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HIGH COURT OF DELHI

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Date of decision: July 4th, 2008

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FAO(OS)No. 08/2007

Union of India

...Petitioner

through

Mr. Bijender Singh, Advocate

Versus

M/s. Mecano Export Import S.A.

...Respondent

through

Mr. Brajesh K. Srivastava with
Mr.Dinesh K.Gaur, Advocates

Coram :

Hon'ble Mr.Justice Manmohan Sarin

Hon'ble Mr.Justice Manmohan

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| (1) | Whether reporters of local paper may be allowed to see the judgment? | Yes |
| (2) | To be referred to the reporter or not? | Yes |
| (3) | Whether the judgment should be reported in the Digest ? | Yes |

Manmohan Sarin, J.

1. Appellant, Union of India in this appeal assails the order dated 8.2.2006 passed by the Single Judge in OMP No.381/2003, dismissing the objection petition filed under Section 34 of the Arbitration and Conciliation Act, 1996. The appellant herein in the Objection Petition had challenged the arbitral award dated 27.6.2003. Learned Single Judge while dismissing the petition held that the Award passed by the Arbitral Tribunal was on

consensual terms and the same could not, therefore, be challenged.

2. Before considering the grounds raised in the present appeal, facts may be noted briefly.

- (i) A contract was executed on 29.8.1996, between the parties for supply of 10,000 nos. 22.9T BG BOX'N' wheel sets. The contract specified detailed terms including a supply schedule. As per the schedule, within 90 days from the execution of the contract, 1500-2000 units were to be supplied. The balance was to be offered in six monthly instalments. Provisions were made for inspection by appellant's representatives and for opening Letter of Credit. Clause 17 of the contract provided for levy of liquidated damages in the event of non-compliance of seller's (respondent's) obligations including timely supply of the material.
- (ii) The quantity of 10,000 was subsequently reduced to 5,297 and the respondent shipped the material in three lots of 1936 nos., 367 nos. and 3,000 nos. on 30.5.1997, 29.6.1997 and 4.3.1999 respectively. Delivery period was extended with token liquidated damages with denial clause for the first and second lot. For the balance 3000 nos., delivery period was extended with liquidated damages and denial clauses to cover foreign exchange and customs

duty variation etc., limiting the total damages to 10% of value of the stores besides expenditure of 'Letter of Credit' extension.

- (iii) Arbitration notice was served by the respondent Firm on 24.5.2000, claiming refund of liquidated damages and other charges totaling to US \$ 10,62,444.16. Shri Ranganath Mishra, former Chief Justice of India, Shri M.V. Ramani, the then COS, Southern Railway and Shri V.S. Malimath, retired Chief Justice Karnataka and Kerala High Court, were appointed as Arbitrators. Petitioner filed their reply to the claims and made counter claims on account of delay in supplies, cost of arbitration proceedings etc.
- (iv) Learned Tribunal in the hearing dated 27.4.2003, came to certain conclusions and passed the order as follows

"After discussing the claims at length with reference to the entire material on record, we have come to following conclusions :

The claim of liquidated damages raised by the respondent (UOI) shall be confined to 1 % uniformly for the entire supply in respect of all the three consignments

The claimant shall be entitled to the price of the material supplied at the stipulated rate for which no payment has been made

The costs actually incurred by the claimant for the LC charges shall be confined to 50%.

In respect of amount in excess of 1% which will now become refundable to the claimant, interest shall be payable at 6% only”.

Costs of the proceedings at USD 10,000 payable to the claimant.

Arbitral Tribunal called upon the parties to clearly indicate within 4 weeks from the date of the above order, the exact amounts under each of the above heads, and on the basis thereof claimant’s dues were to be quantified to determine the stamp duty for the award. It was further held by the Tribunal that other claims of the claimant and all claims raised by the respondent (appellant herein) are negated.

- (v) In pursuance to quantification sought by the Tribunal, appellant submitted computation on 26.5.2003 followed by hearing on 30th May, 2003. The impugned award records “From the submissions, we are satisfied that the parties wanted their dispute to be settled on the basis of the conclusions set out by us on 27.4.2003 subject to the modifications which were suggested to us at the hearing on 30.5.2003 and were agreed”.
- (vi) The award challenged by the appellant in OMP 381/2003, was dismissed on the ground that it was

consensual. The said judgment is impugned before
us.

3. It is the petitioners case that arbitral Tribunal is bound to decide the dispute in accordance with the terms of the contract. Appellant contended as per the terms of contract, liquidated damages could be levied for the delayed period, upto 10%. When the claimants failed to perform the contract, extension of time was given to the claimant only subject to levy of liquidated damages at the rate of 10%. Appellant submitted that the Tribunal acted contrary to the provisions of the contract and the Act and did not encourage parties to a settlement in accordance with section 30 of Arbitration and Conciliation Act, 1996. Instead, after recording five issues, arbitral Tribunal asked the parties to calculate the exact amount arising out of such 5 issues so that necessary stamp duties could be purchased for the award. Counsel contended that such calculation for the purpose of stamp paper cannot amount to any kind of consent, nor any kind of encouragement for the parties for settlement. He submitted that no settlement between the parties was ever arrived at and that the computations were submitted without prejudice to their rights.

4. Appellant's counsel submitted that he had paid/remitted to the respondent a sum of US \$ 3,37,500 towards the liquidated damages and a sum of US \$ 16,856 towards 50% LC charges as per the award without prejudice to the right of the appellant in

order to save the penal interest of 18% per annum. Counsel further submits that the interest as levied is harsh, arbitrary and on the higher side in comparison to the prevailing bank interest.

5. We have heard counsels of both parties and perused the arbitral award along with other documents available on record. Firstly it is seen that as per the arbitral award US \$ 4,64,128.60 inclusive of arbitration cost, 50% LC charges, 6% interest on liquidated damages and liquidated damages in excess of 1% to be returned to the respondent, a total of US \$ 3,54,356 on account of liquidated damages refunded and 50% of LC charges has been paid by the appellant to the respondent without prejudice to the appellants rights under the contract to avoid penal costs on delay of payment @ 18% per annum as per the award.

6. The learned Single Judge has not dealt with the objections raised by the appellant on merits under section 34 of the Arbitration and Conciliation Act, 1996 and dismissed the same on the short ground that it was a consensual award and accordingly, the objections were not maintainable. The appellant has questioned the very basis or existence of consent. The genesis of consensual award lies in the proceedings/order passed on 27th April, 2003 which had also been the basis on which the learned Single Judge has proceeded and dealt with. Reference is required to be made to the proceedings of 27th April, 2003 which are reproduced for facility of reference:-

“PROCEEDINGS

After discussing the claims at length with reference to the entire material on record, we have come to the following conclusions:

- (i) The claim of liquidated damages raised by the respondent shall be confined to 1% uniformly for the entire supply in respect of all the three consignments.
- (ii) The claimant shall be entitled to the price of the material supplied at the stipulated rate (5297) for which no payment has been made.
- (iii) The costs actually incurred by the claimant for the LC charges shall be confined to 50%.
- (iv) In respect of the amount in excess of 1% which will now become refundable to the claimant, interest shall be payable at 6% only.
- (v) We assess the costs of the proceeding at ten thousand US \$ payable to the claimant.

Parties shall now be called upon to clearly indicate within four weeks' from today the exact amounts under each head, and on the basis thereof claimant's due shall be quantified to determine the stamp duty for the award.

Other claims of the claimant and all the claims raised by the respondents are negated.

We are of the unanimous view that if the dues of the claimant to be stated in the award are paid within ninety days from the date of award, no interest shall be payable, otherwise interest @ 18% shall be payable from the date of the award till recovery.

Notify parties and call upon them to appear on 31st May, 2003 with the requisite details at 10 a.m. at the same place.”

7. The parties in compliance with the directions given and the appellant particularly vide its letter of 26th May, 2003 furnished

the information to the Arbitral Board in respect of each of the conclusions recorded in the proceedings of 27th April, 2003. It is significant to notice that the said letter begins with “The respondent is submitting the exact amount as directed vide proceedings dated 27.4.2003 by Hon’ble Arbitrators without prejudice to the rights of the respondent.” (UOI-appellant herein). The letter ends with last two lines as “It is mentioned that the above details as sought by the Hon’ble arbitrators is furnished by the respondents without prejudice to their rights.”

8. The Arbitrators, after the parties complied with the directions given on 27th April, 2003, stated to have taken up the matter for hearing on 30th May, 2003. The original record as produced by the Arbitrators does not carry any recorded proceedings of 30th May, 2008. Counsel for the appellant during the course of hearing sought to hand over an internal noting of their’s titled Sr.No.138 reference : arbitration proceedings held on 30th May, 2003 which recorded directions with regard to payment of fees to the Arbitrators, travel expenses, secretarial expenses etc having been given in the said hearing. However, there is another purported record of proceedings which are erroneously dated 30th June, 2008 which the appellant claims should be 30th May, 2008 which also refers to travel expenses, payment of fees of the Arbitrators and the directions to furnish non judicial stamp paper.

Be that as it may, in the original record, as furnished by the Arbitrators, there is no record of proceedings for 30th May, 2003.

It is only in the arbitral award that a reference is made to the matter having been taken place for further hearing after the order of 27th April, 2007 in the following words:-

“Both the parties have complied with the direction and the matter thus has been taken up for further hearing on 30.5.2003.”

The Arbitrators go on to further record in the award:-

“From the submissions we are satisfied that the parties wanted their dispute to be settled on the basis of the conclusions set out by us on 27.4.2003 subject to the following modifications which were suggested to us at the hearing on the 30.5.2003 and were agreed.”

9. As noted earlier, there is no record of proceedings of 30th May, 2003. It is the appellant’s case that no such agreement was reached or recorded in the hearing. Rather the appellant had even in their letter dated 26th May, 2003 furnished the said information without prejudice to their rights and in compliance with the directions given on 27th April, 2003 which is indicative that there was no consent. The learned Single Judge dismissed the objections by holding the award to be consensual and had also relied on the above quoted portion of the award. The learned Single Judge has also noted that at the end of the award, the Arbitrators have noted “We are thankful to the parties and their counsel for cooperating final disposal of the dispute on terms which are beneficial to the interest of both” and the same again been suggestive of there being consent and agreement. The learned Single Judge, therefore, held that the Arbitral Tribunal had

indicated its mind by recording certain conclusions in the proceedings of 27.4.2003 and the parties agreed to settle the disputes on the basis of said terms. However, certain modifications suggested by the respondent in respect of interest, cost of arbitration and future interest payable etc were discussed on 30th May, 2003 and even those modifications were agreed. The learned Single Judge proceeds to hold that if the appellant had any genuine grievance with regard to the award, it should have addressed a letter or communication to the Arbitral Tribunal disputing the averments made in the said award.

10. Reliance was placed on Shankar K Mondal and others Vs. State of Bihar and others (2003) 9 SCC 519 wherein it was held that “If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call upon the attention of the very Judges who have made the record. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. It is not open to the appellant to contend before this court to the contrary.” The learned Single Judge observed that as to what applied to court proceedings, same analogy would be applicable to arbitral proceedings.

11. Reliance is also placed on Daman Singh Vs State of Punjab (1985) 2 SCC 670 wherein it was observed that where several grounds are taken but later the parties during the course

of arguments confined to few of those grounds, then no grievance can be made that grounds taken have not been considered.

12. We have given due consideration to the findings and reasoning given by the learned Single Judge. We are also conscious of the fact that the Arbitral Tribunal comprised eminent Judges and a high functionary and officer of the Railways and the findings recorded by them deserved the most respectful consideration and should not be lightly disturbed. However, for the reasons stated hereinafter, we hold that finding of the learned Single Judge that award was a consensual award, is not sustainable. The objections to the award as filed, in our view, are, therefore, liable to be disposed of on merits. The reasons are:-

(i) By furnishing of the information in respect of the conclusions recorded by the Arbitrators in their proceedings of 27th April, 2003, an inference of the appellant's having consented to the same, cannot be drawn and more so consent cannot be made the basis of the award. This is especially so in the light of the objections filed and the information being furnished categorically as without prejudice to their rights and contentions. The entire basis of the award being 'consensual' is said to be the deliberations in the hearing held on 30th May, 2003. As observed earlier, there is no record of the said hearing or of the respective submissions made. This is especially so even where the conclusions in respect of which appellant had expressed its reservations by furnishing information as without prejudice to their rights were modified to

the disadvantage of the appellant, without there being a recording of consent in respect thereof. As noted, the only semblance of the recording that is available is with regard to the administrative matters regarding payment of Arbitrators' fees, traveling expenses, secretarial expenses etc. in relation to 30th May, 2003. In the award which was published on 27th June, 2003, a bald recording appears with regard to Arbitrators having been satisfied that parties wanted their disputes to be settled on the basis of conclusions of 27th April, 2003, subject to modifications which were suggested in the hearing on 30th May, 2003 and were agreed. Appellant disputes such an agreement or consent.

(ii) Appellant has also urged that award is vitiated by non giving of the reasons and only conclusions having been given on 27th April, 2003. Reference may usefully be made to Sections 30 and 31 of the Arbitration and Conciliation Act, 1996 giving the procedure with regard to settlement of the disputes through arbitration and the form and contents of arbitral award. There was termination of proceedings as required to be noted in terms of section 30 and recording of agreed terms on the said date. The most natural and normal course of events of 30th May, 2003, when modifications based on settlement and agreement to the earlier conclusions of 27th April, 2003 were allegedly being made, was to have the same recorded and signed by the parties. The absence of the proceedings of 30th May, 2003 coupled with the information having been supplied by the appellant, without prejudice to its rights and contentions and its denial of any

consent raise and cast a serious doubt on the award being consensual.

(iii) In these circumstances, in our view, it is a fit case, where the award cannot be sustained on the basis of consent and would have to be sustained otherwise with objections being disposed of on merits in accordance with law. In our view, appellant's occasion to raise a protest against the award being consensual would arise only after the award was made and published and this being made known to it. In the instant case, objection petition was filed on 23rd September, 2003 without any loss of time and as such not writing any letter of protest in these facts was hardly of any consequence considering the proximity of the date of filing of objection petition.

In view of the foregoing discussion, we allow the appeal and set aside the judgment of the learned Single Judge and remand the matter for objections to be considered on merits without proceeding on the assumption of award being a consensual award.

Manmohan Sarin, J.

Manmohan, J.

July 4th, 2008
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