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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: March 30, 2009

Date of Order: April 02, 2009

+ OMP 81/2009

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02.04.2009

**M/s South India Shipping &
Export Co. (SISECO)**

...Petitioner

Through : Mr. Sanjay Das with Mr. Somit Kumar, Advocates

Versus

**Tribal Cooperative Mrkt. Dev.
Fed. Of India Ltd. (TRIFED)...**

Through :
Respondent

JUSTICE SHIV NARAYAN DHINGRA

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

JUDGMENT

1. By this petition under Section 34 of the Arbitration & Conciliation Act, 1996, the petitioner has assailed the award dated 23rd October 2008 whereby the learned Arbitrator awarded an amount of Rs.44,48,187/- to the claimant (respondent herein).

2. The objections to the award have been filed by the petitioner in the form of an appeal and in the objections the petitioner has mentioned the grounds of appeal on which the award was being challenged. A perusal of these grounds of appeal mentioned by the petitioner would show that the petitioner was aggrieved by the award since it considered that the learned Arbitrator had not appreciated the terms and conditions of the contract properly and has also not appreciated the evidence led by the objector

(petitioner herein). It is stated by the petitioner that the learned Arbitrator passed the impugned award in violation of the settled principle of promissory estoppel. The petitioner had spent huge amount on the basis of assurance given by the respondent within or without the agreement and the Arbitrator could not have allowed the respondent to derive undue advantage/ benefits received under this assurance. The other ground taken by the petitioner is that the award was devoid of any reasoning and it was a ex parte award resulting into injustice to the petitioner. The Arbitrator committed an error apparent on the face of record by not appreciating the facts properly.

3. Under Section 34 of the Arbitration & Conciliation Act, 1996 an award can be set aside by this Court only on the grounds as set out in Section 34. Section 34 reads as under:

*"34. Application for setting aside arbitral award.—
(1).....*

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so

submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation.—Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

4. The petitioner had not challenged the award on any of the grounds as available under Section 34 of the Act but has preferred an appeal

against the award before this Court in the garb of Section 34. It is settled law that this Court cannot act as a Court of appeal under Section 34 and cannot re-appreciate the evidence and give judgment on the disputes between the parties as an appellate court. An award can be set aside only if the petitioner makes out a ground as set out in Section 34.

5. A perusal of the award passed by the learned Arbitrator would show that the petitioner's attitude before the Arbitrator has been just to prolong the proceedings somehow. Initially, during the arbitral proceedings, the petitioner in July 1998 requested the Tribunal for adjournment and sought time for resolving the disputes by mutual discussion and cooperation. The Tribunal gave time to the petitioner for an out of Court settlement. However, this settlement was not arrived at for eight years and the Tribunal was informed only in July 2006 that out of Court settlement could not be arrived at and the arbitral proceedings recommenced after a gap of about 8 years in July 2006. During subsequent hearings when the matter was listed for cross examination of respondent's/ claimant's witnesses on 20th February 2008 and claimant witnesses were present and the counsel for the petitioner did not appear and requested for an adjournment on telephone itself. The Tribunal adjourned the matter for cross examination of claimant/respondent witnesses on 14th March 2008. Again on 14th March 2008, three witnesses of the respondent viz Mr. A.K. Kaul, Shri V. Ramanathan and Shri Sandeep Pehalwan were present but none turned up for the petitioner despite notice of that date having been sent to them. The Tribunal proceeded the matter ex parte. On next date, counsel for the petitioner herein made an application for setting the ex

parte order. This was allowed subject to costs and the matter was listed on 14th May 2008 for cross examination of claimant's witnesses on 4th May 2008. Again on 4th May 2008, three witness of the respondent were present. Counsel for petitioner after starting cross examination stopped the cross examination in between and wanted that its senior advocate should be awaited. The senior advocate was awaited by the Tribunal up to 3.40 pm but the senior advocate did not arrive. Thereafter, the cross examination of the witness was closed and the matter was listed on 22nd July 2008 on 11.30 am and a notice was sent to both the parties for 22nd July 2008 but none appeared on behalf of the petitioner herein and the Tribunal had to hear arguments only of one side. Thereafter, the matter was reserved for orders. The petitioner herein then moved an application for setting aside the ex parte award which was dismissed by the learned Arbitrator with a reasoned order since the application did not disclose any ground for setting aside the ex parte award.

6. Since the petition filed by the petitioner does not disclose any ground of challenge to the award as envisaged under Section 34 of Arbitration & Conciliation Act, 1996, the petition is liable to be dismissed and is hereby dismissed as such. No orders as to costs.

April 02, 2009
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SHIV NARAYAN DHINGRA J.