
(2015) 01 DEL CK 0138
In the Delhi High Court
Case No : O.M.P. 1505/2014

Siya Ram Dwivedi

APPELLANT

Vs

New Holland Fiat India Pvt. Ltd.

RESPONDENT

Date of Decision : 16-01-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 12, 13, 13(2), 13(5), 18
Penal Code, 1860 (IPC) — Section 182, 419, 420, 467, 468

Citation : (2015) 148 DRJ 200

Hon'ble Judges : Deepa Sharma, J.

Bench : Single Bench

Advocate : Abdhesh Chaudhary and Manisha Suri, for the Appellant; Shambhu Sharan, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Deepa Sharma, J.—Vide the present petition, the petitioner has assailed the Ex-parte Arbitral Award dated 2nd August, 2014.

2. The Arbitrator was appointed in this case vide letter dated 18th November, 2013 as a Sole Arbitrator for adjudication of the dispute arising out of a Dealership Agreement.

3. The respondent's predecessor-in-interest M/s. New Holland Tractors (India) (P) Ltd. (NHT for short) was engaged in the business of manufacture and sale of tractors and their spare parts. The NHT appointed M/s. Rajinder Machinery Mart whose proprietor is the petitioner before me, its dealer by virtue of letter of intent dated 30.07.2002. Subsequently, a comprehensive non-exclusive Dealership Agreement dated 01.11.2002 was executed between the petitioner and NHT for the sale and after sale services of NHT's products. The petitioner furnished a personal guarantee also undertaking to make all payments of dues relating to the dealership. The said dealership agreement was renewed by a new dealership agreement dated 05.11.2005 effective from 01.11.2005. By virtue of order passed by the High Court of Bombay and by an order dated 01.09.2008

passed by this court, NHT got amalgamated in Fiat India (P) Ltd. in accordance with a scheme of amalgamation approved by the said High Courts. Consequently, all properties, rights, title, interest, labels, brand registrations, contracts, agreements etc. owned by NHT got vested in Fiat (India) (P) Ltd. Later, the name of Fiat India (P) Ltd. was changed to New Holland Fiat (India) (P) Ltd., with effect from 18.12.2008.

4. The Dealership Agreement dated 5th November, 2005 was due to expire some time in the year 2008. A new dealership agreement dated 24.06.2009 was entered into between New Holland Fiat (India) (P) Ltd. and M/s. Rajinder Machinery Mart for a period of three years effective from 01.01.2009. The petitioner under the said agreement furnished the personal bank guarantee also for the payment of the amounts due from Rajinder Machinery Mart.

5. Certain dispute arose regarding the payments between the parties and the respondent raised the claim which was referred to the Arbitrator. Clause 25 of the Dealership Agreement was invoked by the respondent and accordingly in view of this Clause, the Managing Director of the respondent appointed the retired Judge of the High Court as Sole Arbitrator.

6. The dispute was referred to the Arbitrator. The Arbitrator accepted his appointment and vide letter/notice dated 21st November, 2013 invited the parties for preliminary hearing on 11th January, 2014 at 11.30 am at his residence. The petitioner in response to the said notice, sent a letter dated 26th November, 2013 to the respondent and endorsed the copy of the said letter to the arbitrator.

7. The petitioner, however, did not attend the proceedings before the Arbitrator on 11th January, 2014. The Arbitrator gave opportunity to the claimant to file the statement of claim which was filed on 7th April, 2013. The arbitrator sent a notice dated 12th April, 2012 to the petitioner to file its Statement of defence/ counter-claim by 23rd May, 2014 and also to appear for hearing on 30th May, 2014 at 11.30 am. The petitioner, however, did not attend the proceedings before the Arbitrator at 30th May, 2014 and also did not file his defence/counter-claim. The hearing before the Arbitrator was thereafter fixed for the evidence of the claimant on 9th July, 2014 and the matter was fixed for final hearing on 18th July, 2014 at 11a.m. The copies of the order-sheets of the proceedings held on 30th May, 2014 were sent to the petitioner on the same day by speed post. The petitioner, instead of appearing before the Arbitrator, sent a letter dated 26th May, 2014 which was received by the Arbitrator on 31st May, 2014. On the final date of hearing also, the petitioner did not attend the arbitral proceedings. The evidence furnished by the claimant by way of an affidavit was taken on record by the arbitrator and on the basis of the arbitral record, the Award was passed. It is this Award which the petitioner is challenging in this present petition.

8. The main ground of challenge is that the matter was of criminal nature and the petitioner had filed FIR under Section 467, 468, 419 and 420 of the Indian

Penal Code and despite that the Arbitrator proceeded to pass an Award dated 2nd August, 2014. It is submitted that this makes the Award illegal as it was filed with the sole intention to dilute the FIR in the criminal case.

9. It is submitted that FIR was registered since the respondent had misappropriated and cheated the petitioner of 26 bank drafts which had been furnished to the respondents but were not credited by them in the account maintained.

10. It is submitted that the petitioner vide its letter dated 26th November, 2013 had recorded his objections that the tractors were supplied to him without any orders from him and that 26 bank drafts were not credited in the account of petitioner and that the Arbitrator did not call the concerned bank as per Section 26 and Section 27 of the Arbitration and Conciliation Act to prove those bank accounts. It is submitted that Arbitrator ought to have summoned witness from the said bank during the proceeding and this shows that the arbitrator has not acted in independent, impartial and unbiased manner and has failed to qualify the test as provided under Section 12 of the Arbitration and Conciliation Act.

11. It is submitted that the Arbitrator has not followed the principle of natural justice as it has not given full opportunity to the petitioner to contest his case. It is submitted that while the respondent was given three months to file statement of claim, the petitioner was given only one and a half month to file his counter claim/defence. The petitioner was also not given the opportunity to lead evidence. The Arbitrator has also hurried up the proceedings and concluded the entire proceedings in three appearances, the first being the date 11th January, 2014, the second being the date of 30th May, 2014 wherein the respondent was directed to file the oral evidence and the notice was sent to the petitioner and lastly on 18th July, 2014 wherein the alleged final arguments were heard and the matter was reserved for judgment and thus the petitioner was not afforded the reasonable, fair and adequate opportunity.

12. It is submitted that impugned Award is defective and shocks the judicial conscious and is against the public policy. The Award is based on wrong conclusions and figures on it. It is further stated that the arbitrator has wrongly calculated the due amount against the petitioners and has arrived at a wrong figure. It is submitted that the Arbitrator has mentioned in para 10 of the Award that the petitioner was required to give the amount of Rs. 31,84,374.04 which was arrived at after adjusting the amount of Rs. 5 lacs of security deposit but again said in the said para that vide letter dated 07.11.2013, the petitioner was required to make the payment of Rs. 38,77,381.04/- which was due after adjusting the bank guarantee of Rs.10,00,000.00.

13. Thus, by analogy of the Arbitrator, the money which was due on 8.11.2013 was Rs. 31,84,374.04 which grew to Rs. 48,77,381/- (Rs. 38,77,381+ Rs. 10,00,000) as on 07.11.2013. This shows that the interest charged for two years roughly come to Rs. 16,93,007/- on an amount of Rs. 31,84,374/- which

translates to 26.58%, while the chargeable interest as per the Arbitrator himself was 18%. It is submitted that the Arbitrator has not given the basis on which he has arrived to the figure of Rs. 38,77,381/- and thus the Arbitrator has misconducted himself.

14. It is further submitted that the Banker's Cheque cannot be dishonoured as these are the cheques which are issued by the Banks against the money already received and are, in all sense, the Demand Drafts only. The Arbitrator, however, without understanding the true meaning of Banker's Cheque had wrongly arrived at the conclusion that the same has been dishonoured. On these facts, it is submitted that an Award is liable to be set aside.

15. No notice of the petition has so far been issued to the respondents and the arguments on behalf of the petitioner have been heard at length. File is also perused.

16. As it is clear from the contention raised by the petitioner, he has not challenged the ex-parte award on the ground that he was not being properly served of the arbitral proceedings or was not aware of the arbitral proceedings. He himself has admitted in his petition that he had duly received the notices of appointment of the arbitrator and of all the dates and proceedings held before Arbitrator, but still he has chosen not to contest the case of claimant before Arbitrator. He was given the opportunity to file the counter claim/defence but the petitioner did not file any counter claim or put up any defence before the Arbitrator. He had written letters dated 26.11.2013 and 26th May, 2014 to Arbitrator. In his letter dated 26th November, 2013, he had complained that the tractors were supplied to him without any orders and that he had issued 26 bank drafts which were not credited in his account and requested that his statement of account be rectified so that the business which was stopped since the year 2011 be resumed. He has reiterated the said contentions again in his letter dated 26th May, 2014. The contention of the petitioner is that the Arbitrator ought to have summoned the bank officials under Section 26 and 27 of the Arbitration and Conciliation Act and verified his contentions raised by him in these letters.

17. From the Award, it is apparent that the Id. Arbitrator has given due consideration to the objections of the petitioner raised by him in these letters and has dealt with it in his Award. Section 28 of the Arbitration and Conciliation Act requires that the Arbitrator shall decide the dispute in accordance with the substantive law for the time being in force in India. The law of the land is that burden to prove on that the party which claims a fact to be true. The burden was therefore upon the petitioner to prove his contentions that tractors were supplied without order and his bank drafts were not intentionally credited but he had chosen to stay away from the arbitral proceedings and did not discharge the said burden.

18. The Arbitrator in para 20 of his Award has clearly dealt with the contentions raised by the petitioner and it cannot be said that the Arbitrator had swept his

objections under the carpet and has not dealt with the pleas raised by him in his letters.

19. It is also clear that the Arbitrator had given opportunity to the petitioner to contest his case but it was the petitioner who has chosen otherwise. The Arbitrator had decided the matter on the basis of the evidence produced before him and rejected the contentions which were not supported by any evidence on record.

20. It is also the settled principle of law that pendency of the criminal proceedings does not automatically stay the civil proceedings before any authority. Mere filing of the FIR by the petitioner regarding the 26 bank drafts which he had allegedly handed over to the respondent and which the respondent had not shown in the books of accounts and where there is no contention on record that the respondent had encashed those demand drafts and misappropriated the money, does not in any way initiate the findings of Arbitrator.

21. The only contention of petitioner was that 26 bank drafts were not credited in his accounts and in this matter filed an FIR. The petitioner has concealed the facts relating to the investigation into the FIR lodged by him on 01.07.2014. During the course of arguments, however, it is brought to the notice of this court that the police was in the process of filing the final record of closure of the FIR and also initiated the action under Section 182 IPC against the present petitioner for giving wrong information on the basis of which FIR was lodged. The copy of the final report for closure and a copy of the report for initiating criminal proceedings under Section 182 IPC against the petitioner was also produced before the court. As discussed by this court, the filing of a criminal petition does not automatically stay the civil proceedings and the Arbitrator was justified in continuing with the arbitral proceedings and the Award cannot be said to be illegal on this ground.

22. The next argument by the Id. counsel for the petitioner is that the Award is in violation of Section 18 of the Arbitration and Conciliation Act which requires that the party shall be treated with equality and each party shall be given full opportunity to present his case. Although, the petitioner has contended that he was not given full opportunity to present his case and he was not treated with equality but has failed to point out any circumstances which can show that he was not treated with equality or was not given full opportunity. He was given time to file his counter claim/defence which he did not file. It is also not shown by the petitioner that he had some time from Arbitrator for filing defence/counter claim or lead evidence and the Arbitrator had denied him that opportunity.

23. A mere vague contention that the Arbitrator while had given three months time to file the statement of claim to the respondent, had given one and a half month's time to the petitioner to file his defence/counter-claim shows that he was not treated with equality when he did not ask for any further time or opportunity is nothing but a weak attempt to turn the hands of the clock

backward. His claim would have had some strength had he asked from the Arbitrator for more time to file his defence/counter claim and the said would have been disallowed by the Arbitrator.

24. On the other hand, the Award shows that Arbitrator had been fair to him and had rejected reliefs 3, 4 and 5 of the Claimant although these reliefs were not defended by the petitioner.

25. The contention of the petitioner that the Arbitrator has acted with bias also stands controverted by this fact that the Arbitrator has acted fairly and has based his findings on the evidences produced before him. The Arbitrator has applied his mind which is clear from the very fact that he had refused to grant the claimant relief nos 3, 4 and 5.

26. This clearly shows that the Arbitrator has neither acted in biased manner nor he has shown any inequality towards petitioner. Moreover, the plea of bias is available to petitioner u/s 13(5) of the Act. In view of Section 13 of the Act, challenge of an Award on ground of bias is available to the petitioner only if he has challenged the authority of Arbitrator on this ground u/S 13(2) of the Act. In the present case, the petitioner had never appeared before Arbitrator and adopted the challenge procedures provided under Section 13 of the Arbitration and Conciliation Act.

27. Even otherwise, as discussed above, the petitioner has failed to show that the Arbitrator has acted in any biased manner or has not treated him with equality and had refused the petitioner to grant him full opportunity to present his case.

28. The next contention of the petitioner is that the Arbitrator has calculated the due amount in a wrong manner and without any evidence and thus liable to be set aside.

29. It is apparent from the Award that the Arbitrator has reached to this figure on the basis of certain facts which also includes the documentary evidences placed before him. This includes the various letters of the petitioner acknowledging the due amount.

30. The findings to this fact has been discussed by the Arbitrator in para 18 of his Award which is reproduced as under:-

"18. The claimant's case as stated above stand proved by the documents placed on record and the oral evidence contained in the affidavit of Sri Imran Khan. In his letter dated 26.11.2013 addressed to the claimant's Managing Director the respondent's grievance was about the levy of interest and the non-accounting of 26 bank drafts for amounts totalling to Rs.41,90,900.00. The same grievance is repeated in the respondent's letter dated 26.05.2014 addressed to me. The statement of account filed by the claimant shows that only one banker's Ch. No. 587623 for Rs.3,55,000.00 (item No. 2 in the list appended to respondent's letter dated 26.11.2013) is reflected therein. The statement of account shows

that the said cheque was dishonoured by the bank. The other bank drafts are not reflected in the said statement of account. The said banker's cheque and the bank drafts purport to bear the dates between 09.08.2003 and 30.11.2006. The claimant has filed confirmation of balance letter signed by the respondent Sri Siyaram Dwivedi himself. The first only is at page 113 of the documents by which an outstanding balance of Rs. 75,77,765.00 is acknowledged by the respondent to be due to the claimant. In the confirmation for the period ending 31.03.2008 (page 106 the respondent acknowledged a balance of Rs. 46,63,816.00 and made a note thereon that the interest be waived. At page 109 is copy of a letter dated 07.04.2009 addressed by the respondent to the claimant acknowledging that as on 31.03.2009 as per the respondent's own books of account a sum of Rs.40,62,207 was due from him to the claimant in the Tractor Account and another sum of Rs. 1,24,356.00 was due in the parts account. This is a hand written letter signed by the respondent Sri Siya Ram Dwivedi and falsifies the respondent contention that any payments were not recorded in the claimant's bank of account. The last acknowledgment (page 114) is of an amount due to the claimant as on 31.03.2011 of Rs.3892,265.31". 31. Therefore, it is clear that the findings of the Arbitrator are based on the documentary evidences before him which included certain documents issued and signed by the petitioner himself.

32. There is no contention before me that those documents do not bear the signatures of the petitioner. It therefore cannot be said that the Award of the Arbitrator is not based on evidences produced before it.

33. Section 34 of the Arbitration and Conciliation Act lays down the grounds on which the Arbitral Award can be challenged.

34. In the present case, the petitioner has challenged the Award on the ground that the Arbitral Award is in conflict with the public policy of India. The public policy has been defined by the Hon"ble Supreme Court in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.,

"31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/ judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar Power Co. Ltd. Vs. General Electric Co., it is required to be held that the award could be set aside if it is patently illegal. 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."

The legal position was further crystallized in the later decision in *Steel Authority of India Ltd. Vs. Gupta Brother Steel Tubes Ltd.*, :

"18. It is not necessary to multiply the references. Suffice it to say that the legal position that emerges from the decisions of this Court can be summarised thus:

(i) In a case where an arbitrator travels beyond the contract, the award would be without jurisdiction and would amount to legal misconduct and because of which the award would become amenable for being set aside by a court.

(ii) An error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by courts as such error is not an error on the face of the award.

(iii) If a specific question of law is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law does not make the award bad on its face.

(iv) An award contrary to substantive provision of law or against the terms of contract would be patently illegal.

(v) Where the parties have deliberately specified the amount of compensation in express terms, the party who has suffered by such breach can only claim the sum specified in the contract and not in excess thereof. In other words, no award of compensation in case of breach of contract, if named or specified in the contract, could be awarded in excess thereof.

(vi) If the conclusion of the arbitrator is based on a possible view of the matter, the court should not interfere with the award.

(vii) It is not permissible to a court to examine the correctness of the findings of the arbitrator, as if it were sitting in appeal over his findings."

35. In the catena of judgments, it had been clearly held that the illegality for purpose of setting aside the award must be capable of going to the root of the matter. Trivial illegality cannot be termed as contrary to public policy (Reliance placed on findings in the case of *Prathyusha Associates Vs. Rashtriya Ispat Nigam Limited, Visakhapatnam Steel Plant and Another*, .

36. The courts have also time and again in plethora of judgments have held that while dealing with the Award under Section 34 of the Arbitration and Conciliation Act, the Court does not sit in appeal over the award of an arbitral tribunal and is required to re-assess and re-appreciate the evidence. It can be challenged only on the grounds mentioned in section 34(2) of the Act. (Reliance placed on findings in the case of P.R. Shah, Shares and Stock Broker (P) Ltd. Vs. B.H.H. Securities (P) Ltd. and Others, .

37. Relevant para 21 of the said judgment is reproduced as under:-

"21. A court does not sit in appeal over the award of an arbitral tribunal by re-assessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act...Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at." 38. In the case of Sudarsan Trading Co. Vs. Government of Kerala and Another, , the Supreme Court has clearly held that the Courts are not required to examine the award in order to find out whether the arbitrator had acted correctly or incorrectly. Also in the case of M/s. Ispat Engineering and Foundry Works, B.S. City, Bokaro Vs. M/s. steel Authority of India Ltd., B.S. City, Bokaro, , the Supreme Court has held that there exists a long catena of cases through which the law seems to be rather well settled that the reappraisal of evidence by the court is not permissible.

39. From the contentions raised by the petitioner, it is apparent that he wants this court to re-assess and re-appreciate the evidences.

40. From the nature of challenge to the Award by the petitioner, it is clear that he has failed to point out any illegality in the Award which goes to the very root of the Award and makes it illegal. It is apparent on the face of the Award that the Arbitrator has given due consideration to the contentions of the respondent raised by him through his letters dated 26th November, 2013 and 26th May, 2014 and it is also apparent that despite the petitioner being aware of the continuation of the arbitral proceedings had chosen to stay away from the proceedings and also did not produce any evidence before the Arbitrator to controvert the claim of the respondent. Despite that, the Award clearly shows that it is based on the evidences produced before the Arbitrator. Despite the fact that the petitioner had stayed away from the arbitral proceedings, the Arbitrator has acted fairly and reasonably and without any bias and refused certain claims of the respondent which it did not find justifiable.

41. In view of the above discussion, it follows that the petition has no merit in it. The petition is therefore dismissed.