
(2006) 05 DEL CK 0204
In the Delhi High Court
Case No : OMP No. 246 of 2006

GE Capital Transportation Financial Services Ltd.	APPELLANT
Vs	
South Asian Enterprises Ltd. and Others	RESPONDENT

Date of Decision : 31-05-2006

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 13(5), 16, 24, 28, 28(1)
Constitution of India, 1950 — Article 18

Citation : (2006) 130 DLT 500 : (2006) 90 DRJ 46

Hon'ble Judges : Vikramajit Sen, J

Bench : Single Bench

Advocate : Sanjay Karol, Gyandre Kumar and Abhilash Pillai, for the Appellant;
Manmohan Rekhi Ray, Bina Gupta and Simanti Chakroborty, for the Respondent

Final Decision : Dismissed

Judgement

Vikramajit Sen, J.—The Petitioner has filed this Application/Petition u/s 34 of the Arbitration and Conciliation Act, 1996 (‘the Act’ for short) for setting aside the Arbitral Award of the Sole Arbitrator Justice K.S. Gupta (Retd.) passed on February 17, 2006.

2. Mr. Sanjay Karol, learned Senior Advocate for the Petitioner/Objector has particularly assailed the observations of the learned Arbitrator to the effect that "for deciding this matter it is not necessary to examine the applicability/non-applicability of the concept of economic duress." In the very next sentence the Arbitrator has held that - "As the claimant was coerced/forced to pay the said amount as condition for release of the deposited amount of Rs. 3 crores with interest to VLS beyond the terms of lease agreement, the opposite party is liable to refund it with interest."

3. On first reading these sentences appear to be mutually contradictory. However, a holistic reading would dispel all doubts. Mr. Karol has drawn my attention to the decision of the privy counsel in Pao On v. Lau Yiu 1979 3 AELR PC 65, in which the Board had gone into detail with regard to the meaning of the

term 'economic duress'. Returning to the Award the learned Arbitrator has made a special mention of the letter dated 1.9.1995, a perusal of which would leave little room for controversy that the Respondents were left with no option but to agree to the demand for deposit of the impugned amount, since its sister concern, VLS, had deposits of over Rs. 3 crores with the Objector. It cannot, Therefore, be justly contended that there was no material before the Arbitrator to come to the conclusion that the Respondents were coerced and forced to pay the said amount. The learned Arbitrator was so definitive about this conclusion that he thought it pointless to spend time on the intricacies or theory of what constitutes 'economic duress'. Nothing further needs to be said on this score since this Court is not exercising appellate jurisdiction over the Award.

4. There is no gainsaying that the Objections to the Award can be sustained *inter alia*, only if they are contrary to public policy. If the Arbitrator has proceeded in a manner which is contrary to public policy as has come to be explained in *Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.*, by the Bench of M.B. Shah and Arun Kumar, JJ. The same enunciation of law has been reiterated in *Hindustan Zinc Ltd. Vs. Friends Coal Carbonisation*, by the Bench comprising Arun Kumar and R.V. Raveendran, JJ. Mr. Karol has relied on these observations in *Saw Pipes*:

12. Hence, the jurisdiction or the power of the Arbitral Tribunal is prescribed under the Act and if the award is *dehors* the said provisions, it would be, on the face of it, illegal. The decision of the Tribunal must be within the bounds of its jurisdiction conferred under the Act or the contract. In exercising jurisdiction, the Arbitral Tribunal cannot act in breach of some provisions of substantive law or the provisions of the Act.

13. The question, Therefore, which requires consideration is -whether the award could be set aside, if the Arbitral Tribunal has not followed the mandatory procedure prescribed under Sections 24, 28 or 31(3), which affects the rights of the parties. Under Sub-section (1) (a) of Section 28 there is a mandate to the Arbitral Tribunal to decide the dispute in accordance with the substantive law for the time being in force in India. Admittedly, substantive law would include the Indian Contract Act, the Transfer of Property Act and other such laws in force. Suppose, if the award is passed in violation of the provisions of the Transfer of Property Act or in violation of the Indian Contract Act, the question would be whether such award could be set aside. Similarly, under Sub-section (3), the Arbitral Tribunal is directed to decide the dispute in accordance with the terms of the contract and also after taking into account the usage of the trade applicable to the transaction. If the Arbitral Tribunal ignores the terms of the contract or usage of the trade applicable to the transaction, whether the said award could be interfered. Similarly, if the award is a non-speaking one and is in violation of Section 31(3), can such award be set aside? In our view, reading Section 34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it couldn't be set aside by the court. if it is held that such award could

not be interfered, it would be contrary to the basic concept of justice. If the Arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside u/s 34.

...

22. The aforesaid submission of the learned Senior Counsel requires to be accepted. From the judgments discussed above, it cannot be held that the term "public policy of India" is required to be interpreted in the context of the jurisdiction of the court where the validity of award is challenged before it becomes final and executable. The concept of enforcement of the award after it becomes final is different and the jurisdiction of the court at that stage could be limited. Similar is the position with regard to the execution of a decree. It is settled law as well as it is provided under the CPC that once the decree has attained finality, in an execution proceedings, it may be challenged only on limited grounds such as the decree being without jurisdiction or a nullity. But in a case where the judgment and decree is challenged before the appellate court or the court exercising revisional jurisdiction, the jurisdiction of such court would be wider. Therefore, in a case where the validity of award is challenged, there is no necessity of giving a narrower meaning to the term "public policy of India". On the contrary, wider meaning is required to be given so that the "patently illegal award" passed by the Arbitral Tribunal could be set aside. If narrow meaning as contended by the learned Senior Counsel Mr. Dave is given, some of the provisions of the Arbitration Act would become nugatory. Take for illustration a case wherein there is a specific provision in the contract that for delayed payment of the amount due and payable, no interest would be payable, still however, if the arbitrator has passed an award granting interest, it would be against the terms of the contract and thereby against the provision of Section 28(3) of the Act which specifically provides that "Arbitral Tribunal shall decide in accordance with the terms of the contract". Further, where there is a specific usage of the trade that if the payment is made beyond a period of one month, then the party would be required to pay the said amount with interest at the rate of 15 per cent. Despite the evidence being produce on record for such usage, if the arbitrator refuses to grant such interest on the ground of equity, such award would also be in violation of Sub-sections (2) and (3) of Section 28. Section 28(2) specifically provides that the arbitrator shall decide *ex aequo et bono* (according to what is just and good) only if the parties have expressly authorized him to do so. Similarly, if the award is patently against the statutory provisions of substantive law which is in force in India or is passed without giving an opportunity of hearing to the parties as provided u/s 24 or without giving any reason in a case where parties have not agreed that no reasons are to be recorded, it would be against the statutory provisions. In all such cases, the award is required to be set aside on the ground of "patent illegality".

...

28. From this discussion it would be clear that the phrase "public policy of India" is not required to be given a narrower meaning. As stated earlier, the said term is susceptible of narrower or wider meaning depending upon the object and purpose of the legislation. Hence, the award which is passed in contravention of Sections 24, 28 or 31 could be set aside. In addition to Section 34, Section 13(5) of the Act also provides that constitution of the Arbitral Tribunal could also be challenged by a party. Similarly, Section 16 provides that a party aggrieved by the decision of the Arbitral Tribunal with regard to its jurisdiction could challenge such arbitral award u/s 34. In any case, it is for Parliament to provide for limited or wider jurisdiction to the court in case where award is challenged.

5. Bowing before the wisdom of the Hon"ble Supreme Court in *Saw Pipes* the scope of enquiry whilst considering the strength of Objections u/s 34 of the Act, should be whether the Award is in contravention of the provisions of the Act or any other substantive law governing the party or is against the terms of the contract, but not as an appellate authority. If the conclusion of the Arbitrator is a plausible one, courts would err to interfere or meddle with it.

6. It is the common case that the clause of the contract which was relied upon by the Objector before the learned Arbitrator was Article 18(d), which stipulates that the "lessee will indemnify the Lesser against any liability or additional liabilities, the Lesser may incur under the Income Tax Act, or under any other law, by reason of the use of the equipment/property by the Lessee for any purpose other than that stated by the Lessee to the Lesser." In fairness to Mr. Karol it was conceded that this clause has no applicability to the dispute in question.

7. The intention of Parliament in repealing the Arbitration Act, 1940 and substituting it by the Arbitration & Conciliation Act, 1996 was primarily to impart finality to Arbitration proceedings. Interference by courts was intended to be drastically curtailed. This must be kept in mind by the Court which is called upon to decide Objections to an Award. It is true that the Hon"ble Supreme Court has preferred that a wider rather than a narrower interpretation should be imparted to the words "public policy" ; and that ignoring the term of the contract may amount to a violation of public policy. This must not be confused to indicate that the Court must exercise appellate jurisdiction in regard to the conclusion arrived by the Arbitrator after a reading of the terms of the contract.

8. In the present case there is no reason to conclude that the Arbitrator had ignored any of the terms of the contract. No sooner this position is arrived at the Court must desist from entertaining the Objections to the Award and thereby refrain from obstructing compliance with the Award. In order to ensure that Objections are dealt with expeditiously and do not remain pending in Court for no justifiable reason, the Registry is directed to ensure that advance notice of the Objection has been dispatched to the Respondents prior to the Objections being listed before Court.

9. No grounds to interfere in the Award are made out. The Application/Petition is

dismissed with no Order as to costs.