

* **HIGH COURT OF DELHI : NEW DELHI**

FAO No.268 of 2009

% Judgment reserved on: 2nd September, 2009

Judgment delivered on: 7th September, 2009

M/s. Ways Infotechnologies Pvt. Ltd.

A Company incorporated under the
Companies Act, 1956

Having its office at

(Its through Mr. Rajeev Aggarwal, Director)

31/3203, Beadon Pura, Karol Bagh

New Delhi-110005.

....Appellant.

Through: Mr. Sanjoy Chose, Adv.

Versus

1. M/s. Kotak Commodity Services Ltd.

106, Ist Floor, Amandeep Building,

14 KG Marg, New Delhi-11001.

2. The Arbitration Division

Multi Commodity Exchange of India Ltd.

102 A, Landmark, Suren Road, Chakala

(Andheri (East), Mumbai-400093.

3. Justice Mr. A.D. Tated (Retd)

Sole Arbitrator

C/o. Multi Commodity Exchange of India Ltd.

102A, Landmark, Suren Road, Chakala

(Andheri (East), Mumbai-400093. ...Respondents.

Through: Nemo.

Coram:

HON'BLE MR. JUSTICE V.B. GUPTA

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

V.B.Gupta, J.

In this appeal there is challenge to the judgment dated 1st April, 2009 of Additional District Judge, Delhi, vide which appellant's petition, under Section 34 of Arbitration and Conciliation Act, 1996 (for short as 'Act') was dismissed.

2. Dispute arose between the parties, since appellant claimed Rs. 5,00,000/- (Five Lacs) with interest from respondent-member broker of Multi Commodity Exchange of India towards loss, as result of respondent's squaring its sale position in Silver on 17th March, 2008, without appellant's instructions or consent. The matter was referred to Arbitrator.

3. Arbitrator vide his award dated 5th November, 2008, dismissed appellant's claim.

4. Appellant, thereafter, filed petition under Section 34 of the Act, which was dismissed, vide impugned judgment.

5. It is contended by learned counsel for appellant that trial court wrongly applied restrictive and narrow view to arbitral mis-conduct, contrary to the view of Supreme Court in ***Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705***, in which Court observed;

“The phrase “public policy of India” is not defined under the Act. Hence, the said term is required to be given meaning in context and also considering the purpose of the section and scheme of the Act. It has been repeatedly stated by various authorities that the expression “public policy” does not admit of precise definition and may vary from generation to generation and from time to time.

Therefore, in a case where the validity of award is challenged, there is no necessity of giving a narrower

meaning to the term “public policy of India”. On the contrary, wider meaning is required to be given so that the “patently illegal award” passed by the Arbitral Tribunal could be set aside.”

6. Other contention is that Arbitrator failed to note that as per bill dated 15th March, 2008, margin demanded by respondent (i.e. Rs.2,64,768/-) was already available with him thus, there was no requirement to seek additional margin.

7. It is also contended that respondent in his talk with appellant’s representative admitted that, there were certain complications in his office and his representative would visit appellant’s office on 18th March, 2008. Respondent ought to have waited till that date, before liquidating appellant’s position unilaterally and without obtaining instructions.

8. Lastly, in telephonic conversation, dealer of respondent suggested that additional margin money be deposited, but he was supposed to supply the bank

code for the said purpose, which in fact was never supplied.

9. Section 34 of the Act read as under:-

“34. Application for setting aside arbitral award-(1) Recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub Section (3)

(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 with 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."

10. Supreme Court in ***Grid Corporation of Orissa Ltd.& Anr. V . Balasore Technical School***, JT 1999(2) SC 480 observed;

“The award of the Arbitrator is ordinarily final and conclusive as long as the Arbitrator has acted within its authority and according to the principle of fair play. An Arbitrator’s adjudication is generally considered binding between the parties for he is a Tribunal selected by the parties and the power of the court to set aside the award is restricted to cases set out in Section 30 of the Arbitration Act. It is not open to the Court to speculate where no reasons are given by the Arbitrator, as to what impelled him to arrive at his conclusion. If the dispute is within the scope of the arbitration clause it is no part of the province of the court to enter into the merits of the dispute. If the award goes beyond the reference or there is an error apparent on the face of the award it would certainly be open to the court to interfere with such an award.”

11. In ***Food Corporation of India v. Chandu Construction and Anr., JT 2007 (5) SC 305,***

Supreme Court observed;

“While considering objections under Section 30 of the Arbitration Act, 1940 (for short ‘the Act’), the jurisdiction of the Court to set aside an award is limited. One of the grounds, stipulated in the Section, on which the Court can interfere with the award is when the Arbitrator has

‘misconducted’ himself or the proceedings. The word “misconduct” has neither been defined in the Act nor is it possible for the Court to exhaustively define it or to enumerate the line of cases in which alone interference either could or could not be made. Nevertheless, the word “misconduct” in Section 30(a) of the Act does not necessarily comprehend or include misconduct or fraudulent or improper conduct or moral lapse but does comprehend and include actions on the part of the Arbitrator, which on the face of the award, are opposed to all rational and reasonable principles resulting in excessive award or unjust result.”

12. In ***Markfed Vanaspati and Allied Industries v. Union of India, JT 2007 (11) SC 141***, Supreme Court considered the scope of interference in a non speaking award. The Court held;

“15. The decided cases of this Court demonstrate that this Court has consistently taken the view that scope of interference in a non-speaking award is extremely limited. The Court cannot probe into the mental process of the Arbitrator. The court should endeavour to support a non-speaking arbitration award provided it adhered to the parties agreement and was not invalidated due to Arbitrator’s misconduct.

16. Russell on Arbitration 19th Edition at Pages 110-111 described the entire genesis of arbitration as under;

An Arbitrator is neither more or less than a private judge of a private court (called an arbitral tribunal) who gives a private judgment (called an award). He is a judge in that a dispute is submitted to him: he is not a mere investigator but a person before whom material is placed by the parties, being either or both of evidence and submissions: he gives a decision in accordance with his duty to hold the scales fairly between the disputants in accordance with some recognized system of law and rules of natural justice. He is private in so far as (1) he is chosen and paid by the disputants (2) he does not sit in public (3) he acts in accordance with privately chosen procedure so far as that is not repugnant to public policy (4) so far as the law allows he is set up to the exclusion of the State Courts (5) his authority and powers are only whatsoever he is given by the disputants agreement (6) the effectiveness of his powers derives wholly from the private law of contract and accordingly the nature and exercise of those powers must not be contrary to the proper law of the contract or the public policy of England bearing in mind that the paramount public policy is that freedom of contract is not lightly to be inferred with."

13. In view of above decisions, it is to be seen as to whether arbitrator in the present case, has given reasons or not and whether he mis-conducted himself.

Relevant findings of Arbitrator are as under;

“After hearing the talk between the authorised representative of the applicant and the dealer of the respondent recorded in the CD of which transcript is on record, I find that the respondent is right in saying that the additional margin was sought from the applicant on 15.03.08 and though the applicant agreed to top up the margin did not do so. The respondent is also right in its submission that before the trading started on 17.3.08 the authorised representative of the applicant was tried to be contacted; he could be contacted only after the sale position of the applicant in Silver was squared. The bill dated 17.3.08 shows that the margin was short by Rs.69,840/- and the talk recorded in the CD shows that additional margin of Rs.69,000/- was sought by the respondent which though the applicant agreed to furnish, was not furnished and hence when the price of the Silver substantially arose on 17.3.08 at 10.13 a.m. the respondent squared the sale position of the applicant in Silver by purchasing 4 lots of Silver.”

Arbitrator further held;

“The respondent has proved that there was deficiency in the margin in the sale position of Silver and the applicant on 15.3.08 was called upon to top up the margin by providing additional margin of Rs.69,000/- but the applicant did not comply with the requisition of the respondent and hence as provided in the Member Client Agreement entered into between the parties and also as per the Business Rules and Regulations of the MCX, the respondent was entitled to square the sale position of the applicant in Silver which he did on 17.3.08 and submitted the bill by Email to the applicant. The applicant tried to bolster up his claim by resorting to “suppressio very and suggestion falsi” but the applicant was exposed by the record of the talk between authorised representative of the applicant and the respondent’s dealer maintained in the CD form by the respondent. In the result the applicant’s claim fails.”

14. As per above findings of Arbitrator, it cannot be said that Arbitrator committed any mis-conduct or misused his authority.

15. The case cited by learned counsel for appellant is not applicable to the facts of the present case.

16. Present appeal is without any basis and same is dismissed with costs of Rs.5,000/-.

17. Costs be deposited with Registrar General of this Court, within one month from today.

18. List for compliance on 9th October, 2009.

7th September, 2009
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V.B.GUPTA, J.