in violation of the contract. DVC also failed to make out any case of short supply before the learned Arbitrator. The learned Arbitrator, upon considering the pleadings, RA Bills and the evidence on record, elaborately discussed the same and rightly allowed the claim in favour of the claimant.

37. The respondent submits that the Claim No. 3 related to wrongful invocation of bank guarantee. Since the termination of the contract was held to be illegal and wrongful, the said claim was rightly allowed by the Arbitrator.

38. The award on Claim No. 5 on account of the loss of profit, it is argued, was justified. Oral evidence was adduced to substantiate the claim of twenty per cent of the unexecuted work. Coupled with the oral evidence, a chart showing the break-up of the price quoted and approved by DVC was also produced, to which there was no cross-examination of the witness. Learned senior counsel places reliance on *A.E.G. Carapiet Vs. A.Y. Derderian*, reported at *AIR 1961 Cal 359* for the proposition that if the case of the defendant is not put in cross-examination to the witness of the plaintiff, it has to be construed that the case of the plaintiff has been admitted. That apart, the award on the claim on account of loss of profit is also justified by several judgments of the Supreme Court, it is argued, which are as follows:

i) *A.T. Brij Paul Singh Vs. State of Gujarat,* reported at *(1984) 4 SCC 59;*

ii) *Mohd. Salamatullah Vs. Govt. Of A.P.,* reported at *(1977) 3 SCC 590;*

iii) *Dwaraka Das Vs. State of M.P.,* reported at *(1999) 3 SCC 500; and*

iv) *MSK Projects (I) (JV) Ltd. Vs. State of Rajasthan,* reported at *(2011) 10 SCC 573.*

39. Thus, it is argued that the present challenge ought to be dismissed.

40. The first issue which falls for consideration here is whether the learned Arbitrator acted with patent illegality in holding that the termination by the DVC of the contract between the parties was unlawful.

41. In this regard, the petitioner relies on four termination clauses from different parts of the contract between the parties. Clause 15 of the Special Conditions of the Contract, under the head "General Terms and Conditions", Clause 17 of the GCC, Clause 14 of the ARC as well as Clause 24.2.1 of the ASCC, all provide for termination. However, none of the clauses apart from Clause 24.2.1 contemplate forthwith termination of the contract. The rest of the abovementioned clauses envisage either 30 or 60 days' notice.

42. In the present case, admittedly, the termination was forthwith, simultaneously with the issuance of the notice. Hence, in any event, the other clauses are not applicable and, as such, the learned Arbitrator was perfectly justified in focusing on Clause 24.2.1 as the relevant termination clause. The germane provision of the said clause was that for such forthwith termination, the contractor, in the judgment of the employer, had to be engaged in corrupt or fraudulent practices. However, such expressions "corrupt" and "fraudulent" practices have been clearly defined in sub-clause (c) of Clause 24.2.1. The expression "in competing for or in executing the Contract" qualifies such practices. Hence, *per se*, it is evident that the said practice, to be corrupt or fraudulent, had to pertain to competing for or executing the contract.

43. "Corrupt practice" according to the said sub-clause means the offering, giving, receiving or soliciting of anything of value to influence the action of a public official in the procurement process or in contract execution. The said clause, on the face of it, is not applicable even as per the allegations of DVC.

44. "Fraudulent practice" is defined in the clause as a misrepresentation of facts *"in order to influence a procurement process or the execution of a contract"* to the detriment of the Employer and also includes collusive practice among Bidders (prior to or after bid submission) *"designed to establish bid prices at artificial non-competitive levels and to deprive the Employer of the benefits of free and open competition"*.

45. Hence, the fraudulent practice contemplated in the said clause pertains *ex facie* to the stage of the tender process, till the execution of the contract. In the present case, the claimant succeeded in the tender process and was awarded a contract, pursuant to which it worked for approximately two months. Thus, the applicability of Clause 24.2.1 is ruled out at the outset.

46. The argument of the petitioner to the effect that the expression "executing the contract" also means the performance of the contract is specious. A comprehensive but plain reading of the said clause clearly indicates that the entire fraudulent practice envisaged therein revolves around the bidding process, in order to obviate artificial non-competitive pricing which would curtail free and open competition. The said practice, as envisaged in the clause, has to be for the

purpose of influencing a procurement process or the execution of a contract.

47. It is to be noted that the conscious expression used in the said clause is "execution of a *contract*" and not "execution of the *work*". Hence, by no stretch of imagination can it be construed that the fraudulent practice overreaches the stage of execution of the contract and transgresses into the domain of performance of the contract.

48. As such, the learned arbitrator was perfectly justified in holding that the termination itself was unlawful.

49. With regard to the RA Bills, the claimant is justified in arguing that the work done was approved from the end of the DVC itself. Moreover, the learned arbitrator elaborately discussed the evidence on such issue at length and came to the conclusion that only two elements needed to be considered, being the quantity of coal covered by the four RA Bills and any other factor which may have a bearing in the process and quantification, such as moisture content or purity in the coal. When the quantity had been ascertained, it was held, one only had to apply the rates as per MT as provided in the agreement.

50. The arbitrator took into consideration the fact that the DVC had paid a substantial amount out of the said total claim upon verifying and being satisfied that the stipulated procedure or process of claim had been adhered to by the claimant. The arbitrator also considered that if bills had been raised in a regular fashion it was open to the respondent (DVC) to question the correctness of it but here,

apparently no contemporaneous objection was raised by the DVC showing why that amount claimed was not payable.

51. The learned arbitrator recorded that he raised a query with learned counsel for the DVC to furnish the DVC's version as to the quantity of coal supplied by the claimant, preferably with a breakup, to which counsel submitted, unless in consultation with the claimant effort is made for reconciliation, it might not be possible to give a precise amount. The arbitrator thus rejected such contention since the DVC in the natural course of things must be presumed to be in possession of all bills and relevant document relating to such supply.

52. The Arbitrator further considered several other aspects of the matter including the statements contained in the affidavit of evidence of the DVC's witness, one Gupta Bhaya. The claimant's counsel put a question to him in the course of cross-examination that he was the responsible person entrusted to oversee the operations in connection with the transportation of coal, regarding quantity or quality. In such context, it was observed by the arbitrator that the DVC was deliberately withholding relevant evidence and adverse inference was drawn against the DVC.

53. The third RA Bill, it was recorded by the learned arbitrator, was virtually admitted by the witness Gupta Bhaya in answer to Question Nos. 358-359 and the quantity supplied under the fourth RA Bill was also similarly admitted, which was clear from perusal of the relevant documents appearing at page nos. 7, 8, 9, 11 and 16 of the claimant's Compilation of Documents placed before the learned arbitrator. The

arbitrator thus came to the conclusion that there was no question of short supply and no justification, accordingly, for the DVC to withhold the claims on the RA Bills.

54. Insofar as the loss of profit is concerned, the learned arbitrator also entered into elaborate details and relied on a Chart, being Annexure – 'A' to the Annual Rate Contract (ARC), showing how the agreed price of Rs. 369.179 per MT was calculated by taking into consideration the break-up of charges for transportation, unloading of rakes and loading of vehicles and liaisoning.

55. The break-up of price calculation read with the calculation shown in Paragraph 8 of the affidavit of evidence of one Indrajit Roy Sarkar, who adduced evidence for the claimant, were considered to hold that the rate of profit of 20 per cent was established.

56. The explanation as to the calculation, it was observed by the learned arbitrator, was further elaborated in Paragraph nos. 9, 41 to 44, 46 to 52 in his affidavit of evidence, which testimony was not cross-examined with any meaningful purpose and remained unchallenged. Upon such elaborate consideration of the evidence, the learned arbitrator came to its conclusions regarding loss of profit.

57. With regard to Claim no. 6, that is, loss of reputation and goodwill, the arbitrator looked into several aspects of the matter. Also, fact remains that the continuing commercial relation between the parties since long was uncontroverted. The work was awarded to the claimant, also after checking the claimant's credentials during the tender process. Moreover, since the termination was held to be unlawful, it would

obviously affect the future business and goodwill of the claimant, since it is common business practice that prior termination in earlier contracts is to be disclosed in every commercial tender. The qualitative aspect and the principle on which loss of reputation was awarded in favour of the claimant, thus, cannot be disputed. Insofar as the quantitative aspect is concerned, a mere token Re. 1/- was awarded under the said head and, as such, the said aspect cannot be gone into at all.

58. Insofar as the counter claims of the DVC are concerned, the learned arbitrator based his findings on the fact that the termination itself was bad, for which the claimant was not entitled to such counter claims. The arbitrator also considered that an amount of Rs. 284.97 Crore was claimed for loss of earning revenue on account of loss of generation of electricity due to alleged failure on the part of the claimant to transport for the target quantity contemplated in the contract. As the basis of such assessment, as recorded by the learned arbitrator, the respondent/petitioner-DVC relied on an order of the Central Electricity Regulatory Commission (CERC) dated September 28, 2017 which was passed in a matter to which the claimant was not a party.

59. Also, since the termination itself was wrongful, it was held that no fault could be attributed to the claimant for not performing the contract for its full tenure.

60. Also, the learned arbitrator held that the loss alleged to be suffered was too remote in the sense that likelihood of such loss was not within

the reasonable contemplation of parties when the agreement was made.

61. On such elaborate discussion only, the learned arbitrator turned down the counter claims.

62. Thus, it is amply clear that the learned arbitrator gave elaborate reasons and delved into a detailed factual appreciation of the entire evidence on record and came to his findings as befits a reasonable and prudent man.

63. This Court, as is well-settled by the Supreme Court in the several judgments cited by the parties including *Associate Builders (supra), Ssangyong Engineering (supra), Patel Engineering Limited (supra)* and *UHL Power Company Limited (supra)*, cannot enter into a reappreciation of evidence like a regular first appellate court, sitting in a challenge under Section 34 of the 1996 Act. The limited window which could have been invoked by the DVC is found in sub-section (2-A) of Section 34, which makes patent illegality a ground for challenge. However, such patent illegality has to appear on the face of the award. Also, the proviso to the sub-section stipulates that an award shall not be set aside on the said score merely on the ground of an erroneous application of law or by reappreciation of evidence.

64. In the present case, I do not even find any erroneous application of law, let alone any occasion to reappreciate the evidence. The judgment of the Arbitrator is perfectly well-reasoned and supported by cogent evidence and, as such, none of the grounds of challenge under Section 34 of the 1996 Act are established.

65. There is nothing in the award to attract the grounds of contravention of the fundamental policy of Indian law or to hold that it is in conflict with the basic notions of morality or justice.

66. Hence, the present challenge under Section 34 of the 1996 Act is entirely misconceived and accordingly must fail.

67. Accordingly, AP-COM No. 231 of 2024 is dismissed on contest without any order as to costs, thereby affirming the award dated August 14, 2021 passed by the learned arbitrator in the arbitral proceedings between the present parties.

68. There will be no order as to costs.

69. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)