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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: September 04, 2009

Date of Order: September 15, 2009

+OMP 494/2009

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Mr. Punit Chainani

Through: Mr. A.J. Bhambhani with Ms. Nisha Bhambhani, Advocates

15.09.2009

...Petitioner

Versus

M/s Bhalla Techtran Industries Ltd.

Through: Nemo

...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. This petition under Section 34 of Arbitration & Conciliation Act, 1996 ("the Act", for short) has been preferred by the petitioner raising certain objections against an award dated 16th May, 2009.

2. The petitioner and respondent had agreed to enter into an agreement in respect of 5000 imported watches which were in possession of petitioner. The watches were of 'Time Engine' and 'ZZYZ Series'. As per the agreement, the petitioner was under an obligation to clear the consignment of watches by 15th January 1998. Out of 5000 watches, the petitioner collected only 405 pieces of watches and issued a cheque of Rs.5 lac dated 15th December 1997. This cheque also got dishonoured. According to the claimant (respondent herein), the petitioner was under contractual obligation to take the leftover

consignment of watches and pay a sum of Rs.36,34,475/- in terms of agreement. As petitioner failed to lift the consignment, the claimant raised a dispute. The petitioner took a stand that he was merely providing consultancy services and he had issued a cheque of Rs.5 lac only as a guarantee for performance of his obligations. It is submitted by petitioner (objector) that it was mentioned in the agreement that the goods picked up from claimant shall never be in excess of Rs.5 lac. In order to cover this risk factor he had issued a cheque of Rs.5 lac. He was only to find appropriate party who would buy the watches. However, he found that the first consignment of watches sent by the claimant had serious defects and the watches were not marketable. He, therefore, wrote to the claimant not to present the cheque. He had no obligation under the agreement and award was bad in law and contrary to the contract.

3. In the claim petition, claimant had asked for the specific performance of the contract and requested that the remaining watches be lifted by petitioner and the costs of watches, as agreed, along with interest be allowed in favour of claimant. The learned arbitrator after considering the averments and evidence of both the parties observed that the relief qua specific performance of the contract was not maintainable. He, therefore, considered about alternative relief of awarding damages and came to conclusion that the breach of the contract was on the part of the petitioner. He observed that the parties had entered into the MOU whereunder the petitioner had liability to lift the consignment of watches against agreed price. After failure of petitioner, a meeting had taken place between the parties on 18th May 1998 and the parties had arrived at a consensus. As per this consensus, the petitioner had agreed to pick the consignment of the entire lot i.e. 4865 pieces of watches

(out of which 465 pieces of watches were already with the petitioner) and the petitioner was to pay a total value of Rs.30 lac for these watches to claimant (respondent herein). Sales tax etc was to be borne by both the parties equally. The petitioner was to issue monthly cheques starting from 1st July 1998 for Rs.4,50,000 till December 1998 with the last cheque dated 1st January, 1999 for Rs.4,75,000/- to cover the amount of Rs.30 lac. The interest, cost of surcharge etc and expenditure was to be borne by the respondent. This agreement dated 18th May, 1998 was in the form of an award and it was recorded that this award was acceptable to both the parties and the same shall not be challenged in any Court of law. However, despite the parties having arrived at this agreement, the matter had again come to the Court and the reference was made under the directions of the Court to an arbitrator.

4. The learned arbitrator while deciding the claim of the claimant about the damages took the value of watches as Rs.30 lac. The learned arbitrator during arbitral proceedings also asked the claimant to put the watches on auction. The auction notice for these watches was published, however, only one person turned up and he offered Rs.50,000/- only for the watches. The learned arbitrator while awarding damages to the claimant took the value of watches as Rs.30 lac and then considered that the claimant was supposed to mitigate the losses and observed that since the watches were designer watches, fast losing their value and if claimant had tried to mitigate the losses, he could have got 20% of the value of watches. He, therefore, considered that the mitigation can only be considered to the tune of 20% of the value of watches. Thus, considering the value of watches as Rs.30 lac, he awarded the damage of Rs.24 lac after taking 20% as mitigation and out of

Rs.24 lac, he deducted Rs.50,000/- as the present value of watches and awarded Rs.23,50,000/-. Over this amount, the learned arbitrator awarded interest @ 9% per annum with effect from 1st June 1998 till 30th April 2009.

5. The petitioner has assailed the award on the ground that on the one hand, the arbitrator has held that the award could not be specifically performed and on the other hand by awarding the value of watches to the claimant, the arbitrator has specifically enforced the award.

6. I consider this plea of petitioner must fail. What the learned arbitrator has stated was that the petitioner cannot be forced to take all the watches and pay price as agreed between the parties to claimant. The specific performance herein would have amounted to forcing the petitioner to purchase the watches at the agreed price and then awarding interest on that price for all previous years. In my view, this ground for challenging the award is not tenable.

7. The other ground for challenge taken by the petitioner is that the calculation of the damages by the learned arbitrator was in complete violation of Section 73 and 74 of the Contract Act particularly in relation to proof of damages and mitigation thereof. It is submitted that it was the duty of the claimant to mitigate the losses and the claimant should have sold these watches between June and December 1998 when the petitioner had failed to lift the watches as per the consent award. It was obligatory upon the claimant to mitigate the losses by selling the watches and the arbitrator wrongly calculated the mitigation of losses at 20%. This figure of 20% was arbitrary and no reason has been given by the learned arbitrator as to how he

arrived at this figure.

8. On perusal of contract, it is seen that initially in 1997, the petitioner had agreed to lift the consignment for a sum of Rs.36,34,475/- Later on during first award it was agreed between the parties that the petitioner would pay a sum of Rs.30 lac for entire consignment. Unless the value of watches was not going down steeply because of the watches being designer watches and the fashion fast changing, the petitioner would have lifted these watches for the amount agreed upon by him. The very fact that the petitioner, despite entering into the second agreement, the petitioner did not honour the contract shows that with the passage of time, watches were losing their worth. When the present arbitrator during the arbitration agreement asked these watches to be put on auction, the value of watches was found to be only Rs.50,000/- which shows how fast and rapidly the value of watches fell. The present auction was held after about 8 years of the second agreement between the parties and after 8 years, the value of watches fell down from Rs.30 lac to Rs.50,000/-. That shows that the value of watches after 8 years remained only at 1/60th of the value as it was in 1998. There was no evidence led by either of the parties to show as to what would have been the value of watches in January, 1999, the last month for the petitioner to clear the entire price. The learned arbitrator considered the steep fall in the value of the watches and assessed that the value of watches if had been sold in the open market by the claimant would have only been 1/5th at that time. Looking into the fact that it became 1/60th over 8 years, I consider that the learned arbitrator 's assessment cannot be found fault with and cannot be said to be contrary to Section 73 of the Contract Act. The general principle embodied in Section 73 of the Contract Act is that when there is breach of contract, the

party who suffers by breach is entitled to recover compensation from the other party for the losses caused to it. No doubt that a party has an obligation to mitigate the losses but if the party does not take any steps to mitigate the losses, it does not mean that the party is not entitled to compensation at all. If the petitioner had produced evidence before the arbitrator that even in 1999 or 2000, the value of watches has not gone down and these could have been sold in the market for the same price, the scenario would have been different. Since none of the parties come forward with any evidence in this respect, the learned arbitrator had to depend upon the facts as disclosed by the parties. In my view, the learned arbitrator was within his rights to consider the mitigating factor of 20% and this cannot be a ground for challenging the award.

9. The other ground taken by the petitioner is about interest. It is submitted by counsel for the petitioner that the learned arbitrator wrongly awarded interest from 1st June, 1998 while the arbitrator had assessed damages only on 16th May, 2009 and he could not have awarded interest on damages from 1st June, 1998.

10. The damages awarded to a person pertain to the date of the breach of contract. The breach of contract in this case had taken place in December, 1997. The arbitrator awarded interest from June, 1998 because the damages were calculated by the arbitrator on the basis of value of the watches as in May, 1998. The parties had agreed at that time that the value of watches was Rs.30 lac and it was the petitioner who had specifically agreed to pay Rs.30 lac. The claimant, because of breach of contract, was entitled to damages in January, 1998. However, since the value of watches was calculated from June,

1998, the learned Arbitrator awarded interest from June, 1998 and rightly so. The petitioner has failed to point out any law providing that the arbitrator is prohibited from granting interest on damages from the date when the claimant was entitled to damages.

11. In view of my foregoing discussion, I find that this petition is not maintainable. The petition is hereby dismissed in limine. No orders as to costs.

September 15, 2009
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SHIV NARAYAN DHINGRA J.