

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ O.M.P. 200/1998

**BOMBAY COLOUR LAB
AND ORS.**

Through

..... Petitioners

Mr. Tripurari Ray, Advocate

versus

**JINDAL PHOTO FILMS LIMITED
AND ORS.**

Through

..... Respondents

Mr. Ajay Jain with Mr. Jitendra
Jain, Advocates for R-1

Mr. Aseem Mehrotra, Advocate
for R-3

Date of Decision : December 02, 2009

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

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

J U D G M E N T

MANMOHAN, J (ORAL)

1. Present objection petition has been filed under Section 34 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act, 1996") challenging the arbitral Award dated 13th May, 1998 passed by the sole Arbitrator, Mr. G.S. Agarwala, Advocate.

2. Mr. Tripurari Ray, learned counsel for petitioner submitted that respondent no. 1 had unilaterally referred the matter to Mr. G.S. Agarwala as

sole Arbitrator even though he was not the named arbitrator in the Agreement dated 1st January, 1996. According to Mr. Ray, none of the blanks, including the name of the arbitrator in the aforesaid Agreement were filled up. Mr. Ray referred to respondent no. 1's letter dated 11th November, 1995 wherein the said respondent had asked the petitioner not to write anything in the Agreement except signing each page of the same. In this connection, Mr. Ray relied upon petitioner's own letter dated 8th February, 1996. The relevant portion of the said letter reads as under :-

“As desired by your goodself I am sending the duplicate Agreement signed by us and the guarantor. I may mention that the signed agreement contains all the entries unfilled. Therefore, I request you to kindly fill the same in the presence of both the parties to avoid any kind of misunderstanding. Your co-operation is anticipated in this regard.

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We have also requested you in our letter for fixing a date for filling up the signed agreement. However, no any intimation in this regard has been made to our office so far.”

3. Mr. Ray next submitted that the impugned Award was passed in breach of Sections 75 and 81 of Act, 1996 inasmuch as the Arbitrator in the impugned Award had relied upon certain negotiations which had taken place between the parties during conciliation proceedings.

4. Mr. Ray lastly submitted that the Arbitrator had not allowed evidence to be recorded with regard to a very vital issue, namely, whether the machine handed over by respondent no. 1 was a faulty reconditioned machine or not. According to Mr. Ray, by disallowing the petitioner from leading evidence on this issue, Arbitrator had clearly showed bias in favour of respondent no. 1.

5. On the other hand, Mr. Ajay Jain, learned counsel for respondent no. 1 contended that petitioner's letter dated 8th February, 1996 was a forged and fabricated document. He stated that the Agreement placed on the arbitral record clearly showed that all blanks were duly filled up before the parties entered into an agreement. He also pointed out that petitioner had initially complied with the Agreement executed between the parties without raising any such objection inasmuch as petitioner had paid two monthly installments, namely, for the months of April and May, 1996.

6. Mr. Jain further submitted that the Arbitrator never acted as a mediator/conciliator in accordance with Act, 1996. Therefore, according to Mr. Jain, there was no occasion for the Arbitrator to have violated Sections 75 and 81 of Act, 1996.

7. Mr. Aseem Mehrotra, learned counsel for respondent no. 3, the guarantor, stated before this Court that during the period petitioner alleged that the machine was not functioning, petitioner had issued advertisements in Jammu newspaper claiming that the said machine was in perfect working condition and had even asked the public at large to get their films developed and printed on the said machine in an air-conditioned environment.

8. In rejoinder, Mr. Ray submitted that the requirement of confidentiality under Section 75 of Act, 1996 had been breached inasmuch as Arbitrator had acted as a conciliator in accordance with Section 30 of Act, 1996. The relevant portion of Section 30 of Act, 1996 reads as under :-

“30. Settlement. –

(1) It is not incompatible with an arbitration agreement for an arbitrate tribunal to encourage settlement of the dispute and, with the agreement of the parties; the arbitrate tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement....”.

9. Having heard the parties at length, I am of the view that the scope of interference in present proceedings under Section 34 jurisdiction is not unlimited. In a nutshell, in Section 34 proceedings an impugned award is liable to be set aside only if it is contrary to Statute or contractual provision or the same is opposed to public policy (Refer to ***Delhi Development Authority Vs. R.S. Sharma and Company, New Delhi*** reported in (2008) 13 SCC 80).

10. In the present instance, I find that the objection with regard to absence of a named arbitrator was taken by petitioner even before the Arbitral Tribunal (in short “AT). However, AT rejected the said objection by observing as under :-

“In the replication filed by the claimant, it is to be stated that the machine lease agreement was dully filled up before sending the same to the respondents for the signatures and execution, the same was duly signed by the respondents and sent back to the claimant at New Delhi and the claimant, thereafter signed the same on 1.1.1996 that the binding contract between the parties came into existence on 1.1.1996 at New Delhi, that the machine lease agreement was not sent by respondent Nos. 1, 2 and 3 was not sent from Jammu through courier service, but the same was brought personally to the claimants office in Delhi by respondent No. 4 who signed the same in Delhi. That the alleged letter of respondent No. 1, 2 and 3 dt. 8.2.96 with the courier receipt is manipulated and fabricated, that initially the payment schedule was contemplated for 48 instalments but on the insistence of the respondent, the same was revised to 36 monthly instalment, that the rate of interest was as agreed with the respondents, that the name of the Sole Arbitrator was duly filled in before the same was signed by the respondents. It is further stated that there was no defect or deficiency in the machine and that the report signed by Sanjay Jangid, who was a Technician in the

employment of the Company, as a false and fabricated one as he had already left the service of the claimant company long time back on a estranged terms, that the said report in question was given by him to respondent No. 1, 2 and 3 after the present disputes had arisen to malign the claimant.

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The claimant had made a reference to the Sole Arbitrator vide their letter dt. 5th August 1997, and a copy of the said letter was duly sent to and served on the respondents. Had the respondents not agreed to the Sole Arbitration of the present Sole Arbitrator, the respondents would have taken the said objection immediately within 15 days of receipt of the same letter as required by Section 12 of the Arbitration and Conciliation Act, no such objection was taken by the respondents. It was only in the written statement of the respondents which was filed as late as on 28.11.1997 that the said objection was raised for the first time. Significantly, respondent No. 4 has not raised any such objection. Therefore, I am of the view that the name of the Sole Arbitrator was dully filled up before it was signed by the parties. Section 7 of the Act defines an Arbitration Agreement. Section 7(4) provides that an arbitration agreement is in writing, if it is contained in a document signed by the parties. Since the Agreement in question is duly signed by the parties and the Arbitration Agreement is contained therein, therefore, it constitutes an Arbitration Agreement between the parties. The objection of the respondents to the authority and jurisdiction of the Sole Arbitrator is therefore, over ruled.

(emphasis supplied)

11. Moreover, in my opinion, since respondent no. 1 had disputed petitioner's letter dated 8th February, 1996 and alleged it to be a forged and fabricated document, petitioner was legally bound to prove the said document – which it admittedly failed to prove. Upon a perusal of the Agreement executed between the parties, I find that respondent no. 3, who is a guarantor, had also executed the said document but he had not taken a plea before AT that the aforesaid Agreement contained blanks or that the arbitrator's name was subsequently filled up. Consequently, the plea advanced by the petitioner that there was a unilateral reference by respondent no. 1 to Arbitrator in the present case, cannot be accepted.

12. As far as breach of Sections 75 and 81 of Act, 1996 is concerned, I am of the view that the Arbitrator did not act as a mediator/conciliator in accordance with Part III of Act, 1996 which specifically provides a procedure for initiation of conciliation proceedings. In fact, I find that in the present case, the Arbitrator had only recorded an offer and counter-offer which had been made before him during the arbitration proceedings. Moreover, on this issue I am fortified by a judgment of this Court rendered in the case of ***ERA Constructions (India) Limited Vs. D.K. Sharma, Prop., Keshav Security Services (Regd.)*** reported in ***2008(1) Arb. L.R. 205 (Delhi)*** wherein this Court has held as under:-

“2. The impugned award has been assailed before this court on three grounds. The first ground is that certain materials disclosed to the learned Arbitrator during conciliation have been used by the learned Arbitrator in the course of the award and therefore the requirement of confidentiality under Section 75 read with Section 30 of the said Act has been breached.....

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4. Taking up the first ground raised by the learned counsel for the petitioner, one finds that Section 75 of the said Act provides that notwithstanding anything contained in any other law for the time being in force, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. It is also provided that confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for the purposes of implementation and enforcement. Section 75 falls within Part III of the said Act which pertains to conciliation and has no reference to Part I of the Act which deals with arbitration. Faced with this situation, the learned counsel for the petitioner sought to invoke the provisions of Section 30 of the said Act which falls within Part I and relates to settlement. Section 30 stipulates that it is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement. It was submitted that some sort of conciliation and / or settlement was conducted before the learned Arbitrator and the petitioner had disclosed certain confidential matter which was used

by the learned Arbitrator against the petitioner. First of all, it must be stated that the learned counsel for the petitioner was unable to point out any material which the learned Arbitrator had used and which did not already form part of the record. Secondly, Section 30 relates to an arbitral award resulting, on agreed terms, in the course of settlement. The present award is not an award on agreed terms but is an award made by the learned Arbitrator on contest by the parties. Therefore, invoking the provisions of Section 30 would not be appropriate. In any event, this argument with regard to confidentiality is without any factual basis as nothing has been pointed out which would enable this court to come to the conclusion that the Arbitrator based his award on confidential material provided by the petitioner during the course of arbitration / conciliation.”

13. As far as disallowing of evidence with regard to a particular issue is concerned, I am of the view that in view of Section 19 of Act, 1996, AT was not bound to strictly follow the Code of Civil Procedure, 1908 or Indian Evidence Act, 1872. In any event, in the present case I find that respondent no. 3 who is the guarantor and co brother-in-law of petitioner had clearly admitted before AT that said machine was in perfect working condition. According to me, the various advertisements published by petitioner in Jammu newspaper clearly proves that the said machine was in perfect working condition. In this connection, I may refer to the following observations made by the AT in the impugned Award :-

“In the meantime, respondent No. 4 filed an application on 5.12.1997 together with some envelopes and newspaper cuttings to show that the Mini Lab in question was in perfect working condition, and the respondents No. 1, 2 and 3 were regularly giving advertisements in newspapers in Jammu for developing and printing of films on computerised Japanese machine in airconditioned environment.

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Regarding the contention of the respondents that the Mini Lab in question was a defective one with several deficiencies in it, I find that the said contention is merely an afterthought. The respondents had not taken any objection regarding any alleged defect or

deficiency in the machine, but the main thrust of their objection was that the cost of the machine should be calculated at Rs. 29.0 lacs instead of Rs. 34.0 lacs and the instalments should be calculated taking into account the rate of interest at 15% instead of 17%. This was also the basis on which the respondents made an offer of settlement during the Arbitration Proceedings before me as reflected in the minutes of meeting dated 2.1.1998. I am also convinced that the machine in question is in perfect working condition as stated by respondent No.4 in his written statement and the same is also reflected in the various Newspaper advertisement filed by respondent No. 4 before me during the course of Arbitration Proceedings. As to the reports allegedly signed by Shri Sanjay Jangid, Technician of the claimant company, I find that the same is absolutely unreliable. According to the said report the machine is not in a position to install at all. However, it is an admitted fact that the machine was duly installed and even according to the letter of respondents Nos. 1, 2 and 3 dated 31.7.96, the machine had stopped working since the morning of that day. Obviously the machine was working in good condition up to 30.6.1996 and may have developed some minor maintenance problem as it is clear from the said letter that only the main tank level was low which was not being cleared. It implies that it was only a minor maintenance problem and not something which can lead to an inference that the machine was defective or deficient in any way. The report allegedly signed by Shri Sanjay Jangid is not corroborated by the facts of the case and the subsequent conduct of the parties. The same is, therefore, held to be not worthy of any consideration.

14. No defect or shortcoming has been pointed out before me regarding the aforesaid reasoning in the impugned Award.

15. Accordingly, the impugned Award calls for no interference in Section 34 proceedings and consequently, present petition is dismissed but with no order as to costs.

MANMOHAN,J

DECEMBER 02, 2009

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