

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

+ **O.M.P. 816/2014**

Judgement reserved on: 30.07.2014

% Judgment pronounced on: 01.10.2014

M/S STRACON INDIA LTD.

..... Petitioner

Through: Mr.Arvind Nigam, Sr.Adv. with
Mr.Anish Dayal and Mr.Siddharth
Vaid, Advocates

versus

PRASAR BHARTI

..... Respondent

Through: Mr.Rajeev Sharma, Mr.Sahil Bhalaik
and Mr.Uddyam Mukherjee,
Advocates

CORAM:

HON'BLE MS. JUSTICE DEEPA SHARMA

JUDGMENT

1. Vide the present petition the petitioner has challenged the award dated 14.03.2014 whereby the petitioner was directed to pay the sum of Rs. 7,31,00,000/- alongwith interest @ 6% p.a.. While awarding this sum to the claimants the Id.Arbitrator had rejected the other claims of the claimants . It is to be noteworthy here that the petitioner had admitted its liability to pay the said sum and had issued a cheque No.945977 dated 20.05.1999 drawn at Canara Bank, Bhagwan Dass Road Branch, New Delhi. However, the petitioner had subsequently stopped the payment of the said cheque.

2. The admitted facts of the case are that a Memo of Understanding was

drawn by the parties on 22.01.1999 wherein it was agreed that the petitioner would obtain from M/s Word Tel for the exclusive 'live' and 'highlights', rights in respect of Coca Cola Trophy One Day Cricket Series. In the same year World Cup 1999 also came to be played and the parties had entered into an arrangement for marketing of the World Cup 1999 as well. For the purpose of facilitating the accounting of the two events, a special account was opened in the name of the respondent/claimant with Canara Bank, Bhagwan Dass Road Branch, New Delhi on the understanding that all receipts in respect of the two events would be deposited in the said account.

3. There was also an agreement dated 24.03.1998 between the parties called Consortium Agreement and the opening of the said account with Canara Bank was also in line with the said Consortium Agreement. The Petitioner over a period of time starting from January, 1999 deposited a total sum of Rs.26,75,45,007/- only in respect of two events. The Petitioner was also required to pay the licence fee towards world cup 1999 and for that purpose, petitioner had taken out a sum of Rs.12.54 Crores. Upon the instructions of the Respondent on 11.03.1999, the Canara Bank had remitted a sum of US \$ 25.50 thousand (equivalent to Rs.10,82,99,100/-) to ECB on 12.03.1999 and 16.03.1999. A sum of Rs.1,92,37,500/- was paid out

towards withholding tax. On the instruction of Bombay High Court the marketing rights of World Cup 1999 were withdrawn from the Petitioner and were awarded to M/S NIMBUS thereafter, it was agreed between the parties that all the amounts which were deposited by the petitioner in the said account which included the advances of the advertisers for World Cup 1999 would vest with the Respondent/Claimants alongwith all attached liabilities and the Respondent/Claimant would be liable to provide commercial time to the said advertisers. The Statement of Account of the said bank account further shows that a total sum of Rs.26,75,45,007/- were deposited for both the events i.e. Sharjah Event as well as World Cup and the outgoings amounted to Rs.34,27,89,241/- thereby, leaving a debt balance of Rs.7,52,44,234/-. The total amount of Rs.26,75,45,007/- also included an amount of Rs.12.54 Crores which the petitioner had collected from the advertisers of the World Cup event and the outgoings in respect of the World Cup Event was Rs. 12,75,36,600/-. After calculating the balance amount the Respondent/Claimant wrote a letter dated 11.05.1999 to the Petitioner to clear the deficit amount of Rs. 7,52,44,234/-. In response to the said letter the Petitioner had issued a Cheque No.945977, dated 20.05.99 of a sum of Rs. 7,31,00,000/- in favour of the Respondents towards clearance

of all its liabilities. The said cheque however could not be encashed on account of stop payment by the petitioner. In the reply before the learned Arbitrator the petitioner had contended that its liability to pay was only of Rs.2,66,00,000/- and so replaced the cheque of Rs.7,31,00,000/- with a Cheque of Rs.2,66,00,000/-. It had given certain reasons for said reductions in liability and one of them was that M/S HTA/PEPSI had given an advance of Rs.4,17,00,000/- to the Petitioner against a Bank Guarantee and the said amount had been transferred to the account of petitioner for World Cup but since M/S HTA PEPSI was not returning the Bank Guarantee, transfer could not be completed. The petitioner has also shown other reasons for reduction of certain amount. Several letters were exchanged between the parties but the parties could not iron out the differences in the calculations of the due amount and finally the Respondent had raised the dispute by invoking arbitration clause on 08.02.2003.

4. The petitioner had also taken the plea that the Claim of Respondent was barred by limitation and so liable to be dismissed.

5. Considering all the contentions of the parties and in view of the documents and other evidences on record, the learned Arbitrator has passed the impugned order.

6. The said award has been challenged by the petitioner on several grounds. It is contended that the learned arbitrator has ignored material evidences which also included admission by the respondent in respect of two accounting and he had erroneously considered the pleadings of the respondent as being admitted and that learned arbitrator had relied upon those written submissions of the respondent of which the copy had not been supplied to him. It is further contended that the award is bad in law because the learned arbitrator has adjudicated on issues relating to the World Cup and thus acted beyond his jurisdiction. It has not dealt with issue of discharge of contract and that the accounts had been settled in 1999 and so the contracts stood discharged and despite settlement of accounts no communication from respondent for years, the claim which was suddenly raised ought not to have been accepted as the same was not acceptable in law. The documents of the respondents which were denied by the petitioner were accepted in evidence by the learned arbitrator. On these grounds, it is submitted that the award is liable to be set aside.

7. An award after the amendment of the Arbitration Act and passing of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') an award attains a finality and becomes a decree (since it is passed

under Section 35 of the Act). The award, however, becomes enforceable only when no application to set aside the arbitral award under Section 34 of the Act has been made and the period for making the said application has expired. It, therefore, is clear that an award can only be challenged under Section 34 of the Act. The grounds on which the award can be challenged has been shown in the said Section as under Section 34 (1) and (2) of the Act which are reproduced 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.

8. It is apparent from the contentions raised that the award has not been challenged on the grounds mentioned in Section 34 (2) (a) (i), (ii), (iii), (iv) and (v) since it is nowhere contended that the parties have been suffering with some incapacity or that the arbitral agreement was not valid or that the parties were not having a proper notice of the appointment of an arbitrator or of the arbitral proceedings or that the arbitral award deals with a dispute not contemplated or not falling within the terms of submission to arbitration or that award contains decision on matters beyond the scope of submission to arbitration or that the arbitrator has not followed the procedure properly. It is also not challenged on the ground that the subject matter of the dispute was not capable of settlement by arbitration. The only ground of challenge seems to be under Clause (b) (ii) of Section 34 (2) i.e. award is against public policy. Scope and object of Section 34 of the Act has been elaborately discussed in Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd. 2003 (5) SCC 705 the findings of the Supreme Court to the extend

relevant are as under:

74. It is significant to refer to the judgment Panchu Gopal Bose v. Board of Trustees for Port of Calcutta : [1993]3SCR361 relied on by the learned senior counsel for the respondent, from which it is obvious that the period of limitation for the commencement of arbitration runs from the date on which cause of arbitration arises. It was observed therein that for the purpose of Section 37 (1) of the old Act, 'action' and 'cause of action' in the Limitation Act should be construed as arbitration and cause of arbitration. The cause of arbitration, therefore, arises when the claimant becomes entitled to raise the question i.e. when the claimant acquires the right to require arbitration. The limitation would run from the date when cause of arbitration would have accrued, but for the agreement. Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued.

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81. Further, the scope and object of Section [34](#) of the new Act have been elaborately discussed in ONGC's case (11 supra). The findings of the apex Court, to the extent relevant, are thus:

"Conclusions

74. In the result, it is held that:

(A)(1) The Court can set aside the arbitral award under Section [34](#) of the Act if 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.

82. Further, at para 31 of the same judgment, it was held:

..the result would be - award could be set aside if it is contrary to:

(a) fundamental policy of Indian Law; or

(b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void.

9. In the case of ***Pratyusha Associates vs. Rashtriya Ispat Nigam Limited, Visakhapatnam Steel Plant*** 2006 (1) ALT 691 (DB) it has been held that if the arbitrator has discussed every aspect, including the case law with adequately elaborate and convincing reasons in the award then the award cannot be set aside.

10. It is further held in the said case that illegality for the purpose of setting aside the award must be capable of going to the root of the matter. Trivial illegality cannot be termed as contrary to public policy. Further in the case ***Union of India vs. Noria Ram Gian Prakash***, AIR 2007 NOC 1445 (Cal) (DB) it has further been held that where the arbitrator has scanned the pros and cons of the dispute referred to him and meticulously examined materials on record and the award also sets out the claims including certain amount awarded with brief reasons, the court would have no jurisdiction to examine the different items awarded clause by clause by

the arbitrator.

11. It has also been held in the catena of judgments including the findings of the Supreme Court in case of *P.R.Shah Shares & Stock Broker (P) Ltd. vs. M/s B.H.H. Securities (P) Ltd. & Ors.*, 2012 (1) SCC 594 that under Section 34 of the Act, the court does not sit in appeal over the award of an arbitral tribunal. The Supreme Court has further cautioned that courts under Section 34 of the Act are not required to re-assess or re-appreciate the evidence. In the case of *Sudarshan Trading Co. vs. Govt. of Kerala*, (1989) 2 SCC 38 even while dealing with the matter in old Act which gives the power to the court to set aside an award on the basis of “error apparent on the face of the record”, the court has held that courts has no jurisdiction to find out whether in arriving at a decision the arbitrator had acted correctly or incorrectly and its jurisdiction is confined only to examine the various claims, not to find out whether these claims were within the disputes referable to the arbitrator. The courts are not required to re-appraisal the evidence or substitute its findings to the finding of the learned arbitrator. Even in the cases where there can be two interpretations, the court has to value the interpretation given by the arbitrator. The error apparent in the award has to be something which must go to the root of the matter. In the

background of this settled law, the challenge to award is to be judged.

12. It is argued on behalf of the petitioner that the claim of the respondent was barred by time. It is argued that dispute, if any, had arisen between the parties, it had arisen in the year 1999 and invocation of arbitration clause on 08.02.2003 is clearly time barred.

13. From the reading of the award it is apparent that the same issue had been raised by the petitioner before the learned arbitrator and the learned arbitrator had duly dealt with the said contention of the petitioner and had relied on the findings of the Supreme Court in the case of *Hari Shankar Singhania vs. Gaur Hari Singhania*, (2006) 4 SCC 658 and *Shree Ram Mills Ltd. vs. Utility Premises Pvt. Ltd.* (2007) 4 SCC 599 and held that limitation arises only after the settlement talks between the parties had failed. For the said purpose, the learned arbitrator has relied on various correspondences between the parties. There is no dispute to the fact that the respondent/claimant had written a letter dated 11.05.1999 to the petitioner asking them to make the deficit payment of Rs.7,52,44,234/-. It is also admitted fact that in response to the said letter the petitioner had issued a cheque of Rs.7,31,00,000/- in favour of the respondent/claimant. But in its own wisdom, stopped the payment of the said cheque.

14. Learned arbitrator in its award has made a reference of all these letters and other facts and had also referred to para 21 of the Statement of Claim. It has reference of a cheque dated 20.05.1999 received by the respondent from the petitioner wherein the petitioner had given the reasons of stopping payment of the cheque of Rs.7,31,00,000/- and had stated that only a sum of Rs.2,66,00,000/- was payable. The demand, therefore, had apparently been raised by the petitioner in May, 1999 and therefore, the dispute continued between the parties till the respondent/claimant raised the claim. It is the law of the land that the period of limitation starts running from the date when the cause of action arises. In ***Pratyusha Associates vs. Rashtriya Ispat Nigam Limited, Visakhapatnam Steel Plant*** 2006 (1) ALT 691 (DB) the Division Bench has clearly held as under:

99. The claim and denial, both put together, would constitute a dispute. Mere making a claim and if there is no effective and conclusive repudiation, the controversy would not take the shape of a dispute. Precisely, it is that date on which the differences between both the parties culminated into a 'dispute' would and should be the starting point of cause of action for the purpose of computation of limitation.

15. In the present case it is apparent that the respondent had raised the claim which was initially admitted then denied by the petitioner and then part of the claim was admitted and then entire claim was denied. The period of limitation certainly had started running from the date of conclusive

repudiation of the claim of the petitioner and which the learned arbitrator has judged from the correspondence between the parties. The findings on the issue of period of limitation are both factual and legal. This court in exercise of its jurisdiction under Section 34 of the Act certainly is not required to re-appreciate or re-assess the documentary evidences produced before the learned arbitrator to reach to a particular conclusion. If the conclusion is based on certain facts on record it cannot be faulted.

16. In the present case, the learned arbitrator has considered all the evidences and the facts on record and law applicable and thereafter given a finding that the claim of the respondent was not barred by limitation. There is nothing in this finding of the learned arbitrator which can be said to be suffered with illegality and that too illegality of such a nature which goes to the root of the case. The findings are also not against the substantive law and public policy.

17. The other contentions raised by the petitioner, challenging the award are of trivial nature. There is no such contention which goes to the root of the award and makes the findings illegal. As discussed above at one stage the petitioner had admitted its liability of payment of Rs.7,31,00,000/- and issued a cheque, but subsequently stopped the payment against the said

cheque. Subsequently, he raised the issue of his entitlement of adjusting certain dues against this sum and issued cheque of lesser amount, but against stopped payment of the said cheque. The learned arbitrator on the basis of documents on record had reached to the conclusion that the respondent was entitled for an amount of Rs.7,31,00,000/- @ 6 % per annum. It is not that award is contrary to any public policy or substantive law, or suffers with any procedural defect.

18. For the reasons discussed above, I find no merit in the present petition, the same, therefore, is dismissed in limine.

DEEPA SHARMA, J.

OCTOBER 01, 2014

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