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IN THE HIGH COURT OF DELHI

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FAO No.127/2006

M/s. Hindustan Lever Ltd. Appellant

through: Mr.Raman Kapur with Mr.Honey Taneja,
Adv.

VERSUS

Shri Shiv Khullar & Anr. Respondent

through: Mr.V.M.Issar, Adv.

FAO No.131/2006

M/s. Hindustan Lever Ltd. Appellant

through: Mr.Raman Kapur with Mr.Honey Taneja,
Adv.

VERSUS

Shri Shiv Khullar & Anr. Respondent

through: Mr.V.M.Issar, Adv.

DATE OF DECISION:

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28.03.2008

CORAM:

Hon'ble Mr.Justice Pradeep Nandrajog

1. Whether reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the Reporter or not? Yes.
3. Whether judgment should be reported in Digest? Yes.

: **PRADEEP NANDRAJOG, J.**

1. Above captioned appeals arise out of 2 identically

worded orders of even date 2.03.2006 passed by the learned Additional District Judge dismissing the objections filed by the appellant under Section 34 of the Arbitration & Conciliation Act, 1996 against the award dated 11.4.1995.

2. Brief facts which are necessary to dispose of the present appeals are that respondent No.1 Mr.Shiv Khullar, the sole proprietor of M/s.Shivam Enterprises and M/s. Khullar Enterprises was the owner of two premises bearing municipal Nos.30 & 32, Main Market, Lodhi Road, Delhi.

3. Respondent No.1 acting as sole proprietor of M/s. Shivam Enterprises and M/s. Khullar Enterprises entered into 2 agreements dated 1.10.1998 with appellant company M/s. Hindustan Lever Ltd. Both the agreements were identically worded save and except, one agreement pertained to M/s. Shivam Enterprises and premises bearing No.30, Main Market, Lodhi Road, Delhi and the other related to M/s. Khullar Enterprises and premises bearing No.32, Main Market, Lodhi Road, Delhi.

4. As per the agreement respondent No.1 agreed to provide his premises to the appellant company for the use of its products. Respondent was required to receive the stock of Kwality Ice Creams (a product of appellant company, store the

same in the premises and further deliver the same to the vending distributors of the appellant company). It was the responsibility of the respondent No.1 to maintain the vending carts and motorized carts as also ensuring that the ice cream is stored in safe and hygienic condition. The appellant company had to pay the service charges @ Rs.0.10 per litre of the products sold through vending carts and invoiced at the said premises. The period of the agreements was 3 years.

5. Respondent No.1 filed 2 petitions under Section 11 of the Arbitration & Conciliation Act, 1996 seeking appointment of an Arbitrator to settle the dispute between the parties.

6. Noting the arbitration clause contained in the agreement dated 1.10.1998 the court referred the dispute to the Arbitrator. Respondent No.2 was appointed as the Arbitrator who was to decide the dispute as per the terms of the arbitration clause contained in the agreement. Since the dispute between the parties pertained to 2 different premises 2 arbitration proceedings were instituted.

7. In the statement of claim filed by respondent No.1 it was alleged that appellant company had illegally terminated the agreements dated 1.10.1998 and claimed service charges for the period 1.6.1999 to 30.9.2001 along with interest from

the appellant company.

8. Appellant company in its reply stated that in May, 1999 respondent No.1 failed to perform his obligation under the agreement, therefore it is not liable to pay service charges claimed by the respondent No.1

9. Vide 2 identically awards of even date 11.4.2005 learned Arbitrator allowed the claim of the respondent No.1. A sum of Rs.7,77,374/- each was awarded in both the awards.

10. Aggrieved by the said awards appellant company filed two objections under Section 34 of the Arbitration & Conciliation Act, 1996. Under-noted grounds were raised in the petition:-

“A. Because the learned Arbitrator has clearly erred in passing the award in favour of Respondent no.1 to the extent of allowing minimum charges along with interest and costs and the award to this extent is liable to be set aside.

B. Because the learned Arbitrator has erred by not appreciating or even discussing the evidence and the cross-examination of the witnesses of the parties. The respondent no.1 had admitted that the agreements were not rent agreements and that he had to be paid for the work done by him. He did no work after May, 1999, had no staff or security and had abandoned the work, thereby making it impossible for the Petitioner to carry on with the agreement. In view of the above, it is apparent that the learned Arbitrator has erred

in awarding the minimum charges along with interest and costs in favour of Respondent no.1 as the same has nowhere been proved. To the contrary the evidence of the parties clearly proves the case of the Petitioner and therefore the impugned award is liable to be set aside to this extent.

C. Because the learned Arbitrator has clearly erred in holding that the agreement between the parties remained in force till 30.9.2001, completely ignoring the evidence and material on record and therefore the impugned award to the limited extent is liable to be set aside. As may be seen from the conduct of the Respondent no.1, he did no work after May, 1999 and is therefore not entitled to any payments for the any period thereafter. The learned Arbitrator has however come to the erroneous finding that the agreement continued to be in operation, the same being completely opposed to public policy and the impugned award is liable to be set aside.

D. Because the learned Arbitrator has erred in holding that the Respondent no.1 was entitled to the service charges for the period when no work was done and also in awarding interest for the said period. It may be seen from the record that the Petitioner had paid three months minimum charges to the Respondent No.1 in accordance with the terms of the agreement. The aforesaid aspect has neither been considered nor even discussed by the learned Arbitrator and therefore the impugned award is apparently erroneous. The said finding and award is completely erroneous, opposed to public policy and morality and is therefore liable to be set aside.

E. Because the learned Arbitrator

completely ignored Section 51 of the Contract Act which clearly provides that where the contract consists of reciprocal promises to be simultaneously performed, no promisor would perform his promise unless the promisee is ready and willing to perform his reciprocal promise. It became clear before the learned Arbitrator that respondent no.1 did not work after May 1999 and once he had clearly expressed his intention not to work under the agreement, the contract containing reciprocal promises, it was squarely covered by sub-clause II of the termination clause of the agreement. Therefore, once respondent no.1 refused to perform his obligations under the agreement, the petitioner to safeguard its interests in the market especially being ice cream products, could not take the risk of supplying any further ice cream products to the respondent no.1 and therefore, obligation to pay service charges by petitioner could not arise. The contract clearly provided for payment to respondent no.1 only for the work done at the rate of of Rs.0.10 per liter by products sold through vending carts/motorized carts.

F. Because respondent no.1 had admitted in his cross examination that he gave no notice or even a letter to petitioner demanding alleged minimum service charges after May 1999. He admitted that he maintained cash books and ledger during the period he worked for the petitioner and not thereafter but no account books of any nature were produced by the respondent no.1. He also admitted that he had not shown alleged minimum charges outstanding from petitioner even in his account books or in his income tax returns. Therefore, from May 1999 respondent no.1 did not claim any alleged amount from petitioner till he filed petition in this regard. He produced no account books

and did not show the minimum service charges outstanding allegedly from petitioner in his account books or even in income tax returns which clearly establishes that agreement came to an end after May 1999 otherwise respondent no.1 would have at least once demanded amount from petitioner if he was suffering any loss.

G. Because the evidence produced by respondent no.1 could under no circumstances show that respondent no.1 kept the premises vacant after May 1999 and to the contrary the evidence of the parties showed that respondent no.1 was to be paid only for the work done as per rates specified in the agreement. Admittedly no work was done and reciprocal promises not performed, there was no question of payment of any minimum service charges to the respondent no.1. In fact the Arbitrator himself found that the respondent no.1 did not produce any evidence to establish that any staff or security personnel had been employed by the respondent no.1 after May 1999. This was also admitted by respondent no.1 in his cross examination. Once it was clear that the respondent no.1 had not engaged any staff or security after May 1999, the intention not to work was apparent and once the Arbitrator rejected the claim for security charges obviously, the alleged claim for minimum service charges was also liable to be rejected. The term "service charges" itself shows that they were payable for service performed and once admittedly the respondent no.1 had no staff and security after May 1999 where was the question of payment of any service charges to the respondent no.1. This is the reason why after May 1999, the respondent no.1 did not address any correspondence or demanded any amount from petitioner. Therefore, the learned Arbitrator has clearly

ignored material on record and has given legally erroneously findings. On this ground alone the Award to the extent challenged in these objections, is liable to be set aside.

H. Because perusal of the Award would clearly show that the learned Arbitrator has not dealt with any of the aspects as set out herein above which establishes the amount and complete ignorance of material placed before the Arbitrator. The fact of non employment of staff itself demolishes the claim of petitioner for minimum service charges and the contract being a service contract and not a rent agreement. Once no service was performed and admittedly respondent no.1 not being in a position to do so, there was no occasion for the Arbitrator to award minimum service charges to the respondent no.1. Apparently the Award is against law, suffers from non application of mind to the material placed before the Arbitrator and as such, is perverse and is liable to be set aside to the extent challenged in these proceedings.”

11. Noting the judgments of the Supreme Court in Konkan Railway Corporation & Ors. Vs. Mehul Construction Co. AIR 2000 SC 2821 and Olympus Superstructure Pvt. Ltd. Vs. Meena Vijay Hetan and Ors. AIR 1999 SC 2102, the judgment of the Orissa High Court in the decision reported as Orissa Oils Ind. Ltd. Vs. TRIFED & Ors. 98 (2002) DLT 659 (DB) and the judgment of the Delhi High Court in Union of India & Anr. Vs. Bakshi Steel Ltd., 2005(3) Arblr. 74 (Delhi) the learned Trial Judge returned a finding as under :-

“In the present case, the petitioner company is assailing the said award on merits, which is beyond the purview of this court under Sec. 34 of the Arbitration Act.”

12. On the basis of the afore-noted finding vide impugned order(s) dated 2.3.2006 learned Trial Judge dismissed the objections filed by the appellant under Section 34 of the Arbitration & Conciliation Act, 1996.

13. It would be relevant to note that an award would always be challenged on merits. Thus, for the learned Trial Judge to record that it is impermissible to assail an award on merits is patently illegal. Probably, the learned Judge intends to say that it is impermissible for the court to re-appreciate the evidence while considering a challenge to the award. Indeed, Shri V.M.Issar, learned counsel for the respondent

sought to urge that a perusal of the objections show that the appellant is challenging the findings of fact returned by the Arbitrator on the basis of evidence.

14. In the decision reported as ONGC Ltd. Vs. Garware Shipping Corporation Ltd. AIR 2008 SC 456 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 under Section 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 ONGC Vs. Saw Pipes Ltd. JT 2003 (4) SC 171, 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.

17. A commonly held belief that while considering objections under Section 34 of the Act the court cannot look into the evidence before the Arbitrator also needs to be

clarified. There is a difference in re-appreciating evidence and considering whether material evidence has been ignored. Whereas the former would be an activity prohibited while considering objections under Section 34 of the Act for the reason an Arbitrator is a chosen forum by the parties to conclude rival issues of fact between the parties, the latter would be an activity to find out whether learned Arbitrator has acted within his mandate for the reason the mandate of the Arbitrator is to decide on facts after considering all the relevant facts and not ignoring the same.

18. Thus, while considering objections under Section 34 the court must be conscious of the nature of challenge and must bring out the same with clarity.

19. To illustrate with reference to the instant dispute, in ground No.C it has been urged that there is no evidence on record to establish that the respondent worked under the contract beyond May, 1999. A grievance has been laid that in spite thereof the learned Arbitrator has held that the contract remained in force till 30.9.2001. Does this challenge not require the court to consider whether indeed there is any evidence to sustain the finding that the agreement remained in force till 30.9.2001 or to otherwise consider the effect of the

plea of the appellant pertaining to cessation of the work in May, 1999? Further, in ground No.E a specific challenge has been laid predicated under Section 51 of the Indian Contract Act. Suffice would it be to note that Section 51 of the Contract Act underlines a policy of reciprocity. Was the challenge not to be considered with reference to the decision in Saw Pipes where it was held that if a contract is contrary to a fundamental policy of Indian law it requires to be set aside.

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.

21. I am not speaking any further lest parties are prejudiced before the learned Trial Judge for the matter requires to be remanded for fresh adjudication with a direction that the learned Judge would deal with the 8 objections specifically urged and consider each one of them within the parameters of Section 34 of the Act as explained in the decision in Saw Pipes case (supra) and ONGC's case (supra) as also clarified in the present order.

22. The appeals are allowed. Impugned orders dated 2.3.2006 in both appeals are set aside. Objections filed by the appellant before the learned Trial Judge are restored for fresh decision in accordance with law.

23. Parties are directed to appear before the learned District & Sessions Judge on 19.5.2008.

24. No costs.

25. TCR be returned forthwith.

March 28, 2008
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PRADEEP NANDRAJOG, J.