

(2015) 08 DEL CK 0311
In the Delhi High Court
Case No : FAO(OS) 432/2015

Southern Petrochemical Industries Corporation Ltd.	APPELLANT
Vs	
Great Eastern Shipping Co. Ltd. and Others	RESPONDENT

Date of Decision : 05-08-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 34(2)

Citation : (2015) 9 AD 219 : (2016) 1 ARBLR 64

Hon'ble Judges : Badar Durrez Ahmed and Sanjeev Sachdeva, JJ.

Bench : Division Bench

Advocate : K.V. Viswanathan, Sr. Advocate and Gagan Gupta, for the Appellant; Sandeep Sethi, Senior Advocate, Arvind Kumar Gupta, Anshul Garg and Arjun Mital, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Badar Durrez Ahmed, J.

CAV 809/2015

1. The learned counsel for the respondent/caveator is present. The caveat stands discharged.

CM 13877-13878/2015 Allowed subject to all just exceptions.

FAO(OS) 432/2015 & CM 13876/2015

The present appeal is directed against the judgment dated 12.05.2015 delivered by a learned Single Judge of this Court in OMP 498/2013, which was a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the said Act"), challenging the Award dated 10.01.2013 made by the Arbitral Tribunal. It ought to be pointed out that the Award dated 10.01.2013, which was the subject matter of the challenge in the said OMP, was made on remand, after this Court, by an order dated 20.07.2011, had set aside the earlier Award dated 17.02.2010 and had remitted the matter to the Arbitral

Tribunal for reconsideration.

On the earlier occasion, the learned Single Judge had set aside the Award dated 17.02.2010, primarily because the certificate dated 03.09.1994 issued by the Kakinada Steamer Agents' Association and a letter from the office of the Labour Commissioner dated 01.10.1994, pertaining to the alleged stevedores strike, had been ignored by the Arbitral Tribunal.

2. The entire controversy in the present appeal centres around the question as to whether there was a strike of stevedores at Kakinada port between 23.08.1992 and 17.09.1992. It is the case of the appellant that there was a strike between 23.08.1992 and 17.09.1992, whereas it is the case of the respondent No. 1 that there was no such strike. Essentially, this question is one of fact. The learned counsel for the respondent No. 1 has drawn our attention to the Supreme Court decision in the case of Associate Builders Vs. Delhi Development Authority, and, in particular, to paragraph 33 of the said decision, which reads as under:--

"33. It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares and Stock Broker (P) Ltd. Vs. B.H.H. Securities (P) Ltd. and Others, , this Court held: (SCC pp.601-02, para 21)

"21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second Respondent and the Appellant are liable.

The case as put forward by the first Respondent has been accepted. Even the minority view was that the second Respondent was liable as claimed by the first Respondent, but the Appellant was not liable only on the ground that the arbitrators appointed by the Stock Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows: "General, you have a sound head, and a good heart; take courage and you will do very well; in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong."

It is very important to bear this in mind when awards of lay arbitrators are challenged.

Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the Appellant did the transaction in the name of the second Respondent and is therefore, liable along with the second Respondent. 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.""

3. On the other hand, the learned counsel for the appellant has drawn our attention to paragraph 27 of the very same decision, which reads as under:--

"27. Coming to each of the heads contained in the Saw Pipes judgment, we will first deal with the head "fundamental policy of Indian Law". It has already been seen from the Renusagar judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law."

4. The argument raised by the learned counsel for the respondent No. 1 was that, since the existence or non-existence of a strike was a question of fact and the same had been examined by the Arbitral Tribunal, it was not open to this Court to enter into that arena of discussion as long as there was no perversity or irrationality. On the other hand, the learned counsel for the appellant submitted that if an Arbitral Tribunal disregarded the binding effect of judgment of a superior court, that would clearly constitute violation of the fundamental policy of Indian law and would be within the parameters of Section 34 of the said Act and, therefore, would be one of the circumstances on which an Award could be challenged. Elaborating on this aspect of the matter, the learned counsel for the appellant submitted that in the earlier round, when the learned Single Judge had considered the first Award dated 17.02.2010, the learned Single Judge had clearly indicated in the judgment dated 20.07.2011 that there was an admission on the part of the respondent No. 1 that a strike had indeed taken place and it was only a question of the duration of the strike which needed to be ascertained. Our attention was specifically drawn to paragraph 68 of the judgment dated 20.07.2011, which reads as under:--

"68. The submission of the learned counsel for the respondent that the petitioners had extracted the aforesaid certificates from the Kakinada Steamer Agents Association (Regd.) and from the Commissioner of Labour, Government of Andhra Pradesh after over two years and, therefore, they could not have been relied upon, has to be rejected. Firstly, the Tribunal does not reject the said documents for the aforesaid reason. Secondly, the petitioner itself had agreed in the proceedings held on 20.01.2010 not to deny the existence of the said documents, and the only issue was with regard to their interpretation and

applicability to the facts of the case. Had the correctness of these documents been denied by the respondents, the petitioners would have the occasion to lead evidence to establish the existence of the strike/labour unrest at the Kakinada Port at the relevant time. Therefore, the respondent could not have even contended before the tribunal that the said evidence was unreliable or not trustworthy."

5. The learned counsel for the appellant submitted that the learned Single Judge had given a finding that the evidence submitted by the appellant in the form of the certificate dated 03.09.1994 and the letter dated 01.10.1994, could not be said to be unreliable or untrustworthy. This was a finding returned by the learned Single Judge and had a binding effect on the Arbitral Tribunal when it considered the matter on remand. It was submitted that, since the Arbitral Tribunal, in the second round, by virtue of its Award dated 10.01.2013, has not placed any reliance on the certificate dated 03.09.1994 and the letter dated 01.10.1994, this is in clear disregard of the judgment of the learned Single Judge of this Court, which was delivered on 20.07.2011.

6. We are unable to agree with the submissions made by the learned counsel for the appellant. There are several reasons for this. First of all, in our view, the learned Single Judge, in the first round, by virtue of his judgment dated 20.07.2011 had set aside the Award for the simple reason that the Arbitral Tribunal had completely disregarded and ignored the said certificate dated 03.09.1994 and the said letter dated 01.10.1994. The learned Single Judge was of the view that the same could not be disregarded inasmuch as the respondent No. 1 had not denied the existence of the said documents. The only issue was with regard to the interpretation and applicability of the said documents to the facts of the case. Therefore, the learned Single Judge was of the view that the said documents ought to have been considered by the Arbitral Tribunal and then a finding ought to be returned on the issue of whether there was a strike between 23.08.1992 and 17.09.1992 or not.

7. Secondly, we find that, in the second round, when the Arbitral Tribunal examined the matter on remand, it had, in fact, considered the said certificate dated 03.09.1994 and the letter dated 01.10.1994. Insofar as the letter dated 01.10.1994 was concerned, the same had been issued from the office of the Labour Commissioner and was based upon a report of the Assistant Commissioner/Port Officer which was not on record. In this backdrop, the Arbitral Tribunal considered the letter dated 01.10.1994 to be in the nature of hearsay evidence and, therefore, did not place reliance on the same. With regard to the certificate dated 03.09.1994, the Arbitral Tribunal was of the view that the same could not be accepted as evidence of the fact that there was a strike between 23.08.1992 and 17.09.1992, when the document was not a contemporaneous one. The said document was dated 03.09.1994, which was two years after the strike was alleged to have taken place. We may also point out, at this juncture, that the learned counsel for the appellant had submitted that just because the

certificate was two years subsequent to the alleged strike, it could not be brushed aside and that the learned Single Judge, in the first round, had also accepted this view. We cannot agree with the learned counsel for the appellant because in paragraph 68 of the decision dated 28.07.2011 referred to above, the rejection of the submission made by the learned counsel for the respondent was based on two reasons, one of them being that the Arbitral Tribunal did not reject the said documents for the reason that they had been obtained two years later. The corollary to this would be that had the Arbitral Tribunal rejected the said documents on that ground, the submission of the learned counsel for the respondent could have been accepted. In any event, there is no finding of the learned Single Judge that the Arbitral Tribunal could not reject the said documents on the ground that they were dated two years after the alleged strike.

8. Thirdly, we find that there is no admission on the part of the respondent No. 1 that there was a strike. It is well settled that an admission has to be clear and unequivocal. The statement made by the respondent No. 1 in its claim and rejoinder before the Arbitral Tribunal that the appellant could have made alternative arrangements for providing labour as it had sufficient knowledge of the intended strike, cannot be taken as an admission that, in fact, there was a strike. We agree with the submission made by the learned counsel for the respondent No. 1 that this was an alternative argument. In the first instance, it was the case of the respondent No. 1 that there was no strike. As an alternative and as an argument, it was suggested that even if there was a strike, the appellant had sufficient knowledge of the intended strike and, therefore, could have made alternative arrangements.

9. We may also point out that had the learned Single Judge, in the first round, accepted the plea that there was an admission on the part of the respondent No. 1 that there was a strike, there would have been no occasion for him to have remitted the matter to the Arbitral Tribunal to determine as to whether there was or was not a strike, based on the said two documents. The sum and substance of the entire discussion is that, in the first round, the Arbitral Tribunal had simply brushed aside the said two documents and had not looked into the same. Because the Arbitral Tribunal had not done so, the learned Single Judge had set aside the Award and remitted the matter to the Arbitral Tribunal to arrive at a finding of fact, after examining the said two documents. In the second round, the Arbitral Tribunal looked into the said documents and arrived at a finding of fact. We are not sitting in appeal over the finding of fact arrived at by the Arbitral Tribunal and, as held by the Supreme Court in *Associate Builders* (supra), even errors of fact cannot be corrected by the Court in proceedings under Section 34 of the said Act. Much less in an appeal from an order passed by a Single Judge under Section 34 of the said Act. As long as the view taken by the Arbitral Tribunal is a possible view and as long as the approach of the Arbitral Tribunal is not arbitrary or capricious, finding of facts returned by the Arbitral Tribunal cannot be disturbed. We do not find that the approach adopted by the Arbitral Tribunal was arbitrary or capricious. The learned Single Judge has correctly

appreciated the law and has rightly dismissed the petition under Section 34 filed by the appellant. We see absolutely no reason to interfere with the said decision. The appeal is dismissed. There shall be no order as to costs.