



Credits Google Images

**PSL** Advocates  
& Solicitors

## **Nangia Construction (I) Pvt. Ltd Vs National Buildings Construction Corporation Ltd**

<b>Citation</b>	<b>CS(OS) 3299/2012</b>
<b>Court</b>	<b>Delhi High Court</b>
<b>Date</b>	<b>28 May 2020</b>
<b>Bench</b>	<b>Prateek Jalan. J</b>

© PSL Advocates and Solicitors

## **FACTUAL BACKDROP**

- The arbitration proceedings in the present case were governed by the erstwhile Arbitration Act, 1940 (Act). The State of Haryana (SOH), floated a tender for work of widening and strengthening of an existing national highway (NH-1), which was awarded to National Building Construction Corporation Ltd. (NBCC) by an agreement dated 24.08.1987. Subsequently, NBCC sub-contracted the work of NH-1 to Nangia Construction (I) Pvt. Ltd (Nangia), by an agreement dated 26.10.1987. The value of the contract between NBCC and SOH was Rs. 9,43,92,969/-, and the contract between Nangia and NBCC was for Rs. 8,96,73,320/-.
- As per the contract between Nangia and NBCC, 10 % of the total value of the agreement, was paid to Nangia by NBCC as mobilization advance, which was secured by a bank guarantee. A performance guarantee was also furnished by Nangia to NBCC. However, a dispute arose between SOH and NBCC relating to sub-contracting of work to Nangia, consequent to which NBCC terminated the contract with Nangia and invoked the bank guarantees towards mobilization as well performance submitted by Nangia. Later, SOH terminated the contract with NBCC and rendered the contract for widening and strengthening of national highway (NH-1) to Nangia, in pursuance to which Nangia resumed the work on-site from 1993.

## **THE AWARD**

- Nangia invoked the arbitration clause against illegal termination of the agreement by NBCC and refund of the amount under the bank guarantee. The award was rendered on 30.10.2010 by the Arbitrator, by which termination was held illegal and NBCC was directed to refund the amount realised under the bank guarantee. NBCC's counterclaim for the amount of ₹27,23,800/- by way of interest on the unrecovered part of the mobilization advance was rejected by the tribunal.
- The award was challenged by NBCC, before the Delhi High Court under Sections 30 and 33 of the Act, which was rejected by the Single Bench by order dated 14.03.2012. Further, the order of Single bench was challenged before the Division Bench of Delhi High Court, on the ground, relating to refund of the mobilization advance by NBCC to Nangia. Division Bench observed that the issue of mobilization has not been considered in the arbitral award and therefore remanded the said claim for adjudication by a new arbitrator.
- As such, a sole Arbitrator was appointed, who passed an arbitral award dated 18.10.2012 (Impugned Award), as per which the Nangia was directed to refund the unrecovered mobilization cost along with 12% interest from 01.08.1991 till encashment of bank guarantee. Nangia challenged the Impugned Award under Section 30 and 33 of the Act, by way of the present proceedings.
- As per the impugned award, the arbitrator observed that Nangia used mobilization advance given by NBCC for the purchase of machinery. Further, even after termination of the agreement between Nangia and NBCC, Nangia continued to utilize the machinery

and resources purchased earlier to resume work under the contract executed between SOH and Nangia and therefore, Nangia is not entitled to claim a refund of the amount recovered by NBCC under the bank guarantee against mobilization advance.

## JUDGMENT

- The Court expounded on the scope of court interference while setting aside an arbitral award in a petition under Section 30 and 33 of the Act?
- While adjudicating the issue, the High Court of Delhi referred to judgement of Supreme Court in *K.P. Poulose vs. State of Kerala* (1975) 2 SCC 236, wherein the court observed that:

“6. Under Section 30(a) of the Arbitration Act an award can be set aside when an arbitrator has misconducted himself or the proceedings. Misconduct under Section 30(a) has not a connotation of moral lapse. It comprises legal misconduct which is complete if the arbitrator on the face of the award arrives at an inconsistent conclusion even on his own finding or arrives at a decision by ignoring very material documents which throw abundant light on the controversy to help a just and fair decision. It is in this sense that the arbitrator has misconducted the proceedings in this case. We have, therefore, no hesitation in setting aside such an award.”

- Further, the High Court refers to the judgment in *Union of India vs. Jain Associates* (1994) 4 SCC 665, wherein the court applied the above test to hold that failure to consider material documents leading to inconsistent findings in an award would render it vulnerable to challenge. To further impress upon the issue, the High Court cited the judgment in *State of Rajasthan vs. Puri Construction Co. Ltd.* (1994) 6 SCC 485 wherein the Supreme Court held that:

“31. ...Precisely for the aforesaid reasons, the erroneous application of law constituting the very basis of the award and improper and incorrect findings of fact, which without closer and intrinsic scrutiny, are demonstrable on the face of the materials on record, have been held, very rightly, as legal misconduct rendering the award as invalid. .... Where the error of finding of facts having a bearing on the award is patent and is easily demonstrable without the necessity of carefully weighing the various possible viewpoints, the interference with award based on erroneous finding of fact is permissible. Similarly, if an award is based by applying a principle of law which is patently erroneous, and but for such erroneous application of legal principle, the award could not have been made, such award is liable to be set aside by holding that there has been a legal misconduct on the part of the arbitrator....”

- High Court, further emphasize upon the question as to what amounts to perversity in an award to set it aside, and therefore referred to the Judgement of *Sikkim Subba Associates vs. State of Sikkim* (2001) 5 SCC 629:

“14. ...If there are two equally possible or plausible views or interpretations, it was considered to be legitimate for the arbitrator to accept one or the other of the available interpretations. It would be difficult for the courts to either exhaustively define the word “misconduct” or likewise enumerate the line of cases in which alone interference either could or could not be made. Courts of law have a duty and obligation in order to maintain purity of standards and preserve full faith and credit as well as to inspire confidence in alternate dispute redressal method of arbitration, when on the face of the award it is shown to be based upon a proposition of law which is unsound or findings recorded which are absurd or so unreasonable and irrational that no reasonable or right-thinking person or authority could have reasonably come to such a conclusion on the basis of the materials on record or the governing position of law to interfere...”

- The High Court proceeded to set aside the Impugned Award holding it to be unsustainable as it erroneously proceeded primarily on the basis that mobilization advance was in the nature of a loan recoverable by NBCC and had not been fully recovered. Applying the ratio and tests laid down in above said judgments to the Impugned Award, the High Court held that the finding of the arbitrator that resources mobilized by Nangia from the mobilization advance were used by it after it resumed the work (consequent upon retendering) is wholly unsupported by evidence. While re-appreciation of the evidence is not within the scope of an application for setting aside under the Act, the deference to be accorded to the arbitrator cannot extend to a conclusion which is based on no evidence at all.