**(2008) 10 DEL CK 0062**

**In the Delhi High Court**

**Case No :** O.M.P. No. 367 of 2002

Union of India (UOI) and Another — APPELLANT

Vs

Samrat Press — RESPONDENT

**Date of Decision :** 03-10-2008

**Acts Referred:**

Arbitration and Conciliation Act, 1996 — Section 16, 21, 34, 7

**Citation :** (2008) 10 DEL CK 0062

**Hon'ble Judges :** Rajiv Sahai Endlaw, J

**Bench :** Single Bench

**Advocate :** A.K. Bhardwaj and Jagrati Singh, for the Appellant; Shiv Khorana, for the Respondent

**Final Decision :** Dismissed

## Judgement

Rajiv Sahai Endlaw, J.—Objections u/s 34 of the Arbitration and Conciliation Act, 1996 have been preferred by the petitioner Union of India to the award dated 27th June, 2002 as corrected on 10th October, 2002 of Shri B.L. Nishad, Joint Secretary and Legal Advisor, Ministry of Law, Justice and Company Affairs acting as the sole arbitrator.

2. The respondent was awarded the contract for one year from 9th May, 1993 for printing of Sainik Samachar Weekly Magazine. The said contract was extended for one year on 23rd November, 1994 and thereafter on 31st March, 1995 till 31st May, 1996. Disputes and differences having arisen between the parties, the respondent invoked the arbitration clause and Mr. B.L. Nishad aforesaid was appointed as the sole arbitrator by the competent authority in the Department of Legal Affairs vide order dated 21st September, 2001 and formal order for his appointment as sole arbitrator was issued by the Secretary to the Government of India vide letter darted 3rd October, 2001.

3. The respondent/claimant preferred claims under ten heads out of which claim No. 1 has been allowed, claim No. 2 of interest has been allowed at a rate lower

than claimed by the respondent, claims No. 3 and 7 have been partly allowed. Claims No. 4 to 6 and 8 to 10 of the respondent were dismissed by the arbitrator. The respondent has not preferred any objection against such dismissal and the dismissal thereof has attained finality. The petitioner had also made a counter claim for costs of proceedings which has also been dismissed by the arbitrator and no objections have been preferred by the petitioner with respect to the same and that has also attained finality.

4. The petitioner has preferred objections against the claims allowed and has also raised objections (i) that as per the agreement, the arbitration was to be of the Director of Public Relations, Ministry of Defence and the arbitration proceedings are thus vitiated; (ii) that the award on the preliminary issues raised by the petitioner before the arbitrator is without any reason whatsoever.

5. The objection that the arbitration proceedings are vitiated or the award liable to be set aside for the reason of the arbitrator being not as per the agreement between the parties is now no longer res integra. The Division Bench of this Court in S.N. Malhotra & Sons v. Airport Authority of India (2008) IV AD (Delhi) 424 has held that where the objection to the jurisdiction of the arbitrator as contained in Section 16 is not raised before the arbitrator, a party is not permitted to raise the same for the first time u/s 34. In the present case no such objection was raised before the arbitrator and it is now not permissible for the petitioner to raise the ground of the arbitral tribunal being not in accordance with the agreement.

6. Even otherwise I find that the respondent applied to the petitioner for the appointment of the arbitrator. It was open to the petitioner to, at that time, appoint the Director, Public Relation as the arbitrator. The petitioner did not do so and appointed its Joint Secretary aforesaid as the arbitrator. The respondent made a claim before the said arbitrator and the petitioner filed the reply and participated in the arbitration proceedings without in any way disputing the existence of the agreement for arbitration before that forum. The respondent made the statement of claim before the arbitrator and the petitioner by not controverting the jurisdiction of arbitrator before whom claim was made, agreed to arbitration before him, within the meaning of Section 7 of the Act. This objection of the petitioner has no merit and is rejected.

7. The second objection is that the arbitrator did not record the reasons for decision on the preliminary objections. A perusal of the award shows that three preliminary objections were raised by the petitioner before the arbitrator, i.e., of the claim being barred by time; of the respondent being not registered under the Partnership Act and of the respondent having discussed and finalized its claims in the meeting dated 6th November, 1997 and being not entitled to make any other claim.

8. The arbitrator has, with respect to the preliminary objections of limitation, held that the respondent/claimant demanded arbitration on 21st February, 1997

 

and u/s 21 of the Act, the arbitration commences on the date when the request as made by the claimant is received by the respondent; that the petitioner herein had released the security of the respondent only in May, 1998 and thereafter the claim of the respondent having not been finalized the claims are within limitation. Thus, it cannot be said that the arbitrator has not given any reason for rejecting the preliminary objection of the petitioner of limitation. It is significant that the objection of the petitioner is not to the said reasoning being not in accordance with law but only that no reason was given. The said objection is not found to be correct. Even otherwise I have vis-?-vis the claims of the respondent allowed by the arbitrator examined the matter and do not find the reasoning given by the arbitrator on the aspect of limitation to the contrary to law.

9. On the second preliminary objection of the petitioner of the respondent being not entitled to the claim for the reason of being not registered under the Partnership Act, the arbitrator has dismissed the same holding that the respondent has produced the evidence by filing the claims at serials No. 1 and 2 of its list of documents. Again, the objection of the petitioner before this Court of there being no reasoning is found to be incorrect. The arbitral record was called for before this Court and I have perused the same and there is indeed on record a list of documents having at serials No. 1 and 2 thereof the photocopies of the certificate of registration and of Form A under the rules framed under the Partnership Act. Thus, the reasoning given by the arbitrator for rejecting the second preliminary submission is also not fallacious. The third preliminary objection of the petitioner has also been dealt with by the arbitrator and dismissed with reasoning. The arbitrator has found that the respondent in the meeting held on 6th November, 1997 had not waived any of its claims. The arbitrator has further reasoned that the respondent had nowhere written down or recorded that besides the claims discussed in the said meeting, it had no other claims. The arbitrator has further reasoned that the respondent had in contemporaneous correspondence, after the meeting dated 6th November, 1997, requested for a decision on the balance pending issues also. Again not only the third preliminary objection is disposed with reasons which have not been challenged but the said reasons are plausible. This Court recently in Ircon International Limited Vs. Shri Krishna Trading Co. and Another, has reviewed the legal position with respect to full and final settlement and I do not find the award to be contrary thereto.

10. The next objection is to the claim No. 1 of the respondent being allowed by the arbitrator. The said claim was of Rs. 8,01,299/- for payment of the amounts illegally deducted by the petitioner from the bills of the respondent. The same comprised of Rs. 1,28,371/- (wrongly recorded as 4,28,370/- in the award and subsequently corrected as aforesaid) deducted during the year 1993-94 and the sum of Rs. 6,72,928/- deducted during the year 1995-96.

11. It was contended in the objection/petition that no such dispute was referred to the arbitrator and subsequently that the said amount having been deducted

 

towards liquidated damages in terms of the agreement between the parties, the award for the said amount is contrary to the terms of the agreement. The objection of the petitioner that no such dispute was referred to the arbitrator is not correct. The arbitrator was appointed to adjudicate the claims and counter claims. The respondent preferred a claim/petition before the arbitrator, a perusal whereof shows the respondent to have in paras 4 to 7 thereof made the claim for refund of the amounts illegally and unjustifiably deducted from the payments admittedly due from the petitioner to the respondent.

12. The arbitrator allowed the said claim for the reasons, that the contract between the parties required performance of reciprocal obligation and the respondent could not perform its obligations without the petitioner first performing its part of the agreement; that there was sufficient evidence that it was the petitioner which had delayed in performance of its part leading to the delay in the respondent in performing its obligations; that the petitioner had failed to prove any loss owing to the alleged delays; that the wording of the agreement shows that the deductions made were not a genuine pre-estimate mutually arrived at between the parties; that the petitioner without proving any loss was not entitled to any damages or liquidated damages; that liquidated damages of 50% was in the nature of penalty. The arbitrator thus allowed the claim of deductions made from the payments due for the years 1993-94 and 1995-96.

13. Objection is raised to the aforesaid findings of arbitrator relying upon the Judgment of Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., . I, however find that, that case turned on the peculiar language of the agreement in question in that case. This Court also has in Indian Oil Corporation v. Lloyds Steel Industries Ltd. 2008 (1) R.A.J. 170 (Del) after noticing ONGC (supra) held that without damage/loss being proved, liquidated damages could not be allowed and no fault could be found with the arbitral award for the said reason.

14. Merely because the agreement provides for liquidated damages and the award does not allow liquidated damages for the reason of the interpretation of law by the arbitrator would not make the award contrary to the agreement so as to have the same set aside. The arbitrator is entitled to adjudicate legality or interpretation of a term of the agreement and not bound to follow the same literally. If the arbitrator by examining the legal effect of the agreement holds the same to be not entitling the petitioner to liquidated damages without proving loss or damage, the same does not call for interference with the arbitral award. The purpose of the 1996 Act was to reduce/limit the challenge to the arbitral awards. Of course, the Apex Court in ONGC (supra) has interpreted the new Act also to mean that the court is empowered to set aside the award if not in accordance with law. In my view, an arbitral award would be in accordance with law, if the correct law is applied, even though a wrong view or interpretation of the same has been taken.

15. In the facts and circumstances of the present case, the principle of law

 

required application of facts and even if in such application of facts the arbitrator reaches a conclusion different from the one which the court may reach, the same still does not call for setting aside of the award. Only if, irrespective of the factual application, the conclusion reached by the arbitrator under no circumstance can be reached under the law, is in my respectful view a ground u/s 34 of the Act for setting aside of the award made out. In this regard, I may notice that ONGC (supra) had struck a different note than the then prevalent law. It had been held by a Constitution Bench of the Apex Court in Fateh Chand Vs. Balkishan Das, that a provision in an agreement for liquidated damages did not ipso facto call for such damages to be awarded and to be entitled to damages, loss and damages had to be proved. The Apex Court in ONGC (supra), relying upon the peculiar language in the agreement of the parties having arrived at a genuine pre-estimate of the loss which shall be suffered for the reason of the delay and further agreeing that assessment of such loss was difficult, had held the parties to be bound by the same and upheld the award of liquidated damages. Notwithstanding the said judgment, as in Indian Oil Corporation (supra), the courts have, depending upon the facts of the case continued to follow the Constitution Bench judgment unless finding the language to be as in ONGC case. The arbitrator in the present case also has noticed that the agreement did not provide of the liquidated damages being a genuine pre-estimate and held the petitioner to be not entitled to the same. Thus, it cannot be said that the award on the said claim is contrary to the law prevailing or for that reason contrary to public policy. As long as a correct law is applied even if a wrong view of the same is taken, the arbitrator being a judge chosen by the parties themselves is empowered by the parties to finally decide the matter not only of fact but also of law and this Court does not sit in appeal over the award. See Tribal Co-operative Marketing Development Federation of India Ltd. Vs. Auro Industries Limited and Another, and Flex Engineering Ltd. Vs. Antartica Construction Co. and Another, . The award cannot be set aside even if the decision appears erroneous. Even under the 1940 Act where the scope of interference with award was much more, the Apex Court in Tarapore and Company Vs. Cochin Shipyard Ltd., Cochin and Another, and U.P. Hotels and Others Vs. U.P. State Electricity Board, held that arbitrator decision on a question of law is also binding even if erroneous and in P P.V. Subba Naidu and Others Vs. Government of A.P. and Others, the Apex Court further held that courts are not right in examining and interpreting the contract to see whether the claim was sustainable under the contract. I, therefore, do not find any merit in this objection also of the petitioner.

16. The claim No. 2 of the respondent was for award of interest on the amounts subject matter of claim but @ 23% per annum under the provisions of Small Scale and Ancillary Industrial Undertakings Act, 1993. The arbitrator has, however, allowed interest at 18% per annum only and that too from 1st June, 1996 to September, 2001. The arbitrator having found the monies of the respondent to have been illegally withheld by the petitioner, was fully justified in awarding interest and no fault can be found with the award under the said head.

 

The counsel for the respondent has before this Court also sought interest @ 23% per annum relying upon Assam Small Scale Ind. Dev. Corp. Ltd. and Others Vs. J.D. Pharmaceuticals and Another, and Kanhai Engineering (Towers) Pvt. Ltd. v. Telecommunications Consultants India Ltd 2007 (3) R.A.J. 60 (Del) and argued that this Court should modify the award to award interest @ 23% per annum. However, the respondent having not preferred any objection in this regard, I am not inclined to enhance the rate of interest. Even otherwise, in my view, in the last few years, except recently, the interest rates have been falling and the award of interest at 18% per annum is in consonance with the prevailing laws.

17. The arbitrator has allowed the claim of the respondent of Rs. 5,37,856/- for payment of bills for unprinted issues. The arbitrator has reasoned that the petitioner had in the meeting on 6th November, 1997 agreed that these bills for incomplete work will be processed subsequently but had not processed the same. The arbitrator did not find any merit in the objection of the petitioner in opposition to the said claim. Thus, being factual dispute, and nothing having been shown of the same being contrary to the agreement, no case for interference u/s 34 of the Act is made out. The Apex Court in M/s. Arosan Enterprises Ltd. Vs. Union of India and Another, held findings of arbitrator purely based on appreciation of material on record cannot be interfered with. The last claim of the respondent which has been allowed by the arbitrator is of interest for the delay in the refund of security deposit. The agreement between the parties does not provide for anything required to be done prior to the refund of the security deposit. The arbitrator has on facts found that the security deposit ought to have been refunded in January, 1996 and further found the petitioner to have failed to refund the same without any reason, inspite of repeated reminders of the respondent and thus awarded interest at 18% per annum from July, 1996 till February, 1998 when the security deposit was refunded. The same also being a factual matter and nothing having been shown of the same being contrary to any part of the agreement, no ground for interference with the said part of the award is also made out.

18. The arbitrator has further awarded interest @ 18% per annum on the awarded amounts from the date of award till actual realization. Following Krishna Bhagya Jala Nigam Ltd. Vs. G. Harischandra Reddy and Another, and Flex Engineering Ltd. (supra) I however modify this part of the award. The respondent shall be entitled to interest from date of award till realization @ 9% per annum

19. Thus, the petitioner having failed to make out a case u/s 34 of the Act, the petition is dismissed, save for the modification of rate of post award interest.

 