REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.9048 OF 2014
(Arising out of Special Leave Petition (Civil) No.10849 of 2013)

Swan Gold Mining Ltd. ...Appellant (s)

Versus

Hindustan Copper Ltd. ...
Respondent(s)

JUDGMENT

M.Y. Eqbal, J.:

Leave granted.

2. This appeal by special leave is directed against the judgment and order dated 19.9.2012 passed by the Division Bench of the Calcutta High Court whereby appeal preferred by the appellant against the order of learned Single Judge of the High Court was dismissed. Learned Single Judge had dismissed the appellant's petition under Section 34 of the

Arbitration and Conciliation Act (in short, 'the Act') challenging the award of the Arbitrator.

3. The case of the appellant is that a notice inviting tender (NIT) was issued by the respondent-Hindustan Copper Ltd. inviting offers for operation of its Surda Mine and Mosabani Concentrator Plant. Respondent-company was having several mines rich with natural resources being metallic ores. The global tender floated by the respondent provided that it shall be the responsibility of successful bidder for payment of all statutory duties. The appellant-company submitted its technical and financial bids. It is contended on behalf of the appellant that the NIT contained a techno commercial bid and a separate price bid. Price bid of the appellant provided that any Excise Duty/Service taxes or any levy presently applicable or any variation or new levy in future to be reimbursed on actual basis.

4. After negotiation and acceptance of the final price offer, on 3.3.2007 respondent issued a Letter of Intent to the appellant on the terms and conditions of the NIT and other terms agreed during subsequent discussions/negotiations. Finally, on 26.3.2007 a contract was executed between the parties for re-commissioning and operation of the Surda Mine and Mosabani Concentrator Plant. Thereafter, a work order was issued on 14.4.2007 and the appellant raised its Invoices on 31.12.2007, by which reimbursement of basic excise duty and other duties payable by the appellant to the Government was sought. On refusal by the respondent to make payment in respect of excise duty and other taxes paid by the appellant relating to the work executed, the arbitration clause was invoked and the dispute was referred to a sole Arbitrator, who after considering the pleadings and evidence led by the parties, held that the price bid of the appellant was not exclusive of applicable taxes. Learned Arbitrator held that the clause relating to payment of taxes was deleted by the appellant's representative Mr. Ahlawat on 19.1.2007 and

since work order was acknowledged, it is binding on the appellant.

5. The appellant challenged the award by way of filing petition under Section 34 of the Arbitration and Conciliation Act before the Calcutta High Court on the grounds *inter alia* of perversity and contrary to law. Learned Single Judge of the High Court upholding the award and reasons assigned by the learned Arbitrator, dismissed appellant's petition. Aggrieved by the decision of the learned Single Judge, appellant preferred appeal before the Division Bench of the High Court, which although upheld the contention of the appellant relating to the evidence on the issue of deviation in price bid on 19.1.2007, dismissed the Appeal on the ground of terms contained in NIT and Work Order being in consonance with each other. Hence, this appeal by special leave by the Australian company.

6. Mr. Amarendra Sharan, learned senior counsel appearing for the appellant assailed the award and the impugned order passed by the High Court on various grounds. Learned counsel contended that the appellant is a reputed Australian Mining Company and it submitted bid in response to NIT. The price bid submitted by the appellant provided for "base price plus 55%" and that any excise duty/service tax or any levy to be reimbursed on actual basis. A meeting of the Tender Evaluation Committee of the respondent-company with the bidders was held on 18.1.2007 and 19.1.2007 and the respondent did not object to the price bid submitted by the appellant which was exclusive of taxes. It is further contended by the senior counsel that after opening of price bid, although the respondent made a request to lower the bid price, there was no request to change provision relating to taxes mentioned in the price bid by which respondent was liable to reimburse taxes. The appellant-company submitted the revised bid on 27.1.2007 and reduced the percentage from 55% to 50% (over the base price) and reiterated its

earlier offer of payment of taxes by the respondent. After further negotiation and reduction of price bid to "base price plus 49%", respondent issued Letter of Intent on 3.3.2007 and the contract was signed between the parties on 26.3.2007.

7. Learned senior counsel contended that on 14.4.2007 Work Order was issued with its Clause 4.9, which provided for payment of taxes by the appellant. For the settlement of disputes pertaining to taxes and duties, appellant invoked clause 4.14 of NIT and sought appointment of Arbitrator where it was claimed by the appellant that price bid submitted by the appellant is exclusive of taxes and clause 4.9.1 of Work Order is inoperative and void. This claim was dismissed by the Learned Arbitrator on the ground that the clause relating to payment of taxes was denied by the appellant's representative Mr. Ahlawat on 19.1.2007 and since the work order was acknowledged, it is binding on the appellant.

8. Mr. Sharan has submitted that there had never been any negotiation with regard to the liability of payment of excise duties and taxes as the same was finally concluded to the effect that the taxes shall be liable to be reimbursed by the respondent. The negotiation was only with respect to the percentage which was finally reduced to 49%. It is submitted that the respondent gave a calculation which does not include taxes. All these backgrounds have neither been considered by the Arbitrator nor by the High Court. It was submitted that non consideration of the offer, counter offer and letter of acceptance by the Arbitrator amounts to serious error and patent illegality in the Award. NIT is only invitation to offer, which has been superseded by subsequent offers and counter offers and hence, NIT cannot become the contract. Lastly, Mr. Sharan contended that work order is a unilateral document and there was no consensus ad idem on the Work Order.

9. Mr. Sharan, learned counsel put heavy reliance on the decision of this Court in the case of ***Oil and Natural Gas Corporation Ltd. vs. Saw Pipes Ltd.***, (2003) 5 SCC 705, and submitted that if the Award is contrary to the substantive provision of law, or the provisions of fact or against the terms of contract, it would be patently illegal and could be interfered under Section 34 of the Act. Mr. Sharan finally contended that the parties have expressly agreed that the bid price shall be exclusive of the duty of taxes, deviation from such contract will go to the root of the matter and on that ground Award could be set aside if it is so unfair and unreasonable. This will also be opposed to the public policy and required to be adjudged void.

10. Per contra, Mr. P.P. Rao, learned senior counsel for the respondent, firstly submitted that the Award cannot be set aside except where the Award on the face of it suffers from patent illegality and perversity. As the learned single Judge and the Division Bench after re-appreciation of the entire

facts and documents came to the conclusion that no ground exists to set aside the Award, this Court should not interfere with the order of the High Court.

11. Learned senior counsel drawn our attention to various documents including NIT, initial bid proceedings of the meeting, revised bid, offer and counter offers, on the basis of which the letter of intent was issued. Finally, the Work Order was issued and a contract was signed by both the parties. These documents would show that the appellant was made liable for payment of duty and taxes, which were inclusive of the bid price arrived at between the parties.

12. Section 34 of the Arbitration and Conciliation Act, 1996 corresponds to Section 30 of the Arbitration Act, 1940 making a provision for setting aside the arbitral award. In terms of sub-section (2) of Section 34 of the Act, an arbitral award may be set aside only if one of the conditions specified therein is satisfied. The Arbitrator's decision is generally

considered binding between the parties and therefore, the power of the Court to set aside the award would be exercised only in cases where the Court finds that the arbitral award is on the fact of it erroneous or patently illegal or in contravention of the provisions of the Act. It is a well settled proposition that the Court shall not ordinarily substitute its interpretation for that of the Arbitrator. Similarly, when the parties have arrived at a concluded contract and acted on the basis of those terms and conditions of the contract then substituting new terms in the contract by the Arbitrator or by the Court would be erroneous or illegal.

13. It is equally well settled that the Arbitrator appointed by the parties is the final judge of the facts. The finding of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him.

14. We have gone through the facts of the case and perused the documents on the basis of which the Arbitrator gave the Award on 24.7.2009.

15. The respondent issued notice inviting tender (NIT) for the operation of its mine. Clauses 4.9.1 to 4.9.5 of the NIT are extracted hereinbelow:-

> "4.9.1. The rates quoted by the successful bidder shall be deemed to be (inclusive) of the sales taxes, other taxes and service tax that the successful bidder will have to pay in India & Abroad for the performance of this contract. HCL will perform such duty regarding the deduction of such taxes at source as per applicable laws.
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> 4.9.2. The successful bidder shall also be responsible to bear and pay any taxes, cess, fees and/or duties levied including but not limited to interest, penalty and/or fine imposed by any authorities including revenue authorities in India and/or abroad at any time even beyond the expiry of the Contract period with respect of the work to be performed by the successful bidder in accordance with the Contract.
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> 4.9.3. The successful bidder shall also be responsible for filing income tax return and/or complying with necessary procedure and/or formalities as required or may be required under the fiscal laws of India and/or abroad in respect of the work to be performed by the successful bidder in accordance with the Contract.
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> 4.9.4. Corporate Tax and/or Income Tax, if any applicable/levied in India and/or abroad on the successful bidder and/or its personnel and/or on the sub-contractors engaged by the successful bidder and /or the personnel of such sub-contractors in

> respect of this contract will be the responsibility of the successful bidder. All the necessary return and other formalities will be the responsibility of successful bidder.
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> 4.9.5. All other statutory levies including but not limited to Custom Duties/Excise Duties, Sales Taxes, Works Contract and other levies of whatsoever nature payable in accordance with the law of India, levied/leviable on the successful bidder and/or its sub-contractors in respect of performance of this contract shall be the responsibility of the successful bidder or any of its sub-contractors."

16. The appellant in response to NIT submitted its technical and financial bids. Subsequent to submission of the technical bid and the price bid, the parties entered into negotiation and thereafter a letter of intent on the terms and conditions of NIT and the other terms agreed during subsequent negotiations was issued. In the said letter of intent dated 3.3.2007, it was specifically mentioned that the execution of work shall be on the terms of notice inviting tender (NIT) and other agreed discussions/negotiations subsequently held between the parties. Finally the Work Order was issued on 14.4.2007 in continuation with the letter of intent dated 3.3.2007. The relevant portion of the work order is extracted herein-below:-

"WORK ORDER

SUB:- Re-opening and operating of Sudra Mine & Mosaboni concentrator plant at Indian Copper Complex, Ghatsila

Dear Sir,

With reference to the above subject, Hindustan Copper Limited is please to issue work order to continuation with LOI dated 03-03-2007 to re-commission, operate and maintain Surda Mine and Mosaboni concentrator plant to supply and deliver copper concentrate at rates Rs 1,53,470.00 per ton of mental in concentrate (Excluding Royality) to Maubhandar work of Indian Copper Complex, produced from the operations of these units.

This Work shall be governed by the terms and conditions of the Expressions of Interest of dated 21-09-2006, Notice Inviting Tender No. HC/HO/GM (M&S)/SUDRA dated 11-12-2006 and the other agreed during subsequent discussions/negotiations, and the final offer."

(Emphasis given)

17. In the course of hearing, Mr. P.P. Rao, learned senior counsel appearing for the respondent produced before us a xerox copy of the Work Order dated 14.4.2007. Clause 4.9.1 quoted hereinabove specifically mentions therein that the rate quoted by the appellant was inclusive of sales tax, service tax and the other taxes. The representative of the appellant signed the Work Order on each pages (20 pages) and acknowledged and admitted the terms and conditions for the said work.

18. From the facts mentioned hereinabove, it is evident that the appellant has accepted the liability of payment of excise duty, sales tax, service tax and other taxes and hence it cannot be held that the clause 4.9.1 of the Work Order is inconsistent with the terms and conditions of contract documents.

19. The learned Arbitrator has gone in detail of the dispute raised by the appellant and rightly came to the conclusion that the responsibility on the appellant is to abide by the terms and conditions of the Work Order.

20. We have also gone through the order passed by the High Court. The Court rightly came to the conclusion that there is no patent illegality in the Award passed by the Arbitrator which needs interference under Section 34 of the Act.

21. Mr. Sharan, learned senior counsel appearing for the appellant, also challenged the arbitral award on the ground that the same is in conflict with the public policy of India. We do not find any substance in the said submission. This Court, in the case of **Oil and Natural Gas Corporation Ltd.** (supra), observed that the term 'public policy of India' is required to be interpreted in the context of jurisdiction of the Court where the validity of award is challenged before it becomes final and executable. The Court held that an award can be set aside if it is contrary to fundamental policy of Indian law or the interest of India, or if there is patent illegality. In our view, the said decision will not in any way come into rescue of the appellant. As noticed above, the parties have entered into concluded contract, agreeing terms and conditions of the said contract, which was finally acted upon. In such a case, the parties to the said contract cannot back out and challenge the award on the ground that the same is against the public policy. Even assuming the ground available to the appellant, the award cannot be set aside as

because it is not contrary to fundamental policy of Indian law or against the interest of India or on the ground of patent illegality.

22. The words “public policy” or “opposed to public policy”, find reference in Section 23 of the Contract Act and also Section 34 (2)(b)(ii) of the Arbitration and Conciliation Act, 1996. As stated above, the interpretation of the contract is matter of the Arbitrator, who is a Judge, chosen by the parties to determine and decide the dispute. The Court is precluded from re-appreciating the evidence and to arrive at different conclusion by holding that the arbitral award is against the public policy.

23. We have given our anxious consideration in the matter. In our view the High Court has rightly came to the conclusion that no ground exists for setting aside the award as contemplated under Section 34 of the Act.

24. For the reasons aforesaid, we do not find any merit in this appeal, which accordingly stands dismissed with no order as to costs.

.....J.
[M.Y. Eqbal]

.....J
[Pinaki Chandra Ghose]

New Delhi
September 22, 2014