

(2011) 06 KL CK 0175

In the High Court Of Kerala

Case No : Arbitration Appeal No. 31 of 2010

Mohammed Mamdouh Matwally Ghali

APPELLANT

Vs

Kerala Automobiles Ltd.

RESPONDENT

Date of Decision : 01-06-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 34(2), 37(1)
Civil Procedure Code, 1908 (CPC) — Section 89

Citation : (2011) 3 ILR (Ker) 283 : (2011) 3 KLJ 391 : (2011) 8 RCR(Civil) 1590

Hon'ble Judges : R. Basant, J;K. Surendra Mohan, J

Bench : Division Bench

Advocate : O. V. Radhakrishnan and K. Radhamani Amma and K. Ramachandran, for the Appellant; K. Anand, for the Respondent

Final Decision : Dismissed

Judgement

R. Basant, J.

1.

(i) Are the findings of the Arbitrator-

(a) that the claimant is not bound by the stipulation No. 7 in Ext.C-10 and (b) that the claimant can take advantage of the other stipulations in Ext.C-10 correct and justified?

(ii) Can those findings be held to be illegal perverse, unjust or immoral?

(iii) Can the award passed by the Arbitrator be consequently held to be opposed to the public policy of India?

(iv) Are those vices sufficient to justify the interference by the District Court with the award of the Arbitrator u/s 34 (2) (b) (ii) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act")?

These questions are thrown up for consideration in this appeal.

2. A brief resume of the events that have led to this appeal appears to be necessary. The Appellant (hereinafter referred to as "the claimant") and the Respondent Kerala Automobiles Ltd. (hereinafter referred to as "the company") had entered into an agreement under which the company had agreed to supply automobiles manufactured by it to the claimant, a foreign national. There is no dispute that they had agreed that disputes between them if any must be resolved by arbitration. Purchase order was placed for 144 vehicles. 48 of them were supplied by the company. When the consignment of 48 vehicles reached the claimant at Egypt, he raised an objection that they were defective, unusable and not roadworthy. Disputes thus arose between the company and the claimant. They attempted to settle their disputes by direct negotiation. Parleys were held between the officials of the company on the one hand and the claimant on the other. Ultimately they appear to have settled their disputes. The terms of the agreement/settlement were reduced to writing in the form of minutes. Ext.C-10 dated 3-11-2007 is admittedly the minutes of such meeting in which parties settled their disputes. It is not disputed that the minutes were earlier recorded, were typed later and were presented for signature of the parties. On the next day after the meeting, minutes were signed by the company and the claimant. On the side of the company, officers of the company signed the minutes. On the side of the claimant, claimant himself as also R.W. 1, an advocate, who was representing the claimant and who was present with him throughout the negotiation, signed the minutes.

3. Within a week of signing Ext.C-10, the claimant issued Ext.C-11 letter dated 9-11-2007 expressing his intention not to abide by Clause 7 of Ext. C-10. This was followed by Ext.C-12 formal notice issued by the claimant on 9-2-2008.

4. The claimant staked a claim for huge amounts by way of compensation for the defective/not roadworthy automobiles that were supplied to the claimant. The dispute was ultimately referred for arbitration by an order of a designated Judge of this Court. The learned Arbitrator entered upon reference. Before the Arbitrator, the claimant proved Exts.C-1 to C-26. P. Ws. 1 to 3 were examined on the side of the claimant. P.W.I is the claimant. P.W.2 is the consultant of P.W.I and P.W.3 is a representative of the shipping agent. We shall later refer to the relevant documents in Exts.C-1 to C-26.

5. On the side of the Company, R.W.I who had signed Ext.C-10 minutes was examined. R.W.2 a person who had been deputed by the company to proceed to Egypt was also examined. Exts.R-1 to R-II were marked on the side of the company. Annexure A-I is the list of vehicles found by the Arbitrator during his inspection to the factory of the company on 15-11-2008.

6. The learned Arbitrator by the award dated 4-3-2009 came to the conclusion that the company is liable to pay Rs. 47,83,720 or its equivalent 1,22,000 U.S. Dollars to the claimant. Alternative directions were also issued.

7. The crucial findings on which the Arbitrator came to a decision against the

company are:

(1) The claimant is not bound by Clause (7) of Ext.C-10 to which he had admittedly subscribed his signature.

(2) The claimant is entitled to take advantage of all other stipulations in Ext. C-10.

8. Aggrieved by the award of the Arbitrator, the company approached the District Court, Thiruvananthapuram, with O.P. (Arb.) No. 97/09. It was prayed that the award may be set aside u/s 34 of the Act. It is unnecessary to advert to the various contentions raised by the company before the District Judge. Suffice it to say that it was contended that the award is liable to be set aside u/s 34(2)(b)(ii) of the Act.

9. The learned District Judge by the impugned order came to the conclusion that the award of the Arbitrator is liable to be set aside u/s 34(2)(b)(ii). Accordingly, the learned District Judge proceeded to pass the impugned order. The Arbitrator's award was set aside.

10. It would be apposite straightaway to mention that the company had raised a counter-claim. That counter-claim was rejected by the Arbitrator. The rejection of the counter-claim was not interfered with by the learned District Judge. No Appeal or Cross-Appeal has been preferred by the company against the rejection of the counter-claim.

11. Arguments have been advanced before us. We have heard the learned Counsel for the rival contestants. On the arguments advanced before us, the 4 points raised in paragraph 1 of this judgment arise for consideration.

12. We shall now proceed to consider the grounds of challenge.

13. It shall be appropriate at the very outset to note the nature and quality of the jurisdiction of this Court u/s 37 (I)(b) of the Act. An appeal lies from the order of the District Court. This appellate jurisdiction is co-extensive and co-terminus with the jurisdiction of the first court. We shall therefore consider this appeal as if the entire matter is before us for consideration.

14. Objections have been raised about the want of pleadings. We have been taken through the petition u/s 34 filed before the District Court. Significantly though the award is challenged, it is not specifically stated that the arbitral award is in conflict with the public policy of India which is the specific ground available u/s 34(2)(b)(ii) of the Act. The learned Counsel for the claimant contends that in the absence of specific pleadings, the attempt made now to justify the order of the District Court u/s 34(2)(b)(ii) is not sustainable.

15. "Forms we may have buried but they still rule us from the grave". The necessity of pleadings has to be understood realistically. Proper pleadings are necessary not as a matter of ritual or as a fetish. The law of pleadings has its foundation on the principles of natural justice that the adversary must be notified

of the precise nature of the challenge raised and given the opportunity to make his defence. The insistence of the law on pleadings is not to repeat the words of the statute. Notwithstanding the fact that a specific plea that the award is in conflict with the public policy of India is not raised in the petition filed u/s 34, a total and holistic reading of the petition must eloquently convey that the challenge raised is on that ground also. In these circumstances, the laborious attempt made to assail the findings of the District Court on the ground that the findings are not supported by pleadings cannot be accepted.

16. The learned Counsel for the Company Sri Anand points out that the semantics employed by the legislature in Section 34(2) (a) and (b) is in this context of crucial relevance. Section 34(2)(a) and (b), we extract below:

34. Application for setting aside arbitral award.-(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with Sub-section (2) and Sub-section (3).

(2) An arbitral award may be set aside by the Court only if-

the party making the application furnishes proof that-

(i) * * *

(ii) * * *

(iii) ***

(iv) ***

(v) ***

the Court finds that-

(i) * * *

(ii) the arbitral award is in conflict with the public policy of India.

(emphasis supplied)

17. The attempt of the learned Counsel is to impress upon the court the fact that while grounds u/s 34(2)(a) must be proved by the party making the application, the legislature consciously deviated and employed different semantics while enacting Clause (b). The requirement of Clause (b) is only that the court must find the two grounds to exist.

18. We find the contention to be interesting and acceptable. It is idle to assume that the legislature did not employ the language of Clauses (a) and (b) of Section 34(2) without proper application of mind. While an award can be set aside under Clause (a) only if the applicant "furnishes proof of the relevant ground, it is enough under Clause (b) if "the court finds" existence of the relevant ground. Every finding of the court may also have to be on the basis of pleadings and evidence; but that by itself cannot persuade us to ignore the different semantics

employed by the legislature in Clauses (a) and (b) of Section 34(2). It appears to us that a paramount duty is imposed on the court to ensure that the award is not vitiated by either of the two grounds mentioned in Clause (b); whereas the grounds under Clause (2) (a) are to be established by a person making the application to assail the arbitral award. Though the language of Section 34(2)(b) will not justify a court acting without pleadings and evidence altogether, the argument appears to be acceptable that the burden to plead and prove is lesser when it comes to a ground under Clause (b) and that different language has been employed by the legislature definitely as a result of the perception of the legislature that the court has a duty to ensure that the award does not conflict with the public policy of India. The process of settlement of disputes by arbitration commands greater sanctity under the Indian law now after introduction of Section 89 of the Code of Civil Procedure. The purity and credibility of the process have to be maintained. That appears to be the only object of the different semantics employed. Additional/greater burden is laid on the shoulders of the court to ensure that the awards are not vitiated by the vices under Clause (b). Considering the object to be achieved and the language employed by the legislature, purely technical pleas founded on the law of pleadings and burden of proof cannot claim primacy when a court considers the ground u/s 34(2)(b) urged to set aside an award.

19. Contentions have been raised about the law relating to the attempt of a party to avoid one stipulation alone in an agreement/contract. We feel it unnecessary to advert to the various precedents cited. When a person enters into an agreement and signs the same it must be assumed that such person has entered into such agreement after necessary and full application of mind. The attempt of a person to avoid one inconvenient stipulation alone in an agreement containing various stipulations should always be viewed by a prudent person with the requisite care and caution. Different may be the situation when one stipulation is contrary to law or unenforceable. In a case where parties after detailed mutual negotiations come to an agreement and reduce the same into writing it will be an uphill task for one of the parties to contend that one stipulation alone was entered into without proper application of mind or without properly understanding the stipulation. Though various precedents have been cited at the Bar in support of this proposition we think it sufficient to advert to paragraph 6 of *Grasim Industries Ltd. and Another Vs. Agarwal Steel*, which we extract below:

In our opinion, when a person signs a document, there is a presumption, unless there is proof of force or fraud, that he has read the document properly and understood it and only then he has affixed his signatures thereon, otherwise no signature on a document can ever be accepted. In particular, businessmen, being careful people (since their money is involved) would have ordinarily read and understood a document before signing it. Hence the presumption would be even stronger in their case. There is no allegation of force or fraud in this case. Hence it is difficult to accept the contention of the Respondent while admitting that the document, Ext.D-8 bears his signatures that it was signed under some mistake.

We note that on facts that was also an identical case where the Arbitrator permitted a party to avoid one stipulation in an admitted document accepting the plea that he subscribed his signature under a mistake. That was not approved by the Supreme Court.

20. Arguments have been advanced on the question of severability of an agreement and the option available to the court to accept the remaining stipulations after holding one stipulation to be not binding or void. Our attention has been drawn to the texts as also precedents which stipulate that a person cannot be permitted to approbate or reprobate. There can be no serious controversy on this aspect also. An agreement containing different stipulations must be holistically read. It is difficult in the absence of better evidence to come to a definite conclusion as to the impact which each stipulation had in the mind of the contracting parties. Under the doctrine of severability there can certainly be instances where one stipulation which is found to be illegal, contrary to public policy or unenforceable can be severed from the rest of the stipulations.

It is certainly not the law that no agreement would be severable at all. But the facts and circumstances of each case will have to be considered in detail to decide whether the attempt to wriggle out of the obligation under one stipulation and to place reliance on the other stipulations is justified or not.

21. We shall now consider the ground of conflict with public policy of India which is a ground recognized u/s 34 (2)(b)(ii) to set aside an award passed by the Arbitrator. We read Section 34(2)(b)(ii) again:

34. Application for setting aside arbitral award.-

(b) the Court finds that-

(i) * * *

(ii) the arbitral award is in conflict with the public policy of India.

22. As to when an award can be held to be in conflict with the public policy of India, the law is now well-settled. Disputes, if any, can be only on the application of the law which is well-settled. It will be apposite in this context to refer to the decision in *Renusagar Power Co. Ltd. Vs. General Electric Co.*, . The question arose in *Renusagar's* case while considering the relevant provisions of the Foreign Awards (Recognition and Enforcement) Act, 1961. Summarizing the law relating to public policy as a ground for avoiding an arbitral award, the learned Judges in paragraph 66 stated the law thus:

Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such

enforcement would be contrary to

(i) fundamental policy of Indian law; or

(ii) the interests of India; or

(iii) justice or morality.

23. Later, a two Judge Bench of the Supreme Court had occasion to consider the ambit and sweep of the expression "in conflict with the public policy of India" in Section 34(2)(b)(ii). After referring to the decision in *Renusagar's case* (supra), the learned Judges felt the need to assign a wider meaning for the expression "public policy of India" for the purpose of Section 34(2) (b)(ii). In *Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.*, the Bench after referring to the need to assign a wider meaning for the said expression declared the law thus:

The result would be- award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

24. The law on the point has thus been succinctly held. We are conscious of the fact that this judgment had attracted criticism from various quarters. But, be that as it may, a later two Judge Bench of the Supreme Court in *McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others*, in paragraphs 62 to 64 observed thus:

62. We are not unmindful that the decision of this Court in *Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.*, had invited considerable adverse comments but the correctness or otherwise of the said decision is not in question before us. It is only for a larger Bench to consider the correctness or otherwise of the said decision. The said decision is binding on us. The said decision has been followed in a large number of cases. (See *The Law and Practice of Arbitration and Conciliation* by O.P. Malhotra, 2nd Edn., p. 1174).

63. Before us, the correctness or otherwise of the aforesaid decision of this Court is not in question. The learned Counsel for both the parties referred to the said decision in extenso.

64. We, therefore, would proceed on the basis that *Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.*, lays down the correct principles of law.

25. There can hence be no doubt that the declaration of law in ONGC's case assigning a wider meaning to the concept of an award being "in conflict with the public policy of India" has to be followed by us in the present case.

26. Precedents have been copiously cited before us about the narrow scope for judicial interference with an arbitral award. We are conscious of the fact that the jurisdiction which the court has u/s 34(2)(b)(ii) is not appellate; nor even revisional. The nature and quality of the jurisdiction has to be alertly perceived. The court u/s 34 of the Act cannot reappreciate facts and law. It cannot choose to disagree with the Arbitrators and come to a more reasonable or more correct conclusion. The mere fact that a different view is possible cannot persuade a court to interfere with an award u/s 34. That a better conclusion is possible or even the fact that the Arbitrator had erred in facts or in law is not sufficient to persuade a court to invoke the jurisdiction u/s 34 of the Act. The court will have to be convinced that the illegality is patent and that it goes to the root of the matter. The court will have to be satisfied that the award is so unfair and unreasonable that it should shock the conscience of the court. Only then can it be held that the award is opposed to public policy and consequently deserves to be adjudged void.

27. A question arises whether the vice of perversity would justify the conclusion that an award is patently illegal as to attract the 4th limb of the grounds mentioned in ONGC's case. It will be advantageous in this context to refer to the commentary by O.P. Malhotra on the question of perversity with which we completely agree. At page 1194 of "The Law and Practice of Arbitration and Conciliation" (Second Edition) by O.P. Malhotra the learned author observes thus:

Perversity, though not identical with an "error of law apparent on the face of award", is very much akin to it. Perversity, therefore, will have the same effect on an award, as an error of law apparent on the face of award. Even if it does not fit in any of the grounds listed in Section 34(2)(a), it is well comprehended in the concept of the expression "in conflict with the public policy of India" in Section 34(b)(ii) for annulling the award.

28. Precedents have been cited before us in support of the proposition that gross perversity will also vitiate the award leading to its avoidance u/s 34(2)(b)(ii) of the Act. We accept that proposition of law without any doubt.

29. As to what is gross perversity in law, it is not necessary to advert to the precedents which have been cited at the Bar. The principle is stated thus:

Broadly speaking, if the reasons stated in the award on which it is based, reveal that the decision in it is based on no legal evidence at all; or in coming to its conclusion, the arbitrator has taken into account irrelevant and extraneous considerations not germane to the resolution of the dispute; or it has not taken the vital material into account, the award is perverse. It will be "an affront to the law which cannot be overlooked, and the order stands self-condemned even though it may be within jurisdiction.

(See at page 1193 of "The Law and Practice of Arbitration and Conciliation" Second Edition by O.P. Malhotra).

30. It is trite that courts have to alertly ascertain whether there is patent illegality to justify interference with an award on the ground available u/s 34(2)(b)(ii) of the Act. It has to be verified whether the award is vitiated by gross perversity as to justify interference on that ground. But if it is found that the award is so vitiated, we find no reason for a court not to invoke its powers u/s 34. On this aspect we find it advantageous to refer to paragraph 28 of the decision in ONGC Ltd. Vs. Garware Shipping Corpn. Ltd., which we completely accept and follow:

28. There is no proposition that the Courts could be slow to interfere with the arbitrators Award, even if the conclusions are perverse, and even when the very basis of the Arbitrators award is wrong.

If the court finds that the award is vitiated by gross perversity and consequently patent illegality, the court should not hesitate to invoke the power u/s 34(2)(b)(ii). We are in agreement that such an approach is necessary to maintain the purity and credibility of the process of arbitration to which the Indian law gives great emphasis as can be seen from Section 89 of the amended Code of Civil Procedure

31. That takes us to the crucial question whether the two findings referred above (a) that the claimant is not bound by Clause (7) of Ext. C-10 and (b) that the claimant can rely on the other stipulations of Ext. C-10 are reasonable and correct and whether they are vitiated by the vice of gross perversity. To decide this question a detailed reference to the facts appear to be necessary. We repeat that we are conscious of the fact that re-appreciation of evidence is not in the domain of a court u/s 34. But to decide whether the award is vitiated by the vice of gross perversity it is certainly necessary to be cognizant of the relevant facts. For this purpose alone reference is necessary to Exts.C-10 and C-11.

32. Ext. C-10 was the result of direct negotiations between the parties. They entered into Ext. C-10 by direct negotiation after the disputes arose between them about the condition and road worthiness of 48 vehicles which had already reached the claimant at Egypt. According to the claimant he had suffered a net loss of 1,22,000 USD (for the sake of convenience, we shall refer to the amount in US Dollars only hereafter). The basis of that claim is explained in Annexure-I of Ext.C-11. That is the claim made by the claimant, it is evident. We extract below Annexure I giving details of the claim by the claimant annexed to Ext.C-10:

Consignment Value

..

US\$ 88239.00

Customs Duty

..

58266.00

Customs Clearance

..

3253.00

Freight Charge

..

7608.00

Loading Charges

..

900.00

Transportation Charges

..

600.00

Rent for storing the containers

..

288.00

Total

..

159154.00

Less: Sale Proceedings of 48

vehicles at Egypt

..

37154.00

Net Claim

..

122000.00

33. Firstly, we will refer to the binding nature of Clause (7) of Ext. C-10 on the claimant. It is admitted that Ext.C-10 was entered into after prolonged discussions. The claimant with his wife proficient in English was present for the early part of the negotiation. It included discussions with the Minister. In addition

to his wife, the claimant had with him R.W.1 who is said to be an Advocate of standing and reputation of the Trivandrum Bar. He was present throughout the negotiation including the negotiation with the Minister. It is not disputed that the minutes was initially handwritten, was subsequently type written and was made available to the parties for perusal before the same was signed on the next day. It is also not disputed that the claimant had opportunity to peruse the same before he affixed his signature confirming the minutes. Not only he, his representative, R.W.1 a person competent in law was also present along with him during negotiation as also at the time when Ext. C-10 was presented for signature. It is not disputed that R.W.1 had perused Ext. C-10 and had confirmed to the claimant that it is in tune with the negotiations and discussions held. Extraction of the relevant portion of Ext.C-11 letter dated 9-1-2007 will in this context be crucially relevant as it reveals the circumstances under which the claimant signed Ext. C-10:

I asked Mr. Sasidharan yourself and Advocate Karim if the minutes were in line with our discussion. As all confirmed the minutes were as per our discussion I signed the document in good faith without asking for an Arabic translation.

34. Now the case of the claimant is that he did not have his spectacles and could not hence read Ext. C-10. He was not proficient in the English language and could not hence understand the same. It is his further case that the stipulation No. 7 in Ext. C-10 alone was not in terms of the discussions held. It will be apposite in this context to note that admittedly the claimant is a well qualified and educated person. He holds a double doctorate degree. He enters into the correspondence in English by himself. Exts. C-11 and C-12 are all written by him in English. An argument that for want of his spectacles and for the deficiency in the knowledge of English language the claimant must be permitted to avoid Clause (7) of Ext. C-10 is on the face of it totally and grossly untenable. Add to this, the circumstance that his Advocate was present along with him throughout the negotiation; while preparing the draft of the minutes and later when that draft was presented for signature. The claimant had taken pains to cross check with his Advocate and Ors. to confirm that the minutes were in line with the discussions. The Advocate had confirmed that the minutes were as per the discussions. Not only the claimant but the Advocate had also signed Ext. C-10 to represent the claimant. In these circumstances, the conclusion that there was confusion and that Ext. C-10 was signed by the claimant without being cognizant of the import and implication of Clause (7) is on the face of it grossly unreasonable and unacceptable. If we were sitting in appeal, there can be no doubt that the said finding would have been vacated. There can be no semblance of doubt on that aspect.

35. But we remind ourselves that our jurisdiction is not appellate or revisional. Our jurisdiction is u/s 34(2)(b)(ii) of the Act. Gross perversity amounting to patent illegality has to be shown and perceived. The ready acceptance by the Arbitrator that want of spectacles with the claimant and the existence of the

alleged confusion in the mind of the claimant justifies avoiding Clause (7) of Ext C-10 is certainly incorrect and unacceptable. According to us, it is not merely incorrect or erroneous; but it is certainly grossly perverse. No reasonable person, according to us, could have come to such a conclusion on the admitted evidence. It is not a question of choosing between two sets of evidence. The conclusion of the Arbitrator that the claimant did not understand Clause (7) of Ext. C-10 alone is, according to us, not based on any evidence. If a person swallows the version of the claimant such course must be held to be not only erroneous and unreasonable but grossly perverse. That course-of readily accepting that convenient explanation, must shock judicial conscience.

36. We now come to the crucial circumstance. The claimant did not examine R.W.1. Therefore, the company was obliged to examine R.W.1. R.W.1 in his evidence stated that he had signed Ext. C-I. It is puerile and perverse to assume that R.W.1 a legal practitioner of standing would have signed the minutes along with the claimant if the same were not in tune with the discussions earlier held. The Arbitrator, we find, has erred grossly in not considering the relevance, significance and impact of R.W.1, the legal advisor and representative of the claimant affixing his signature in Ext. C-10 after confirming to the claimant (as stated in Ext. C-II) that the minutes were in line with the discussions. That was a very crucial circumstance which a prudent person could not have ignored or omitted to consider before coming to a finding that the claimant is not bound by Clause (7) of Ext. C-10 alone. Crucially we find that the relevance, significance or impact of that circumstance was not even adverted to by the Arbitrator.

37. The finding of the Arbitrator is thus vitiated by one gross vice, viz., non-consideration of a crucially vital circumstance-of the competent and experienced legal advisor who was present with the claimant through out and who had confirmed to the claimant that the minutes were in line with the discussions affixing his signature along with the claimant to confirm the minutes. Non-consideration of that crucial circumstance is not a mere error or mistake. It certainly amounts to gross perversity in our mind.

38. The relevant discussions/observations of the Arbitrator appears in paragraph 27 which we choose to extract below:

I do not find any reason to disbelieve this witness (R.W.I). He is an Advocate practising in Thiruvananthapuram having a long standing. Therefore, I can conclude that at the time of drafting of Ext. C-10 minutes, claimant might have completely agreed the contents therein, as if he has correctly understood the contents. But from the evidence as disclosed in this case, both oral and documentary, it can be inferred that regarding the mode of recovery of the damages there was a confusion. There was no dispute at all with regard to any other clause contained in Ext. C-10. Therefore, so far as issue No. 3 is concerned, Ext. C-10 settlement dated 3-11-2007 executed between the claimant and the Respondent as per clauses 21 and 23 is valid and binding on both the parties and consequently the claimant is entitled to be reimbursed the

amount of loss, damages, and expenses and costs incurred thereby, contained in Issue No. 1. The dispute raised by the claimant cannot be said to be an afterthought or without any bona fide. Immediately after he received Ext. C-10, he raised the dispute. One cannot infer that in such a commercial transaction claimant would have agreed to wait for two years for reimbursement without any provision for payment of interest. The manner, the time, the content of the dispute he raised all will go to show that there was some confusion with regard to the terms of reimbursement contained in Ext. C-10. A commonsense approach dictates that no prudent businessman would agree for such a long repayment schedule.

(emphasis supplied)

39. In the light of the admitted signature of the claimant and R.W.1 in Ext. C-10, after verification and checking, as stated in Ext.C-11, strong reasons must be shown to exist for a prudent person to conclude that the claimant is not bound by Clause 7 of Ext. C-10 minutes. Not only that the Arbitrator has not considered the relevance, significance and impact of R.W.-1 signing the same, the Arbitrator has proceeded to observe that "commonsense approach dictates that no prudent businessman would agree for such a long repayment schedule". This is an inference or assumption which the Arbitrator has imported. It does not appear to be reasonable to us. It crosses the rubicon of gross perversity. It is all the more so when we look into Exts.C-10 and C-II. It was claimed that the loss suffered be fixed as 1,22,000 USD. As per Ext.C-10, an amount of 40,677 USD was to be adjusted in the first three consignments-evidently the 144 vehicles including the 48 vehicles already despatched and the balance of 81,323 USD was to be adjusted over the future consignments including 7000 number of vehicles to be supplied as per the proposed new contract on a prorata basis. The point that we note is that under Ext.C-10 40,677 USD is agreed to be immediately adjusted-ie. in the value of 144 vehicles. The balance was agreed to be adjusted towards the promised contract for 7000 vehicles.

40. Let us now see how the claimant claims to have understood this stipulation. According to the claimant, 80,000 USD was to be adjusted towards the value of 144 vehicles. The balance 42,200 USD alone was agreed to be adjusted towards the fresh order for 7000 vehicles. The contract for 7000 vehicles had not been specifically entered into. The price for supply of those 7000 vehicles and the details were also not agreed upon. In spite of that, even according to the claimant, it was agreed that 80,000 USD will be presently adjusted (against 144 vehicles) and 42,200 USD will be adjusted later for the 7000 vehicles. As against this, the version in ExtC-10 is only that 40,677 USD was to be presently adjusted and the balance 81,323 USD was to be adjusted towards the later promised contract of 7000 vehicles. The finding of the Arbitrator that commonsense approach dictates that no prudent businessman would agree to such a long repayment schedule without interest is contrary to what claimant himself stated in Ext.C-11 about the adjustment of the balance 42,200 USD towards the price of

7000 vehicles as per the proposed new order. It would be totally and grossly perverse to assume (against the express stipulations in Ext.C-10) that a reasonable person would agree to the 80,000-42,200 USD arrangement and not to 40,677-81,323 USD arrangement. That is a very subjective inference imported by the Arbitrator contrary to the specific stipulations in Ext. C-10 which was entered into and signed in the manner referred to earlier by the claimant and R.W. 1. This subjective inference imported by the Arbitrator to jettison Clause 7 of Ext. C-10 is, it appears to us, definitely grossly unreasonable and perverse.

41. We now come to the question of the Arbitrator upholding other stipulations in Ext. C-10 against the company. A holistic reading of Ext.C-10 would clearly reveal that there was no acceptance as such of the case of either by the other. A negotiated settlement was reached. 144 vehicles were formally ordered to be supplied. 48 were supplied and the dispute was about the road worthiness of those 48. The total price which the company got as consignment value was only 88,239 USD. As against this, the net claim of loss staked by the claimant was 1,22,000 USD. In spite of that, we find the parties agreeing on the net claim of 1,22,000 USD. Evidently the temptation for the company was the agreement to place order for 7000 vehicles in future. Both knew that order for 7000 vehicles was to be so placed. This temptation was offered even in Ext. R-3, where it was suggested that orders will be placed for a lot more of vehicles in future. To assume that the other terms of Ext. C-10 were entered into, ignoring the promise for future orders for 7000 vehicles is, to say the least, unreasonable and perverse. We must in this context again note the fact that against supply of 48 vehicles of consignment value 88,239 USD, the company was agreeing to satisfy the net claim of 1,22,000 USD and obviously the agreement to place future orders for 7000 vehicles must have weighed heavily with the company. The claimant now wants to avoid that responsibility for purchase of 7000 vehicles and adjustment of 81,323 USD towards the value of those vehicles. He now wants to claim 1,22,000 USD straightaway. Arbitrator accepted the same. The course adopted by the Arbitrator-of holding that sans clause No. 7, all the other clauses of Ext. C-10 are binding on the parties, is again vitiated by the vice of gross perversity and unreasonableness. The claimant, it is transparent, was permitted to approbate and reprobate. That conclusion appears to be unjust also. Commercial morality is offended by the conclusions reached by the Arbitrator.

42. The learned Counsel for the claimant contends that there was a confusion relating to "consignments" and "containers". Such a specific plea, it is seen, is not raised with precision or in detail either in Ext C-II or in Ext. C-12, though in Ext. C-II there is a passing reference to such a confusion. The fact remains that the said explanation that there was a confusion in the mind of the claimant between "consignments" and "containers" could not have been accepted by any prudent mind to enable the claimant to avoid Clause 7 of Ext.C-10 while choosing to place reliance on the other stipulations of Ext. C-10.

43. To conclude we find specifically-

(1) that the acceptance of the explanation that the claimant did not have his spectacles and did not have proficiency in English language and is consequently entitled to avoid Clause 7 of Ext. C-10 is grossly unreasonable;

(2) that the acceptance of the explanation that Clause 7 of Ext. C-10 was not in time with the discussions that preceded is grossly unreasonable;

(3) that the importation of the subjective inference by the Arbitrator that a commonsense approach must suggest that no reasonable person would have been persuaded to accept the 40,677-81,323 USD Schedule in Clause 7 of Ext. C-10 (in the light of the admitted arrangement of 80,000-42,000 USD as claimed in Ext. C-II) is grossly unreasonable;

(4) the total omission of the Arbitrator to consider the relevance, significance and impact of the admitted circumstance that R.W. 1, a legal practitioner of standing who was present with the claimant throughout had signed Ext. C-10 after specifically confirming to the claimant that all the terms in Ext. C-10 were in tune with the discussions that preceded, is grossly unreasonable;

(5) that the conclusion of the Arbitrator that the claimant can take advantage of the other stipulations in Ext. C-10 after avoiding Clause 7 (which virtually enables him to avoid the liability to adjust any part of the amount of 1,22,000 USD towards the future liability to pay price of 7000 vehicles) is grossly unreasonable and offends the accepted fundamental principle of law that a person cannot approbate and reprobate;

(6) that the facility afforded to the claimant to avoid the obligation to purchase 7000 vehicles as agreed in Ext. C-10 is unjust and commercially immoral;

(7) that the findings and approach of the Arbitrator are not merely erroneous or mistaken but are perverse and do shock the conscience of this Court;

(8) that the findings are hence grossly perverse (and hence patently illegal), unjust and commercially immoral;

(9) that consequently the award is liable to be set aside-being in conflict with the public policy of India as explained in para.31 of Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.,

44. In the result:

(a) This Arbitration Appeal is dismissed;

(b) The impugned order is upheld.

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