

(2009) 10 DEL CK 0174
In the Delhi High Court
Case No : O.M.P. 40 of 2003

Shree Forwarding Agency

APPELLANT

Vs

Cement Corporation of India Ltd.

RESPONDENT

Date of Decision : 15-10-2009

Acts Referred:

Arbitration Act, 1940 — Section 30

Arbitration and Conciliation Act, 1996 — Section 28, 28(1), 28(2), 28(3), 31(3)

Evidence Act, 1872 — Section 21

Stamp Act, 1899 — Section 17, 3, 33, 35, 38

Citation : (2009) 10 DEL CK 0174

Hon'ble Judges : Manmohan, J

Bench : Single Bench

Advocate : Anurag Kumar Agarwal, for the Appellant; Arvind Kumar Gupta, for the Respondent

Final Decision : Dismissed

Judgement

Manmohan, J.—Present objection petition has been filed u/s 34 of the Arbitration and Conciliation Act, 1996 challenging the arbitral award dated 05th December, 2002 passed by Shri M.P. Sinha, Sole Arbitrator.

2. At the outset, Mr. Arvind Kumar Gupta, learned Counsel for respondent has submitted that in a similar award, identical objections had been dismissed by Hon''ble Justice Sanjay Kishan Kaul and even appeals before the Division Bench as well as the Supreme Court had also been dismissed. In this context, Mr. Gupta referred to Hon''ble Justice Sanjay Kishan Kaul's judgment dated 28th November, 2005 and two orders dated 30th August, 2007 and 16th November, 2007 passed in the present case by this Court. The relevant portion of the judgment rendered by Hon''ble Justice Sanjay Kishan Kaul in Shree Vinayak Cement Clearing Agency v. Cement Corporation of India Ltd. OMP No. 106/2003 decided on 28th November, 2005 is reproduced hereinbelow:

2) Learned Counsel for the petitioner attempted to take the Court through the

complete records of what transpired before the Arbitrator and to reappraise the material including the evidence and facts, but it was pointed to the learned Counsel that such a course was impermissible in law in view of the clear provisions of Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter to be referred to as, "the said Act"). Thus, the petitioner was required to point out under which Clause of Sub-section (2) of Section 34, would the case of the petitioner fall. Learned Counsel submitted that this aspect should be considered taking into consideration the judgment of the Apex Court in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., The findings were, thus, sought to be challenged on the following parameters:

(1) The Award had absence of reasons and did not decide the matter in issue. In this behalf, learned Counsel referred to the provisions of Sub-section (3) of Section 31 requiring the reasons to be set out in the arbitral award. Learned Counsel also referred to the provisions of Section 28, more specifically Section 28(1)(a), 28(2) and Section 28(3) of the said Act to contend that dispute between the parties was not really decided and the Arbitrator was required to decide only disputes raised before the Arbitrator and in accordance with the terms and conditions of the contract.

(2) The second aspect of the challenge is the plea that the Award is patently illegal and would be, thus, hit by the provisions of Clause (b)(ii) of Sub-section (2) of Section 34 of the said Act providing that no Award should be contrary to the public policy. In this behalf, learned Counsel referred to para 32 of the judgment of Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.'s case (supra) to contend that one of the conditions is that if the award is patently illegal, the same is liable to be set aside.

Insofar as the principles of law are concerned, there is really no dispute. However, the question arises as to whether the same would apply to the facts of the present case.

A perusal of the Award shows that the plea of the petitioner that the Award is devoid of any reasoning is misconceived. There is detailed reasoning given in the Award, though it may not be palatable to the petitioner. In this behalf, learned Counsel referred to the discussion on claim No. A(1) to A(11) to contend that the Arbitrator had drawn conclusions which were not sustainable. This plea arises from the fact that during the course of hearing, the petitioner for the first time on 02.09.2002 took a stand by saying that no amount was payable to the respondent. The direction of the Arbitrator to jointly reconcile the accounts was declined by the petitioner. The Arbitrator passed an Order on the said date directing the petitioner to scrutinize the Statement of Account submitted by the respondent vide its letter dated 28.07.2002 for ascertaining the outstanding amount payable to the respondent against the cement lifted by M/s. Aggarwal Traders, Meerut, which was a sister concern of the petitioner. The petitioner once again failed to do the needful but filed his Counter Statement of Account. The Arbitrator came to the conclusion that repeated refusal of the petitioner to make

his submissions on the Statement of Account filed by the respondent, especially taking into account the turn around taken by the petitioner by denying any amount being payable for the first time in the proceedings on 02.09.2002 implied that the petitioner was only trying to hide facts with the object of avoiding payment and, thus, relied upon the accounts of the respondent.

The consequence arising of the petitioner not complying with the directions of the Arbitrator cannot imply that the Award is without reasoning or is patently illegal.

(3) Another aspect agitated by learned Counsel for the petitioner arises from the encashment of bank guarantee and whether the bank guarantee was a performance bank guarantee. This aspect has been considered in claims No. B(4) and B(5) by the Arbitrator who came to the conclusion that the bank guarantee was for the security deposit and the guarantee was not a performance guarantee. In fact, the heading of the bank guarantee was "Proforma of Bank Guarantee in lieu of Security Deposit for Satisfactory Completion of Contract". It was, thus, found that the bank guarantee was for the security deposit. In this behalf, learned Counsel for the petitioner submitted that the findings are beyond the contract.

This plea cannot be accepted for the reason that the matter in issue is one of the interpretation of the nature of the bank guarantee. Thus, it is not that something not provided in the contract has been taken into account, but that the terms of the contract have been read in a particular manner. The Apex Court while analysing the scope of interference by a court u/s 30 of the Arbitration Act, 1940 in *Sudarsan Trading Co. Vs. Government of Kerala and Another*, observed that so long as the view taken by an arbitrator was plausible, though perhaps not the only correct view, the award cannot be examined by the court. In fact, the phraseology "error apparent on the face of the record" in the said provision was held not to mean and imply closer scrutiny of merits of the documents and material on record. *Arosan Enterprises Ltd. v. Union of India and Anr.* 1990 (3) Arb. LR 310. If that be the legal position under the Old Act, it can hardly be supposed that a greater scrutiny would be required under the new Act, which is more restrictive in nature insofar as the scope of interference by the Court is concerned.

(4) The last aspect contended by learned Counsel for the petitioner arose from the plea that the Award was not duly stamped. In this behalf, learned Counsel referred to the provisions of Sections 3, 17, 35 read with the Schedule of The Indian Stamp Act, 1899 to contend that a document, which is not stamped, cannot be relied upon. It was submitted that one of the counter claims was allowed and, thus, the plea of the respondent in its reply that the Award was a nil award and, thus, did not require to be stamped could not be accepted. However, learned Counsel for the respondent in this behalf pointed out by reference to Sections 33 and 38 of the Stamp Act that consequence of the provision of an under-stamped or deficiently stamped document during the

course of evidence would be that the same would be required to be impounded and sent to the Collector of Stamps to be stamped in accordance with law inclusive of penalty, if any.

This issue, in my considered view, would not imply that the Award has to be set aside, but in case of reliance on the Award in evidence or for any other purpose, the same can be sent to the Collector of Stamps for making up the deficiency of court fee.

3) For all the aforesaid reasons, I find no merit in the petition.

4) Dismissed.

3. The two orders passed by this Court in the present case are reproduced hereinbelow:

30.08.2007

Counsel on both sides have submitted that in an identical award the objections were dismissed by the learned Single Judge and aggrieved therefrom an appeal was filed by the objector on which arguments have been heard and the case has been reserved by the Division Bench. It is submitted that the present case may be taken up for hearing after the decision of the appeal in the connected case so that conflict of judgments may be avoided.

List for hearing on 16.11.2007.

16.11.2007

The learned Counsel for the parties submit that the order of Division Bench in an identical matter is still awaited and they, therefore, request for a date to await the outcome of the said decision.

At joint request, case is adjourned for further directions on 5.5.2008.

4. On the other hand, Dr. Anurag Kumar Agarwal, learned Counsel for petitioner submitted that Hon''ble Justice Sanjay Kishan Kaul had decided the matter in accordance with the judgment of the Supreme Court in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., but as of today, the grounds on which an arbitration award can be interfered with, have been enlarged. In this context, he referred to the following judgments:

i) Engineering Development Corporation v. Municipal Corporation of Delhi reported in 2008 (2) Raj 81 (Del) wherein it has been held as under:

8. ...These letters, unfortunately, have been ignored by the learned arbitrator and have not been given due weightage. Therefore, the award of the learned arbitrator in respect of claim No. 2 cannot be sustained. It would definitely be against public policy of India inasmuch as the findings have been arrived at by ignoring material documents.

9. Insofar as claim No. 4 is concerned, the award in respect of this is also required to be set aside because of the reasons given for claim No. 2. The very same letters, i.e. Exts P-6, P-7 and P-8 have been ignored. Similarly, the award in respect of claim No. 6 to the extent of pre-suit interest also deserves to be set aside because the arbitrator has not considered Ext. P-6 where a claim of interest had clearly been made. The arbitrator, as pointed out above, has mentioned that the claimant had, at no occasion, given any written notice to the respondent about claiming interest on the due amount. This conclusion of the arbitrator is clearly contrary to the record and is a patently erroneous finding which does go to the root of the matter...

ii) ONGC Ltd. v. Garware Shipping Corporation Limited reported in 2008 (1) Raj 164 (SC) wherein the Supreme Court held as under:

28. There is no proposition that the courts could be slow to interfere with the arbitrator's Award, even if the conclusions are perverse, and even when the very basis of the Arbitrator's award is wrong. In any case this is a case where interference is warranted and we set aside the norms prescribed by the Arbitrator as upheld by the learned Single Judge and the Division Bench.

iii) Hindustan Lever Ltd. v. Shiv Khullar reported in 2008 (3) Raj 612 (Del) wherein it has been held as under:

14. In the decision reported as ONGC Ltd. Vs. Garware Shipping Corpn. Ltd., it has been held that there is no proposition that the courts would be slow to interfere with an award even if the conclusions are perverse and even when the very basis of the Arbitrator's award is wrong.

15. Needless to state the mandate of an Arbitrator is to be reasonable and not perverse. If an Arbitrator acts perversely he acts beyond his mandate. The statement of objects and reasons of the Arbitration & Conciliation Act, 1996 states that one of the object of the Act is to ensure that the Arbitral Tribunal remains within the limits of its jurisdiction. Further, as per Sub-section 3 of Section 28 of the Act, the Arbitral Tribunal has to decide in accordance with the terms of the contract and has to take into account the usages of the trade applicable to the transaction.

16. Exercising power u/s 34 of the Act it is the duty of the court to see whether the Arbitrator has acted within his mandate. As held by the Hon'ble Supreme Court in the decision reported as Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., if an award is contrary to a fundamental policy of Indian Law or is against justice or morality or is patently illegal, the same has to be set aside.

xxxxx xxxxx xxxxx xxxxx 20. Even in the realm of evidence, no doubt the provisions of the Evidence Act, 1872 are not strictly applicable before an Arbitral Forum, but underlining principles thereof would certainly apply. For example, Section 21 of the Evidence Act, 1872 mandates that an admission made by a party is a relevant fact. The said Section underlines a fundamental policy of the

law that the best evidence of a party is the admission of the opponent. Suppose an Arbitrator ignores an admission made by a party which has not been explained? Would not such an award be liable to be challenged on the plea that by ignoring a material evidence, a fundamental policy of law relating to evidence being violated by the Arbitrator, the award is liable to be challenged? Surely, such an award would suffer from the mandate of the Arbitrator being violated as also on the ground that the conclusions are perverse.

5. But in my view none of the aforesaid judgments states that Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd. (supra) has been decided wrongly. In my opinion, the scope of interference by a Court u/s 34 of the Arbitration and Conciliation Act, 1996 has not been enlarged subsequent to the judgment of the Supreme Court in Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd. (supra). In fact, the Supreme Court in Delhi Development Authority Vs. R.S. Sharma and Co., New Delhi, after referring to a catena of judgments has held that an arbitration award is open to interference by a Court u/s 34(3) of the Act, 1996 if it is:

- i) contrary to substantive provisions of law; or
- (ii) contrary to the provisions of the Arbitration and Conciliation Act, 1996; or
- (iii) against the terms of the respective contract; or
- (iv) patently illegal; or
- (v) prejudicial to the rights of the parties.

6. Supreme Court has further held in the aforesaid judgment that an award can 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.

7. The award can also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Supreme Court has also held that it is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

8. In my view the grounds of interference mentioned in Delhi Development Authority v. R.S. Sharma and Co., New Delhi (supra) are identical to the grounds for interference mentioned in Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd. (supra) and there has been no enlargement of scope of interference by the Apex Court or this Court in arbitral awards.

9. Consequently, keeping in view the orders dated 30th August, 2007 and 16th November, 2007, I am bound to follow the judgment rendered by the Hon''ble

Justice Sanjay Kishan Kaul in OMP No. 106/2003. Accordingly, present petition is dismissed but with no order as to costs.