
(2014) 08 BOM CK 0080
In the Bombay High Court
Case No : Arbitration Petition No. 398 of 2014

JSW Steel Ltd.

APPELLANT

Vs

AI Ghuriar Iron and Steel LLC

RESPONDENT

Date of Decision : 20-08-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 18, 31(8), 31(8)(a), 31(8)(b)
Contract Act, 1872 — Section 23, 28, 28(a), 28(b)
Evidence Act, 1872 — Section 118, 119, 120, 121, 122
Sales of Goods Act, 1930 — Section 15, 41, 42

Citation : (2014) 5 ABR 540 : (2015) 2 ALLMR 60 : (2015) 2 ARBLR 373 :
(2015) 2 BomCR 655 : (2015) 3 MhLj 147

Hon'ble Judges : R.S. Dalvi, J

Bench : Single Bench

Advocate : S.U. Kamdar, Sr. Advocate, Karl Tamboly, Aditya Sikka and Prakritee Yonzon i/b Bharucha and Partners, Advocate for the Appellant; Navroz Seervai, Sr. Advocate, Nikhil Sakhardande, Amitava Majumdar, Shiv Kumar Iyer, Sujan Malhotra and Abraham Varughese i/b Bose and Mitra and Co, Advocate for the Respondent

Final Decision : Dismissed

Judgement

R.S. Dalvi, J.—The petitioner has challenged the money award of the Arbitral Tribunal dated 28th May, 2013 upon a written contract between the parties. The petitioner was the supplier of certain specified goods being Prime Hot Rolls Steel Coils. The respondent paid the price of goods and was to receive the same under two bills of lading dated 8th May, 2008 shipped from Mumbai to Dubai. It has been the petitioner's case that the goods were to be supplied per description and specification as regards the Weight, the Outer Diameter (OD) and the Inner Diameter (ID) of the coils. This was an important part of the contract. The respondent as the claimant in the arbitration claimed that unless the goods were of the correct specification, they could not be loaded on the mangle of the respondent and the mangle would have been damaged if the coils were not of the required specification.

2. When the goods were shipped the petitioner sent the Mills Test Certificate to the respondent. This was received by the respondent a day prior to the shipment of the goods on 16th September, 2008. It has been the claim of the respondent in the arbitration that the certificate itself showed that the goods did not conform with the specification as to Weight and the OD stipulated in the contract and this was immediately informed by the respondent to the petitioner. The goods were however shipped on 16th September, 2008 and arrived at the destination port. They remained in the port for some time. It has been the case of the respondent that they were granted permission for the clearance only on 9th November, 2008. They could examine the goods only after they could be delivered to the respondent's plant on 14th November, 2008. They had no opportunity to inspect the goods prior to such date. Upon inspection the respondent realized that the goods did not conform with the specification of the ID and were in a damaged condition being bent and cut. The respondent sent an inspection report and photographs of the damaged coils to the petitioner. By its email dated 13th November, 2008 followed by other emails the respondent complained about damaged goods. The respondent could not utilize the goods. The respondent rejected the goods and called upon the petitioner to remove the same and return the consideration paid. That was not done. Hence the respondent sold the goods and claimed the price paid for the goods together with interest and storage charges and gave credit for the amount received upon sale to the petitioner.

3. This is the contract that the learned Arbitrators had to consider. The learned Arbitrators have considered the aspect of the damage to the goods, the goods not conforming with the specification in the contract, the legal rights of the respondent for the damaged goods supplied to it and the resultant loss caused to the respondent for which the respondent was granted the money award. For considering these aspects several issues have been framed and evidence led by both the parties aside from considering the essential document being the contract itself and the correspondence that arose between the parties contained in several emails. The Court, of course, cannot go into the evidence led by the parties. The Court would have to see from the award itself whether the terms of the contract and the legal rights of the parties were considered and whether evidence in that regard was led. The learned Arbitrators may come to a possible view and if that is done, the Court would not interfere.

4. The challenge to the Award is essentially made on the following grounds:

(a) No Breach of Contract:

It may be mentioned that in the contract between the parties of the sale by description (specification) there was an implied condition in the contract that the goods shall correspond with the description as enjoined by Section 15 of the Sale of Goods Act, 1930.

5. The respondent as the claimant has shown that the Mills Test Certificate showed that the goods did not correspond with the specification as to Weight and

OD. An examination of the goods upon delivery of the goods further showed that the goods did not conform with the specification as to ID also.

6. The respondent exercised its statutory right of examining the goods u/s 41 of the Sale of Goods Act which runs thus:

41. Buyer's right of examining the goods.-(1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

7. The respondent has claimed that the goods were cleared by the port authority only on 9th November, 2008. The respondent examined the goods on 14th November, 2008. The respondent sent emails dated 13th November, 17th November, 20th November and 25th November, 2008 to the petitioner. The respondent also forwarded the inspection report and the photographs of the goods. Thus the respondent informed the petitioner of the damaged condition of the goods by emails. The respondent ultimately rejected the goods since the petitioner did not act upon its complaint.

8. The petitioner claims that the respondent could and should have inspected the goods before they were loaded on the ship. This is stated to be under Clause 4(1) of the contract under which the respondent had such option which was not exercised. The petitioner dispatched and shipped the goods from Mumbai. The respondent is the buyer in Dubai. The option is, therefore, in vain and not contemplated to supercede the right of inspection statutorily provided in Section 41 of the Sale of Goods Act. The very contention is rather impertinent. The petitioner has claimed that the right of rejection was not exercised as per the terms of the contract. Under Clause 4.2(b) the respondent was to make all the quality related claims within 30 days of the date of the arrival of vessel at the discharge port. The ship is stated to have arrived on 16th September, 2008 at the discharge port. The petitioner would contend that the respondent should have made its claim by 15th October, 2008. The respondent had already notified the petitioner and consequently made a quality related claim upon receiving the Mills Test Certificate with regard to the Weight and OD a day prior to the arrival of the ship at the destination port upon the documents being forwarded by the petitioner to the respondent with the bills of lading. The learned Arbitrators have considered that claim has been made within time.

9. The petitioner would argue that the claim is made before time because the claim had to be made within 30 days from the date of arrival of the vessel. It could not be made a day prior to the arrival of the vessels. There is no such bar in the contract. Clause 4.2(b) shows the maximum period granted to the buyer

to make quality related claim. If it is otherwise legal, the period of time cannot be extended and no claims would be entertained after the contractual period. The purpose of having such a contract is that the supplier must know within a reasonable time if the goods are to be rejected if they do not conform with the specification. Making the claim immediately upon the receipt of the documents with the bills of lading, the supplier would not be prejudiced. He would in fact be put on guard and may remedy the quality related defect.

10. The learned Arbitrators have considered the purport of the clause and have come to very possible conclusion that the initial quality related claim was made within the period specified in the contract.

11. However the quality related claim was later extended even in respect of ID. This would stand to reason. If an essential part of the claim is already made, the supplier would be put to notice. Whilst the supplier would seek to remedy that defect, any further defect noticed may also be remedied. Consequently the act of the parties fell within the contractual requirement and the consideration by the learned Arbitrators to that effect cannot be interfered with.

12. Besides the respondent as the buyer had the right to examine the goods upon a reasonable opportunity provided to the respondent to ascertain whether they were in conformity with the contract, more so when the contract was a sale by description carrying the statutory implied condition that the goods would conform with the specification. The respondent cannot be deprived of this statutory right. This right could be exercised only after the respondent had a reasonable opportunity to examine the goods. Since this was an international contract and the goods were shipped from one country to another, the bills of lading would arrive at the destination port. The shipment would have to comply with all the necessary requirements of the port authority. The goods would be cleared thereafter. The goods can be transported to the plant of the respondent yet thereafter. The respondent would, therefore, be in a position to examine the goods only when the consignment was opened. This reasonable opportunity would, therefore, merit reasonable time to be granted.

13. This aspect is reflected in Section 42 of the Sale of Goods Act which runs thus:

42. Acceptance.-The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

It relates to acceptance of the goods which enjoins the buyer to accept the goods if within a reasonable time he has not rejected them. The right of rejection follows as a corollary to the right of examination of the goods.

14. A reading of Sections 41 & 42 would require a reasonable time afforded to

the buyer of the goods for examination of the goods and for rejection if they do not conform with the contractual requirement. The learned Arbitrators have accepted the aforesaid statutory right of the respondent as the buyer.

15. Upon the claim of the respondent herein that the goods were not conforming with the specifications (description) as to Weight, OD and ID, the learned Arbitrators have considered the evidence with regard to the various specifications and have concluded that the Weight met the specification as shown in "Information Feedback Report" and that the OD was also approximately of the specification in the contract despite the claim of the respondent. The petitioner herein (as the respondent in the arbitration) accepted that the ID of the goods supplied did not correspond with the ID specified in the contract. With regard to the ID, the petitioner requested the respondent to process the coils having ID of more than 730 mm and to use the coils below 730 mm after cutting wraps at the ID. This would show that the goods were not upto specification but the petitioner showed the respondent how to make do with goods of different specification which could not be used by the respondent. It is for this that the learned Arbitrators have held that there is variance with the contract specifications. Whilst the Weight and the OD came to be explained, the ID was not explained. The difference in the ID has been considered. The learned Arbitrators have held that the ID was at variance with the contract specification and it is only on that count that the contract is held to be breached. Indeed that would show that the implied condition in the contract was not complied for the sale by description/specification as mentioned in Section 15 of the Sale of Goods Act. Consequently upon the evidence of the respective cases of the parties the learned Arbitrators came to the conclusion that the delivery did not conform with the stipulation in the contract, a question of fact which cannot be interfered with.

(b) Validity and Legality of the Contract:

16. For the strict reliance upon Clause 4.2(b) of the Contract put by the petitioner herein, the respondent contended as a question of law that such an agreement would be void as being in restraint of legal proceedings u/s 28 of the Indian Contract Act, 1872 which runs thus:

28. Agreements in restraint of legal proceedings, void.-[Every agreement,-

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability; under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent]

17. The learned Arbitrators have considered the parameters of Section 28. A

reading of the section becomes material as the learned Arbitrators must be seen to have passed an award in accordance with law. Section 28 as it initially stood consisted of only the first part of the aforesaid section which is now shown to be Section 28(a). That part dealt with contracts which restricted absolutely a party enforcing any right in any legal proceeding or which limited the time to enforce such right. The first part of the section dealt with such contracts which did not allow one party to at all sue. If the restriction was absolute the contract would be void. Certain contracts only conferred a time less than time which would otherwise be available under the Limitation Act to a party to sue. Such contracts which limited the time to enforce the rights were also void to the extent of such limitation. If the contract, therefore, provided that no claim could be made (in a Court of law or in any alternate forum such as arbitration) after 30 days from a given date when the law of limitation would allow 3 years within which a party can sue, the contract would be void to the extent of the provision of the period of 30 days. The remainder of the contract would, of course, be effectuated.

18. The legislature amended the section by the addition of Clause (b) to Section 28. This amendment was made for specific reasons. The reasons have been set out in the Statement of Objects and Reasons (SOR) of the gazetted amendment. The SOR has been shown to Court by Mr. Seervai upon the argument of law requiring the Court to consider whether clause such as Clause 4.2(b) could be considered void u/s 28(b). It would be material to see the SOR to understand the legal position which prevailed by the judge-made law prior to the amendment and for which the legislature considered it necessary to amend the law. The SOR runs thus:

Statement of Objects and Reasons

The Law Commission of India has recommended in its 97th report that section 28 of the Indian Contract Act, 1872 may be amended so that the anomalous situation created by the existing section may be rectified. It has been held by the courts that the said section 28 shall invalidate only a clause in any agreement which restricts any party thereto from enforcing his rights absolutely or which limits the time within which he may enforce his rights. The courts have, however, held that this section shall not come into operation when the contractual term spells out an extinction of the right of a party to sue or spells out the discharge of a party from all liability in respect of the claim. What is thus hit by section 28 is an agreement relinquishing the remedy only i.e. where the time-limit specified in the agreement is shorter than the period of limitation provided by law. A distinction is assumed to exist between remedy and right and this distinction is the basis of the present position under which a clause barring a remedy is void, but a clause extinguishing the rights is valid. This approach may be sound in theory but, in practice it causes serious hardship and might even be abused.

2. It is felt that section 28 of the Indian Contract Act, 1872 should be amended as it harms the interests of the consumer dealing with big corporations and causes serious hardship to those who are economically disadvantaged.

3. The Bill seeks to achieve the above objects.

19. This would show that there was an anomalous situation created upon the interpretation of Section 28 as it then prevailed. That was u/s 28(a) cited above. The SOR states that it has been held by the Courts that the unamended Section 28 would invalidate only a clause which would restrict the party from absolutely enforcing its rights or from limiting the time to sue. The SOR further states that the Courts have held that this section would not come into operation when any contractual term sets out the extinction of the right to sue or discharges a party from the liability when sued. The legislature considered that, therefore, even when a remedy was relinquished, the agreement would be hit by Section 28. This would be on the basis of reasonableness of agreements. However the legislature thought that though this would be sound in theory, it caused serious hardship to parties and could be abused specially if they were consumers dealing with large corporations. The legislature, therefore, did the act of power balancing. The law came to be amended. The amended law, therefore, caused all contracts where the remedy was relinquished as also where the right to sue was extinguished or a discharge was claimed. All the aforesaid 3 types of agreements would be void and, therefore, unenforceable under the amended law. Mr. Seervai would argue that the learned Arbitrators held that consequently Clause 4.2(b) is void as falling within the mischief of Section 28(b) of the Contract Act.

20. The learned Arbitrators would be expected to consider the question of law under Clause 4.2(b) as per the amended Section 28. The learned Arbitrators have held that Clause 4.2(b) is void. Clause 4.2(b) extinguishes the right of the respondent to make quality related claims to the petitioner after 30 days. It would have to be seen what would be the legal position for the respondent to sue. The petitioner would claim that the respondent would not be entitled to enforce its rights as a buyer upon the quality related claim because such a claim was not made by the respondent to the petitioner within 30 days of the arrival of the goods at the destination port.

21. If it was understood that the expression "claims" would mean a claim in a legal proceeding, the respondent would be constrained to sue or enjoined to make a claim within 30 days instead of the normal claim of 3 years. Such a claim would fall within the part of unamended Section 28 being Section 28(a) as it would limit the time to enforce the right.

If it is contended that the expression "claim" relates to notice being given to the petitioner to make a quality related claim that the goods were defective or not as per sample or were damaged etc. also the claim having to be made within 30 days from the date of arrival of the vessel would extinguish the respondent's right to make the claim after that period and would discharge the petitioner from any liability thereunder. That would then fall within the mischief of the amended Section 28 being Section 28(b) of the Contract Act.

22. Mr. Kamdar would argue that the contracts contemplated in the SOR are

contracts of big corporations with economical disadvantage for their consumers and, therefore, would not apply to a commercial contract between a buyer and a seller where the parties contract on an equal footing. Consequently he would contend that the contract between the parties would not fall foul of Section 28(b) even though it would extinguish the right of the respondent after the period of 30 days and discharge the petitioner from liability after the period of 30 days specified in the clause. The SOR shows that what propelled the legislature to amend the law were the 2 aspects set out at the end of para 1 of the SOR. It was not only because Section 28 as it then was interpreted by the Courts caused serious hardship "to the economically disadvantaged" (as per the example given in para 2 of the SOR), but also because Section 28(a) "might even be abused". This case is itself a clear illustration of the abuse-even though the defects in the Weight & OD were pointed out at the first available opportunity, it is claimed that the defects were not pointed out within 30 days of the arrival of the goods at the destination port because defects in the ID were not pointed out until after 30 days of arrival. No exclusion of the parties at par in contracts is seen in the legislation. Exclusion has not also been shown in a judicial pronouncement relating to the extent of applicability of the amended Section 28 to commercial contracts.

23. In fact, it may be seen that the right of examination of the goods and the consequent right of rejection of the goods which are two statutory rights of the respondent as the buyer would be defeated because the respondent would not have reasonable opportunity of examining the goods and a reasonable time to reject the goods outside the period of 30 days specified in Clause 4.2(b) of the Contract. Such an agreement would be void u/s 23 of the Contract Act because if permitted it would defeat the provisions contained in Sections 41 & 42 of the Sale of Goods Act.

24. It is, therefore, clear that such a contract would be void u/s 28. The Arbitrators have so held. The Award is, therefore, in accordance with law as seen from the statute.

25. This law has been a part of judicial pronouncements which have been relied upon by the parties and considered by the learned Arbitrators.

In the case of M/s. Chander Kant & Co. Vs. The Vice Chairman, DDA in Arbitration Petition No. 246 of 2005 the Division Bench of the Delhi High Court considered this point of law. It considered the law pre and post amendment. That would indeed show the changed legal position and the application of the section to contracts extinguishing a right and discharging a liability. In that case the period of limitation of 90 days was to be considered. The relevant clause runs thus:

It is also a term of the contract that if the contractor (s) does/do not make any demand for arbitration in respect of any claim (s) in writing within 90 days of receiving the intimation from the Engineer-in-Charge that the Bill is ready for

payment, the claim (s) of the contractor (s) will be deemed to have been waived and absolutely barred and the Delhi Development Authority shall be discharged and released of all liabilities under the contract in respect of those claims.

It related to the demand for arbitration to be made within 90 days of receiving the intimation of the Engineer-in-Charge in respect of a bill which was ready for payment. The contractor would be taken to have waived his right to receive the payment thereafter which would be absolutely barred and the Corporation (DDA) would be discharged and released of all the liabilities in respect of those claims.

The Court considered the legislation as also the precedents prior to the amendment in para 7 of the Judgment. The Court considered the amended law and the precedents after the amendment in para 8 of the judgment. It would be material to see that that law would apply post amendment. The Court has set out 4 specific cases in which clauses showing a period of time during which the right would be extinguished or the liability discharged have been held to be not valid in view of Section 28(b) of the Contract Act. The Court followed the earlier decision in the case of Explore Computers Pvt. Ltd. Vs. Cals Ltd. and Another, which considered the Supreme Court decision in the case of National Insurance Co. Ltd. Vs. Sujir Ganesh Nayak and Co. and another, and held that the scope of Section 28 was widened and accordingly the distinction carved out by the earlier legal pronouncement was held not good.

That case set out a period of one month from the expiry of bank guarantee within which the right of the plaintiff to institute any legal proceeding would be extinguished. The Court held that such a plea would "fly in the face of the amended Section 28" and the defendant could not be discharged from the liability nor could the right of the plaintiff be extinguished by such a clause.

The judgment would show that Clause 4.2(b) would be void to the extent it sets out the 30 days period of making any quality related claims from the date of arrival of the vessel to discharge the defendant from its liability under such claims or to extinguish the right of the plaintiff to claim with regard to the quality.

Consequently it was held that the distinction drawn earlier by the judge-made law was obliterated and such contracts were also held to be covered u/s 28(b) of the Contract Act.

The learned Arbitrators have considered and followed the aforesaid Division Bench judgment.

26. This judgment has been followed by another Division Bench of the Delhi High Court in the case of D.D.A. Vs. Pandit Construction Co. In that case clause 25 of the Contract of DDA for appointment of the arbitrator within a period of 90 days from the date the dispute arose came to be considered. The Court considered the amended Section 28 in para 8 of the judgment holding that in both the instances under the section the contract would be void. In paragraph 11 of the judgment the Court considered the retroactivity of a legislation and referred the case of

Chander Kant (Supra).

In that judgment the Court has also referred to the case of National Insurance (Supra) considered in the case of Chander Kant (Supra) and also the case of Continental Construction Ltd. Vs. Food Corporation of India, which shall be considered presently. The Court distinguished these cases in which the cause of action had arisen prior to the amendment and the amendment was not considered.

27. The judgment has been further followed in the case of Shri Avinash Sharma Vs. Municipal Corporation of Delhi, relating to the same clause by the learned Single Judge holding that the amended section deprived the party to the contract (in that case the contractor) of a very valuable right to claim the amount due to him and holding such a contract void.

28. There has been a later Division Bench judgment of the Bombay High Court being the case of M/s. Indusind Bank Ltd. Vs. Union of India & Ors. in Appeal No. 258 of 2008 dated 20th April, 2011 in which the period of the validity of the bank guarantee was set out. In that case the claim was to be made within 3 months of the validity of the bank guarantee. The claim having not been made, the bank claimed to be relieved and discharged from its liability under the bank guarantee and claimed that nothing was payable to the plaintiff. The learned Single Judge considered the law u/s 28 and held that the bank guarantee was void as it laid down the period of 90 days during which a legal claim had to be made.

The Division Bench considered that the bank guarantee was to remain in force until a specific day and any claim under the bank guarantee had to be made within 3 months therefrom. If no demand was made, the claim under the bank guarantee could not be made. The Court observed that the respondent's right to make the claim or demand against the bank under the said bank guarantee was to be perfected only if the claim or demand was lodged before 90 days period.

The Court considered the provision of unamended Section 28 and the judgment of the Supreme Court as also other Courts thereunder. The Court set out the judgment of the Supreme Court in the case of National Insurance (supra) which was also considered by the Division Bench of the Delhi High Court to set out and amplify the distinction that was carved out in that judgment pre amendment. Based upon the decision of the Supreme Court in the pre amendment case, the Division Bench of the Bombay High Court drew a parallel. The Supreme Court judgment set out the distinction between the right to enforce and the forfeiture or the waiver of rights as also the curtailment of limitation which was held to be not permissible and the extinction of the rights which was permissible and enforceable. The Division Bench of the Bombay High Court, therefore, considered the law before the amendment of 1997 and after the amendment. Having done so, it set out the distinction between the right to adopt the remedy (the right to sue) and the restriction of enforcement of an accrued right. After observing that both were declared void, it drew the distinction and held that only the former

was void and the latter was not affected by Section 28(b).

It further referred to the decision of the Supreme Court in the case of Food Corporation of India Vs. New India Assurance Co. Ltd. 1999(3) SCC 324 which was also pre amendment and consequently showed the distinction. Extensively quoting the Supreme Court in the case of Food Corporation of India (supra) the Division Bench of the Bombay High Court held that such a clause did not affect "the right of the respondents to enforce their rights" by approaching a Court of Law within the normal period of limitation if the respondents assert their right or make a demand or claim with the bank within the period mentioned in the bank guarantee.

Consequently it held that in a case of a bank guarantee the assertion of right must be within the period mentioned though the action in law may be taken as per the law of limitation. Thereupon the Division Bench of the Bombay high Court set aside the judgment of the Single Judge holding that such a clause was void u/s 28(b) of the Contract Act.

This judgment has not considered the judgment of the Delhi High Court in the case of Chander Kant (Supra) as also Avinash (Supra) and as per incuriam to that extent.

29. The learned Arbitrators have considered the Bombay High Court judgment also. The learned Arbitrators have however distinguished the judgment specifically because the contract of guarantee specified the date when the guarantee ended. Thereafter a grace period was given for making the claim. The learned Arbitrators considered that the claim was, therefore, not within the contractual period. The contract had expired. Consequently in such cases the contract relating to a period of time could be saved. When a contract was alive, as in this case, the parties had vested their rights which could be enforced as per law at the relevant time. Hence in such contracts as in our case Section 28 would apply with full force and the position in law could not be bypassed. This is what the learned Arbitrators have held. They have, therefore, considered both the relevant judgments and upon following one and distinguishing another come to conclusion in accordance with the prevalent law. The Court cannot interfere with such an award. The contention on behalf of the petitioner that the Arbitrators having not followed the Bombay High Court Judgment would merit the award being set aside upon the principles enunciated in the case of Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., is incorrect.

30. Mr. Seervai produced before the Court various judgments which considered the unamended Section 28 which need not detain us. Mr. Kamdar relied upon the judgment in the case of P. Manohar Reddy and Bros. Vs. Maharashtra Krishna Valley Dev. Corp. and Others, which was a case of contract that was entered pre amendment but which was ultimately decided by the Supreme Court post amendment of Section 28 of the Contract Act. The claims in that case were raised in 1991. The cause of action arose in 1991, reference to arbitration was

made by an order dated 09.12.1997. The law came to be considered thereafter.

The Supreme Court held in para 20 of the judgment that the provision in the contract for a limitation for the purpose of raising a claim was covered by Section 28 of the Contract Act. The period of limitation under the Limitation Act would apply but the clause providing for limitation so as to enable the party to lodge his claim with the other side was not invalid.

This was the position pre 1997 and specifically altered post 1997 by legislation. However what the Supreme Court considered was the lodging of the claim with the other side. That would not affect the period of limitation within which the party could sue.

31. The Division Bench of the Delhi High Court has considered the aforesaid judgment in the case of P. Manohar (supra) in para 11 thereof. It has clarified that the case was considered under the unamended provision and the Supreme Court had not considered the effect of insertion of Clause (b) in Section 28 by Amendment Act 1 of 1997.

32. Mr. Kamdar drew my attention to the judgment in the case of Official Liquidator Vs. Dayanand and Others, about the judicial discipline that must be followed between different benches of High Courts. In para 78 of the judgment the Supreme Court has set out the position of following the precedents by various High Courts which did not appeal to it. Quoting from the case of Mahadeolal Kanodia Vs. The Administrator-general of West Bengal, it held that the decision of a higher bench was incumbent to be followed unless the Court or the Arbitral Tribunal was able to distinguish it from a decision of another Division Bench. The learned Arbitrators have distinguished the judgment of the Division Bench, Bombay High Court from the judgment of the Division Bench of the Delhi High Court on the ground of the expiration of the contract. The judicial discipline set out by the Supreme Court has accordingly been followed. It may be mentioned that the argument of Mr. Kamdar of the Courts and Arbitral Tribunals having to follow the higher bench of the same High Court to the exclusion of any other High Courts which, according to Mr. Kamdar is only persuasive, is neither in the judgment in the case of Official Liquidator (Supra) nor is such preference made mandatory anywhere else in the practice of precedents. Hence upon considering the amended law, and the relevant judicial pronouncements, the learned Arbitrators have held that Clause 4(2)(b) is void u/s 28 of the Contract Act.

33. This would be only to the extent that it specifies the period of 30 days to make a quality related claim: in view of the last 3 words of the section. Thus seen the other fact of Clause 4(2)(b) would be required to be complied. Notice of the claim is given. It would require to be given within a reasonable period from the delivery of goods and having an opportunity to examine them u/s 41 of the Sale of Goods Act. The respondent has promptly given notice immediately upon being informed of the specifications as to Weight and OD. That is even before the

statutory period granted to the respondent as the buyer u/s 41 of the Act. The respondent has been seen to have given notice about ID within a week of the examination (inspection) of the goods upon they being released by the Port Authority and they having arrived at the plant of the respondent. Hence the right of the respondent could not be taken to have been extinguished. In any event the finding of fact of the learned Arbitrators that notice was given within the period stipulated in Clause 4(2)(b) of the Contract would be conclusive and the applicability of the law becomes only academic.

(c) Equal treatment:

34. It has also been argued that the award militates against the principles of natural justice set out in Section 18 of the Arbitration and Conciliation Act, 1996 (Arbitration Act) which enjoins the Arbitrators to treat all parties equally and give a full opportunity to present their case. Mr. Kamdar would contend that the learned Arbitrators did not treat the petitioner and the respondent equally. The learned Arbitrators did not allow the petitioner time to lead evidence of another witness, one Pratap Kurve. He contended that the provisions of Section 31(8) were not correctly applied resulting in discrimination in the treatment to the parties. The learned Arbitrators granted certain adjournments upon payment of specified costs. The petitioner having agreed to pay the costs and having taken adjournment, failed and refused to pay the costs of arbitration. Later in the arbitration when the costs of arbitration was again to be considered upon the petitioner's request of examining another witness, the learned Arbitrators refused such examination in view of the previous conduct of the petitioner.

35. The costs contemplated in Section 31(8) include the fees of the Arbitrators, expenses of witnesses, legal fees, administrative fees and other expenses under Explanation (i) to (iv) to the said section. Such costs of arbitration would be fixed by the Arbitral Tribunal u/s 31(8)(a) of the Arbitration Act. This clause gives unfettered power to fix the costs u/s 31(8)(b) to the Arbitral Tribunal who is entitled to specify the extent of the costs, who would pay the costs, the party who would be directed to pay the costs, the method of determining the amount and the manner of payment. Consequently it would be in the absolute discretion of the Arbitral Tribunal to determine and fix the costs of arbitration. Mr. Kamdar would argue that the costs can be fixed in the final award and would be executable and recoverable by the claimant if his claim succeeded in arbitration and hence the Arbitrators could not fix costs in any other manner. The argument is erroneous because no such bar is seen in Section 31(8) of the Arbitration Act. Mr. Kamdar would argue that because the costs were not paid (despite the order and assurance) once, the Arbitrators did not grant time for further cross-examination, though they were otherwise inclined to allow it.

36. Mr. Kamdar would argue that the Arbitral Tribunal "shut out" the evidence that the petitioner desired to lead and hence discriminated.

37. What is lost sight of is that on that day the petitioner also produced certain

photographs. The learned Arbitrators granted the application for taking photographs on record. The photographs were produced and hence such evidence was considered. The petitioner did not produce the ready evidence of the other witness, Pratap Kurve. The petitioner applied for time in that behalf. The petitioner had done the same thing earlier when time was granted and hence the learned Arbitrators did not repeat the same action. The learned Arbitrators passed direction for payment of fees as well as costs thrown away. Since that was rejected, despite "wanting to lead evidence at the last minute", the application for adjournment to lead evidence later came to be rejected. The learned Arbitrators had full discretion to conduct the proceedings as they deemed just and no injustice is demonstrated by the firmness of the learned Arbitrators in enforcing discipline of proceedings.

38. One cannot see how a comparison can be made with regard to the other party who does not so apply. It is a settled position in law that parties equally placed must be treated equally. Treating unequals equally would be discrimination. The parties were not similarly placed. The respondent did not want "to lead evidence at the last minute". The respondent had not accepted and then refuted the payment of costs as directed earlier. The respondent's act did not amount to prolongation of the trial. All these applied to the petitioner. The discretion of the learned Arbitrators in dealing with such a situation can never be taken away or interfered with. A party applies for postponement at this peril. He must bear the costs of the postponement. Once it is seen that the reason for the postponement is genuine and bonafide and based upon the evidence led on the postponed date and if that party's claim can be seen on merits to have been justified, the learned Arbitrators would have complete powers to pass directions for further costs as found equitable. However a party cannot demand any unconditional grant of request. The reliance upon the observation that the Tribunal was otherwise inclined to allow such evidence makes no difference. It could have been allowed but for the fact that it was made too belatedly and without accepting the obligation to pay costs and fees. It must be understood that for allowing that evidence which was until then not produced, an additional time of not only the learned Arbitrators but also the other side would be taken up. Hence only if the entire costs of arbitration is borne by the party requiring the evidence at that belated stage ("at the last minute") can the process be allowed. The decision would be entirely in the discretion of the Tribunal, as it would be in the discretion of the Court under similar circumstances.

39. Mr. Seervai, in fact, drew the Court's attention to the fact that on another occasion the Arbitrators granted costs to the respondent though the respondent was directed to produce the document to consider the petitioner's claim with regard to the insurance of the goods which shall be considered presently. Of course, that grant was equally in the discretion of the Tribunal. If that was so made, there can be no bar to the learned Arbitrators making the payment of costs and fees a condition precedent to a party demonstrated to be a defaulter. Mr. Seervai would argue that the order was passed to test the bonafides of the

petitioner and cannot be faulted with.

40. Mr. Seervai argued that the evidence of Pratap Kurve was required to produce documents relating to another contract and hence was not even material. The learned Arbitrators must be taken to have also considered the quality of the evidence sought to be led whilst passing directions with regard to the condition upon which the request could be granted. The evidence of that witness is not seen to be so material that the petitioner's case cannot be put forth without it. The request for grant of time to produce evidence about what the respondent had done with another contracting party is too luxurious to be granted without conditions at that stage.

41. Mr. Kamdar drew the Court's attention to the judgment of the Himachal Pradesh High Court in the case of Rishi Electricals (P) Ltd. Vs. H.P. State Electricity Board, In that case the claimant was allowed to produce the witness in rebuttal to prove a document but the respondent was not allowed to counter the statement made by that witness by producing a new document. The learned Arbitrator based his award on the document produced as the main document. Consequently the parties were seen not to have been treated equally. This not one such case.

42. In the case of Sterlite Industries (India) Limited Vs. Department of Telecommunications, which was also relied upon by Mr. Kamdar, the petitioner wanted to produce 2 outside witnesses. The Arbitrators concluded that no useful purpose would be served to summon them. However the parties were permitted to produce documents upon that matter. The party who wanted to examine the witness contended that production of document was not sufficient. Under those circumstances it was observed that if one of the parties became unable to present the case, the award would become challengeable on that ground as per the observations in the case of Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.,

43. The broad principle of law was however also set out in para 44 of that judgment thus:

44. In my considered view, there is no doubt about the legal proposition that normally it is the arbitrator, who is the final authority on the aforesaid issue. This court also does not sit as a court of appeal over any direction or order of the arbitrator.

44. It is seen that here the Arbitrator's discretion cannot be curtailed or impeached. They may decide when the costs of arbitration was payable and by whom. In the absence of any prejudice as in the case of Sterlite (supra), there would be no cause for complaint. Consequently the contention that the learned Arbitrators did not treat both parties equally has to be rejected.

(d) Evidence struck off:

45. Mr. Kamdar also argued that the second witness of the petitioner, one

Vishwakarma, was an ex-employee of the respondent. Portions of his evidence which would militate against his agreement with the company relating to confidential information was not allowed to be led and accordingly certain parts of his evidence were struck off. It is known that sometimes protective orders are passed limiting discovery to protect confidential information. (They are known as "Attorney-eyes-only" protective orders in the U.S.). Mr. Kamdar would argue that in the evidence, which is made on oath before an adjudicating authority, there is an obligation to disclose the truth within the knowledge of the witness and that no witness can claim that it would not depose as to any fact required to be brought before the adjudicating authority on the ground that it would contravene a contract entered into by it with its employer relating to disclosure of confidential information. Mr. Kamdar took the Court through the various provisions in the Indian Evidence Act from section 118 to 129 to show specified bar to give evidence and which does not contain the bar relating to confidential information.

46. The petitioner would also contend that the evidence of Vishwakarma was largely struck off because he was the ex employee of the respondent who sought to depose on behalf of the petitioner having been employed by the petitioner. Mr. Kamdar argued that even if he was not employed by the petitioner, the petitioner could have led evidence of an employee of the respondent.

47. That aspect has been considered by the learned Arbitrators. A part of the evidence of Vishwakarma is accepted. A part has been struck off only because it related to confidential information which as per the contractual requirement of the said witness could not be disclosed.

48. The case of Dominic Reab Vs. Associated Newspaper Ltd. 2011 EWHC 3375 QB was a libel action upon an article in a newspaper with regard to an agreement containing a confidentiality clause. The Court considered whether the claimant should give up the right of confidentiality in order to be free to continue the claim. The claimant had not told the Court what consequences would follow if the obligations under the confidentiality agreement were to be waived. The Court considered that public interest did not outweigh confidentiality. The Court held that the claimant need not give up the right of confidentiality and the confidentiality agreement need not be overridden. The Court exercised balance, as in this case & did not strike out the whole claim as a disproportionate interference with the claimant's right of access to Court. The Court also considered the effect upon third parties of the disclosure of confidential matter in the agreement of settlement. The Court declined to order disclosure of the statement which was confidential. Hence it would depend upon the facts and circumstances of the case that confidential information may be allowed to be stated when relevant to the extent required and in the manner deemed appropriate.

49. The petitioner has not shown which part of the confidential information of the witness would be relevant and material to consider the specifications in the

contract which are not confidentially made but a known part of the contract. That having not been stated to the learned Arbitrators, reliance upon such evidence as relevant and material evidence which should have been considered is seen to be misplaced.

50. It may be mentioned that the confidential information which is mandatorily required not to be disclosed only relates to business connections or trade secrets (See. Faccenda Chicken Ltd. Vs. Fowler 1986 1 AER 617). The transaction in this case has no concern with the trade secrets of how the coils could have been manufactured. The transaction in this case related to a contract of sale of goods by description. The learned Arbitrators would not require to know the confidential information other than the contract specifications. No matter what were the trade secrets of the respondent, the goods had to be dispatched as per the specification in the contract itself, the only aspect relevant in the arbitration between the parties. Consequently bringing on record confidential information would be mischievous. Such information is rightly struck off. It is for the petitioner to show that the evidence struck off was vital for proof of its contentions. If the part which is struck off is shown to be erroneously struck off as required for discharging the burden of proof by the petitioner, the learned Arbitrators would have considered such contention as they would not insulate witnesses from their duty to provide evidence. The petitioner has not shown how the evidence which was not allowed to be brought on record was material to the petitioner's case and the petitioner suffered prejudice by such evidence not being brought on record. The requirement of this transaction would have to be seen from the facts brought on record in this case. The learned Arbitrators are not seen to have acted against law or the terms of the Contract or in any way misconducted themselves upon this allegations also.

(e) Insurance Claim:

51. Another aspect with which the parties were at dispute was the aspect of insurance claim of the respondent. This was not a part of the claim or the defence. Consequently no issue was raised in that regard. Nevertheless it was contended before the learned Arbitrators that the respondent had insured the goods. Consequently the petitioner would contend that if the respondent had been granted any amount by the insurance company it could not recover the damages from the petitioner at least to that extent.

52. Consequently the learned Arbitrators deemed it proper, upon the principle of equity, that the respondent must produce documents to show what transpired in the claim, if any, made by the respondent under any insurance contract (it is in this regard that the respondent was directed to produce those documents and were also saddled that costs much as was done to the petitioner as shown hereinabove).

53. From the documents produced by the respondent it came to transpire that the claim was not made by the respondent but its sister concern, one Tradeline

LLC, which also paid for the Letters of Credit. This was, of course, for the transaction in dispute.

54. It was argued on behalf of the petitioner that the insurance claim would show that the goods were damaged in transit and that the damaged goods were not supplied. Mr. Kamdar sought to rely upon a survey report indicating such damage. Once the document is produced and considered by the learned Arbitrators, and it is not suggested that it is not, it cannot be gone into by this Court as it is a part of the evidence on record.

55. Mr. Kamdar would argue that the insurance claim would have been made only for insuring the goods during transit. Hence if a claim is made it could have been made only for the goods damaged in transit. Mr. Kamdar also relied upon the fact that the bills of lading showed that the goods were "clean on board" and, therefore, the goods could have been damaged only in transit. Mr. Kamdar also relied upon photographs to show that the coils were bent and such photographs show that it was not that the coils were not as per specifications. He argued that if there is damage to the coils by pressure from outside, the ID would be changed because the coils would be compressed as shown in the photographs. It is not shown by the petitioner that evidence in this regard has been led and not considered by the learned Arbitrators. The only case of the petitioner was that the respondent could have obtained certain amount from the insurance company and there could not be double payment.

56. The learned Arbitrators have considered that the petitioner had not shown this fact. Mr. Kamdar would argue that it is a fact within the knowledge of respondent and hence only the respondent should have shown that fact. The argument is misconceived. It is for a party to rely upon a particular fact. That party must prove that fact. To prove that fact the party may require to lead oral and documentary evidence. The documents relied upon by the party may be the documents in the possession of such party or in the possession of the other party to the lis. If that is so, the party relying upon the document must issue a notice upon the other party to produce that document. The other party would be enjoined to produce that document, failing which adverse inference could be drawn or any other fact on merits of the non existence of the document could be considered.

57. In this case the petitioner did not call upon the respondent to produce the document of insurance claim placing reliance upon the same in its written statement. The petitioner also did not call for details of the claim. The petitioner did not also call upon the insurance company to produce the documents relating to the claim, if any, made by the respondent or its sister concern.

58. In fact, a claim was sought to be lodged. It required certain material particulars to be filled in. The respondent claims to have called upon the petitioner to provide certain particulars. These were never provided. This would show that the petitioner knew about the claim. In fact, it is upon such knowledge

that the petitioner contended that the claim was made but without particulars to prove it. Under these circumstances the petitioner was enjoined to follow either of the above procedures for proof of its contention relating to the insurance claim. The learned Arbitrators would have been well within their jurisdiction to reject the contention altogether as not having been proved though raised. They have not done so. They have required the respondent to satisfy their conscience with regard to this aspect as would be expected of them. The respondent has produced the document (as also paid the costs of the adjournment). Upon the production of the document it was seen that the claim was not granted by the insurance company at all. Nothing was recovered. Hence the respondent could claim damages only from the petitioner, the other contracting party.

59. The argument of Mr. Kamdar that because the claim is made it stands proved that the goods were damaged in transit is also misconceived. A party may make a right as also a wrong claim. A party may make a claim upon one or more parties. One or some of the claims may be merited. Because one claim is made, it cannot be concluded that the premise upon which such claim was made was the right premise.

60. If the defence of the petitioner was mainly that the goods were damaged in transit and that otherwise they had met with the specification in the contract, that positive case had to be proved by the defendant. The defendant has not led evidence of any witness to show or prove what happened in transit.

61. The "clean and board" bill of lading does not prove the goods were as per specification. The judgment in the case of *Ellerman and Bucknall Steamship Co. Ltd. Vs. Sha Misrimal Bherajee*, relied upon by the petitioner shows what a clean bill of lading is. In para 16 of the judgment the definition from Halsbury's Laws of England is set out thus:

16. A clean bill of lading is defined in Halsbury's Laws of England, 3rd Edn., Vol. 2, at p. 218, as "one which does not contain any reservation as to the apparent good order and condition of the goods or the packing". Carver in his book *British Shipping Laws*, Vol. 2, Part I, in para 82, explains the expression "good order and condition" thus:

"The general statement in the bill of lading that the goods have been shipped "in good order and condition" amounts (if it is unqualified) to an admission by the shipowner that, so far as he and his agents had the opportunity of judging, the goods were so shipped. If there is no clause or notation in the bill of lading modifying or qualifying the statement that the goods were "shipped in good order and condition" the bill is known as a clean bill of lading."

This, therefore, does not refer to the specification in the contract. The goods not confirming with the specification may be in apparent good order and condition.

Para 19 of the judgment further shows that the good order and condition in a clean bill of lading would not contain any further reservation or qualification. It

would estop the owner from denying that the goods were not in good order and condition. Such an estoppel is held to apply only when the bad condition is discernible on a reasonable examination of the container having regard to their contents. Hence it only relates to external and apparent condition of the container.

62. The learned Arbitrators have further found that the fact that the bills of lading were further endorsed: "said to contain" and "declared by shipper unknown to carrier". Consequently the reliance placed upon the clean bills of lading lacks bonafides and has been considered by the learned Arbitrators.

63. From the documents produced by the respondent in respect of the claims sought to be made by its sister concern, the learned Arbitrators satisfied themselves that the insurance company had "not paid anything". Hence the case that the goods were not damaged in transit being accepted stands to reason.

64. The learned Arbitrators have, in fact, considered that the petitioner herein had not claimed that there was damage in transit either in the correspondence or in the pleadings or in the evidence. (In the cross-examination the petitioner's witness admitted that it had informed the claimant that the goods were not damaged in transit and the witness of the respondent herein had categorically denied in its evidence in chief that there was any damage in transit.)

65. The evidence of the parties was, therefore, fully considered even with regard to the damage in transit which was not raised as a specific issue because it was not denied in the written statement of the petitioner herein. The conclusion of the learned Arbitrators is more than possible conclusion which not only merits no interference but deserves acceptance.

66. What would be material to see is if the petitioner suffered prejudice by the particular evidence not being allowed or struck off or whether or not the fees of the Arbitrators or the costs of the arbitration were directed to be paid. No such prejudice is shown. In fact it is seen from the above discussion that the learned Arbitrators have been within the parameters of the contract and enforced the contract between the parties on the question of facts and enforced the law prevalent and applicable upon the question of law.

67. It has been held in a number of judgments that non supply of documents would not constitute violation of natural justice if no prejudice is shown to have been caused by non production of any document (See. Russell Vs. Duke of Norfolk 1949 C.A. The All England Law Reports 109, Chandrama Tewari Vs. Union of India (UOI) (through General Manager, Eastern Railways), , State of Tamil Nadu Vs. Thiru K.V. Perumal and others, , State of U.P. Vs. Harendra Arora and Another, , State of Uttar Pradesh and Others Vs. Ramesh Chandra Mangalik, , Syndicate Bank and Others Vs. Venkatesh Gururao Kurati, and State Bank of India and Others Vs. Bidyut Kumar Mitra and Others, .

The principles laid down in the aforesaid cases relating to the documentary

evidence being supplied in departmental inquiries would similarly apply to the oral evidence of witnesses. No prejudice is shown. Consequently the act of the Arbitrator cannot be taken to be without jurisdiction or in excess of jurisdiction on that score.

68. Hence the Arbitration Petition is dismissed with costs of Rs. 1 lac.