

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 14.10.2015

DELIVERED ON : 01.12.2015

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR.JUSTICE M.VENUGOPAL

O.S.A.No.159 of 2015

M/s Jeypore Sugar Company Ltd.,
Presently having its office at
Sundar Mahal, Padmavathy Street,
Off. Peters Road, Chennai - 600 006 Appellant

Vs.

1. M/s Laxmi Organic Industries Limited
Having office at Chandramukhi Basement,
Nariman Point, Mumbai - 400 021
2. The Hon'ble Chief Justice Ratnam (Retd.,)
16, Pelathopu, Mylapore,
Chennai - 600 004
3. The Hon'ble Chief Justice P.R.Gokulakrishnan (Retd.,)
No.7, Anna Annexe,
Bakthavatsalam Nagar Extension,
Adyar, Chennai - 600 020
4. The Hon'ble Justice KP. Sivasubramanian (Retd.,)
New No.47 (Old No.46), Pulla Avenue,
Shenoy Nagar, Chennai - 600 020 ... Respondents

Prayer: Original Side Appeal filed under Order XXXVI Rule 1 of the Original Side against the fair and decreetal Order dated 06.07.2015 in O.P.No.643 of 2009 is filed set aside the award, dated 19.08.2009 and to direct the first Respondent to pay the costs.

For Appellant : Mr.G.RM.Palaniappan

For Respondent : Mr.Vijay Narayanan,
No.1 Senior Counsel for
M/s Menon Karthik Mukundan

J U D G M E N T

[Judgment of the Court was made by
M.VENUGOPAL, J.]

Preamble

The Appellant/Petitioner has focused the instant Original Side Appeal as against the Order dated 06.07.2015 in O.P.No.643 of 2009 passed by the Learned Single Judge.

2.The Learned Single Judge while passing the Impugned Order dated 06.07.2015 in O.P.No.643 of 2009 (filed by the Appellant/Petitioner) in Paragraph No.42 had interalia observed the following:-

"-----this Court is of view that the learned arbitrators gave valid reasons in support of the award. After having discussed elaborately, the learned Arbitrators have come to the just and correct conclusion that since the petitioner has committed the breach of agreement, they are liable to re-pay the advance amount with interest, however, negatived the other claims of the first respondent and therefore, there is nothing warrants the interference of this Court with the Award of the learned Arbitrators....."

and resultantly dismissed the Original Petition without costs thereby confirmed the Award passed by the Learned Arbitrators.

Appellant/Petitioner's Contentions

3. The Learned Counsel for the Appellant/Petitioner urges before this Court that the Learned Single Judge had committed an error in upholding the Award passed by the Learned Arbitrators.

4.According to the Learned Counsel for the Appellant, the finding of the Learned Single Judge at Paragraph No.36 of the Impugned Order in O.P.No.643 of 2009 is contrary to Paragraph No.42 of the said Order inasmuch as the Learned Single Judge justifies the breach of Agreement committed by the 1st Respondent in Paragraph No.36 thereby holding that the 1st Respondent had committed breach. But, at Paragraph No.42 made an observation that the Petitioner had violated the Agreement.

5.Advancing his arguments, the Learned Counsel for the Appellant projects an argument that it was not even the case of the 1st Respondent that the 1st Respondent was not informed that the 'Goods' are still in the 'Bonded Warehouse' to give rise to render such a finding that 'had the Petitioner

revealed the fact that process of importation has not yet been completed, the 1st Respondent would not have entered into an Agreement with the Petitioner' (Appellant), which is nobody's case.

6. On behalf of the Appellant, it is represented before this Court that the Learned Single Judge should have seen that although an interpretation of 'Agreement' by the Arbitrators could not be interfered with by a Court of Law under Section 34 of the Arbitration and Conciliation Act, 1996, yet it is settled Law that Arbitrators get their authority to adjudicate the dispute by virtue of the Agreement entered into between the parties and further they are bound to decide the dispute in accordance with the terms of the 'Agreement'.

7. The stand of the Appellant is that the recitals at Page No.2 of the Agreement and Clause 6.1, 14.1 and 15 of the Agreement among other Clauses go to show beyond doubt that the transactions entered into between the Appellant/Petitioner and the 1st Respondent/Claimant for sale of 8000 Metric Tonnes of Ethyl Alcohol which was in the Bonded Warehouse by a 'Bond To Bond Transfer' for clearance by the 1st Respondent through sea route.

8. The Learned Counsel for the Appellant brings it to the notice of this Court that the Learned Single Judge had rightly held that 'Goods' had not crossed the Customs Frontier and hence it could not be held that the 'Goods' had come into the Country, ought to, as a consequence of the same, ought to have held that 'there was no necessity to obtain any licence from the State Excise Authority' for sale or transport of the said material.

9. The plea of the Appellant is that in the list of 'Firm Terms of the Agreement' there was no question of any licence to be obtained by the licence Appellant from the State Excise Authorities or for the Appellant to inform the 1st Respondent about the necessity for such licences to give rise for any argument that there was suppression of material particulars, which would enable the 1st Respondent to repudiate the Agreement.

10. It is the submission of the Learned Counsel for the Appellant that the 'Award' passed by the Arbitrators was against the Law of the Land and more particularly, the Indian Contract Act, 1872 and therefore was liable to be interfered with under Section 34 of the Arbitration and Conciliation Act, 1996.

11. That apart, it is represented on behalf of the Appellant that the findings of the Learned Single Judge at Paragraph Nos. 31 and 32 of the Impugned Order that the Petitioner has not become the absolute owner of the product when the same was in the 'Bonded Warehouse' and hence the agreement itself was void, is an incorrect and unsustainable in the Eye of Law.

12. The Learned counsel for the Appellant contends that it is only the 1st Respondent who had employed the words that 'Transport by Road' which was not in consonance with the terms of the Agreement. Furthermore, it is the 1st Respondent, who with a view to wriggle out of the Agreement had deliberately brought in covenants that were missing in the Original Agreement. Moreover, the 1st Respondent was no longer interested in taking delivery of the material and that the Appellant accepted repudiation of the 'Agreement' without prejudice to the legal rights which is clearly mentioned by the Appellant in its letter dated 03.05.2005 addressed to the 1st Respondent.

13. At this juncture, the Learned Counsel for the Appellant refers to Clause 6 of the Agreement which reads as under:-

6. Customs Duty, C.V.D, Education Cess, Port due, Wharfage, Demurrages etc. The buyer shall take full responsibility to pay the statutory taxes, duties, levies, fee, interest on customs duty and levies and incidental expenses already paid/to be paid by the seller.

6.1 Sales Tax: Not applicable as the cargo will be sold on bond transfer basis.

6.2 The Buyer shall take the responsibility to get the required specific permission from the Customs / State Excise authority for utilizing the imported Special Denatured Spirit (SDS). Originally, it was imported for specific purpose of converting the same into Anhydrous Ethanol.

14. The Learned Counsel for the Appellant submits that 'Arbitrators' cannot go beyond the terms of the Contract and therefore the award is liable to be set aside. Continuing further, the Learned Counsel for the Appellant takes a plea that a perusal of the award passed by the learned Arbitrators would reveal that they had not appreciated true meaning and effect of Clause 6 and 6.2, but had chosen to refer to and rely upon Clause 14.2 which was to the effect that the seller

shall sign all necessary papers for the purpose of transfer of ownership. In short, it is the contention of the Learned Counsel for the Appellant that the Learned Arbitrators had covered the two vital Clauses of the Agreement and had given completely a new meaning to the true intent of the parties when they had signed the agreement. Also that the very fact that Clause 6 and Clause 6.2 were present in the 'Agreement' clearly indicates that the seller was aware of the requirement to obtain permission.

15.The Learned Counsel for the Appellant contends that by virtue of Clause 6 and 6.2, the purchaser was aware of this obligation to obtain all statutory permissions and therefore should have been made responsible for the same. Apart from that the very fact that they were the 'First Party' to address a letter to the Commissioner of Prohibition and Excise, Hyderabad on 18.01.2005 to seek advice on the formalities to be complied with, fees and duties to be paid if any (as per Ex.R.18), clearly shows that they were aware of the obligations under the Contract inasmuch as the Learned Arbitrators had travelled far beyond ambit of the contract to arrive at this finding, they had ignored the vital terms of the contract. As such, on this simple ground alone, the Award is liable to be set aside.

16.The Learned Counsel for the Appellant submits that the Learned Arbitrators had ignored counter claim wherein the Appellant had clearly established that the goods were sold at a very great loss and that the Appellant was entitled to that loss after adjustment of advance amount of Rupees One Crore. If only a proper finding on the question of violation of contract was rendered, the counter claim of the Appellant could not have been rejected.

17.Finally, it is the plea of the Learned Counsel for the Appellant that the moment, the Appellant had produced the 'Goods' from the foreign exporter, title passed on to the Appellant and the contra finding of the Learned Single Judge in the Impugned Order that the Appellant was not the owner of goods is not a correct one. As a matter of fact, on behalf of the Appellant it is pleaded that even the Learned Arbitrators had not held that contract was void or that the Appellant was not the owner of the 'Goods' but, the Learned Single Judge had gone one step ahead and rendered a totally erroneous finding in the Impugned Order which is liable to be set aside in the interest of justice.

Appellant's Citations

18. The Learned Counsel for the Appellant relies on the decision of the Hon'ble Supreme Court reported in (2008) 13 Supreme Court Cases at Page 80 at Special Page 81 whereby and whereunder it is held as follows:-

The principles for interference with an arbitral award under Section 34(2) of the 1996 are as follows:

(a) An award, which is
(i) contrary to substantive provisions of law; or
(ii) the provisions of the Arbitration and Conciliation Act, 1996, or
(iii) against the terms of the respective contract; or
(iv) patently illegal; or
(v) prejudicial to the rights of the parties;
is open to interference by the court under Section 34(2) of the Act.

(b) The award could be set aside if it is contract to:

- (a) fundamental policy of Indian law; or
- (b) the interest of India; or
- (c) justice or morality

(c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

Submissions of 1st Respondent

19. Repelling the contentions of the Learned Counsel for the Appellant, the Learned Senior Counsel for the 1st Respondent submits that the Appellant/Petitioner entered into an Agreement for sale of 8000 Metric Tonnes of Ethyl Alcohol and that the 1st Respondent proposed to purchase the same and paid an advance of Rupees One Crore to the Appellant, but the Appellant had not obtained prior permission of the Excise Department, Government of Andhrapradesh and inasmuch as the requirement of obtaining such permission was not disclosed to the 1st Respondent, the 1st Respondent rescinded the contract and further that the Appellant had accepted the repudiation.

20. According to the Learned Senior Counsel for the 1st Respondent, since the amount was not returned to the 1st Respondent, the 1st Respondent had initiated Arbitration Proceedings for recovery of said advance of Rupees One Crore and for damages and as counter blast the Appellant filed a counter claim for damages alleging breach by the 1st Respondent.

21.The Learned Senior Counsel for the 1st Respondent contends that the Court under Section 34 of the Arbitration and Conciliation Act, 1996 does not act as an Appellate Court and further that a Court of Law would not reappreciate the evidence in order to interfere with the findings of the facts. Moreover, the interpretation of the terms of the contract is within the sole domain of the Arbitrator and in fact, the ambit of Appeal under Section 37 of the Act, 1996 is even more restricted. Also that a Court of Law under Section 34 of the Arbitration and Conciliation Act, 1996 is primarily concerned with the decision making process and not the merits of the decision.

22.The Learned Senior Counsel for the 1st Respondent submits that the Arbitrators had already applied their mind and concluded that the contract was repudiated and the advance was to be returned to the 1st Respondent with interest. Added further, it is pointed out that in Ex.R1 letter dated 26.04.2005, the Appellant had admitted that they would obtain consent of the Excise Department which proves the fact that the Appellant knew that permission was required. Moreover, the Commissioner of Prohibition and Excise, Andhrapradesh-Hyderabad in Ex.R.64 Letter dated 05.02.2005 had called for certain details from the Appellant directing it to furnish information on the following points immediately,

a) Whether the imported denatured Spirit said to have been arrived at the Visakhapatnam Port Trust has been cleared by the Customs authorities? If so has it been informed to the local Excise Officers? Whether it is now in the custody of the local Excise Officers?

b) The reasons as to why they want to sell?
(with specific reasons in support of their request be furnished through Distillery Officer concerned)

and therefore a plea is taken that it is latently and patently evident that prior to entering into the contract and after repudiation of the contract, the Appellant's action pointing out unerringly that the consent of the Excise Commissioner was required to sell SDS and further that the Learned Arbitrators and the Learned Single Judge had opined that the consent was very much required to sell the SDS by the Appellant. In short, it is the stand of the 1st Respondent that the Appellant's 'Agreement to sell' without such consent was an invalid / voidable one.

23.The Learned Senior Counsel for the 1st Respondent projects to take a legal plea that the 'Arbitral Tribunal' held that the contract was voidable and that the 1st Respondent

had avoided the contract and if the Learned Single Judge under Section 34 of the Arbitration and Conciliation Act, 1996 holds that the contract is void ab initio, then, it would not materially affect the case of the 1st Respondent. Further, the Appellant had retained the benefit of both the 'Goods' and the 'Advance'.

First Respondent's Decisions

24. At this stage, on behalf of the 1st Respondent, the following decisions are cited:-

(i) In the decision of Hon'ble Supreme Court in Municipal Corporation of Delhi V. Jagan Nath Ashok Kumar reported in (1987) 4 Supreme Court Cases at Page 497 at Special Page 500 in Paragraph No.2 it is observed and held as follows:

" 2. The arbitrator gave reasons in support of the award. The question is whether reasonableness of the reasons in a speaking award is justiciable under Article 136 of the Constitution. We are of the opinion that such reasonableness of the reasons given by an arbitrator in making his award cannot be challenged in a proceeding like the present."

(ii) Also in the afore said decision at page 503 and 504 in Paragraph No.4 and 5, it is observed and held as follows:-

4. In this case, there was no violation of any principles of natural justice. It is not a case where the arbitrator has refused cogent and material factors to be taken into consideration. The award cannot be said to be vitiated by non-reception of material or non-consideration of the relevant aspects of the matter. Appraisement of evidence by the arbitrator is ordinarily never a matter which the court questions and considers. The parties have selected their own forum and the deciding forum must be conceded the power of appraisement of the evidence. In the instant case, there was no evidence of violation of any principal of natural justice. The arbitrator in our opinion is the sole judge of the quality as well as quantity of evidence and it will not be for this Court to take upon itself the task of being a judge of the evidence before the arbitrator. It may be possible that on the same evidence the court might have arrived at a different conclusion than the one arrived at by the arbitrator

but that by itself is not ground in our view for setting aside the award of an arbitrator.

5. It is familiar learning but requires emphasis that Section 1 of the Evidence Act, 1872 in its rigour is not intended to apply to proceedings before an arbitrator. P.B.Mukharji, J. as the learned Chief Justice then was, expressed the above view in *Haji Ebrahim Kassam Cochinwalla V. Northern India Oil Industries Ltd.*, (AIR 1951 Cal 230: 85 CLJ 176) and we are of the opinion that this represents the correct statement of law on this aspect. Lord Goddard, C.J. in *Mediterranean & Eastern Export Co. Ltd. V. Fortress Fabrics Ltd.*, (1948) 2 All ER 186, 188, 189. observed at pages 188-189 of the report as follows:-

A man in the trade who is selected for his experience would be likely to know, and, indeed, would be expected to know, the fluctuations of the market and would have plenty of means of informing himself or refreshing his memory on any point on which he might find it necessary so to do. In this case, according to the affidavit of the sellers, they did take the point before the arbitrator that the Southern African market has "slumped". Whether the buyers contested that statement does not appear, but an experienced arbitrator would know, or have the means of knowing, whether that was so or not and to what extent, and I see no reason why in principle he should be required to have evidence on this point any more than on any other question relating to a particular trade. It must be taken, I think, that in fixing the amount he has, he has acted on his own knowledge and experience. The day has long gone by when the courts looked with jealousy on the jurisdiction of arbitrators. The modern tendency is, in my opinion, more especially in commercial arbitrations, to endeavour to uphold awards of the skilled persons that the parties themselves have selected to decide the questions at issue between them. If an arbitrator has acted within the terms of his submission and has not violated any rules of what is so often called natural justice the courts should be slow indeed to set aside his award.

(ii) In the decision of Hon'ble Supreme Court in *Puri Construction Pvt. Ltd., V. Union of India* reported in (1989) 1 Supreme Court Cases at Page 411, it is held as under:

"When a court is called upon to decide the objections

raised by a party against an arbitration award, the jurisdiction of the court is limited, as expressly indicated in the Arbitration Act, and it has no jurisdiction to sit in appeal and examine the correctness of the award on merits with reference to the materials produced before the arbitrator. The court cannot sit in appeal over the views of the arbitrator by re-examining and re-assessing the materials. None of the grounds for setting aside an award as provided under the Arbitration Act is available in this case. The award is fair and not open to challenge."

(iv) In the decision of Hon'ble Supreme Court in M/s Sudarsan Trading Co., V. Government of Kerala reported in (1989) 2 Supreme Court Cases at Page 38 and 39, it is observed and held as under:-

"There are two different and distinct grounds involved in many of the cases. One is the error apparent on the face of the award, and the other is that the arbitrator exceeded his jurisdiction. In the latter case, the courts can look into the arbitration agreement but in the former, it cannot, unless the agreement was incorporated or recited in the award. An award may be remitted or set aside on the ground that the arbitrator in making it, had exceeded his jurisdiction and evidence of matters not appearing on the face of it, will be admitted in order to establish whether the jurisdiction had been exceeded or not, because the nature of the dispute is something which has to be determined outside the award - whatever might be said about it in the award or by the arbitrator
(Paras 30 and 31)

Christopher Brown Ltd. V. Genossenschaft Oesterreichischer, (1954) 1 QB 8; Dalmia Dairy Industries Ltd. V. National Bank of Pakistan, (1978) 2 Lloyd's Rep 223, relied on

However, there is a distinction between disputes as to the jurisdiction of the arbitrator and the disputes as to in what way that jurisdiction should be exercised. There may be a conflict as to the power of the arbitrator to grant a particular remedy. One has to determine the distinction between an error within the jurisdiction and an error in excess of the jurisdiction. Court cannot substitute its own

evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. Whether a particular amount was liable to be paid or damages liable to be sustained, was a decision within the competency of the arbitrator in this case. By purporting to construe that contract the court could not take upon itself the burden of saying that this was contrary to the contract and, as such, beyond jurisdiction. If on a view taken of a contract, the decision of the arbitrator on certain amounts awarded, is a possible view though perhaps not the only correct view, the award cannot be examined by the court"

(v) In the decision of Hon'ble Supreme Court in U.P. State Electricity Board V. Searsole Chemicals Ltd. reported in (2001) 3 Supreme Court Cases 397, it is held as follows:-

"When the arbitrators have applied their mind to the pleadings, the evidence adduced before them and the terms of the contract, there is no scope for the court, including the Supreme Court to reappraise the matter as if this were an appeal, and it is clear that where two views are possible - in this case there is no such scope - the view taken by the arbitrators would prevail."

(vi) In the decision of Hon'ble Supreme Court in Oil & Natural Gas Corporation Ltd., V. Saw Pipes Limited reported in (2003) 5 Supreme Court Cases at Page 705 at Special Page 707 and 708, it is observed and held as follows:-

In Section 34(2)(a)(v) of the Act, the composition of the Arbitral Tribunal should be in accordance with the agreement. Similarly, the procedure which is required to be followed by the arbitrators should also be in accordance with the agreement of the parties. If there is no such agreement then it should be in accordance with the procedure prescribed in Part I on the Act ie., Sections 2 to 43. These provisions prescribe the procedure to be followed by the Arbitral Tribunal coupled with its powers. Power and procedure are synonymous in the present case. By prescribing the procedure, the Arbitral Tribunal is empowered and is required to decide the dispute in accordance with the provisions of the Act, that is to say, the jurisdiction of the Tribunal to decide the dispute is prescribed. In these sections there is no

distinction between the jurisdiction/power and the procedure. Therefore, if the award is dehors the said provisions, it would be, on the face of it, illegal. The decision of the Tribunal must be within the bounds of its jurisdiction conferred under the Act or the contract. In exercising jurisdiction, the Arbitral Tribunal cannot act in breach of some provision of substantive law of the provisions of the Act. (Paras 8, 11 and 12)

Harish Chandra Bajpai V.Triloki Singh, AIR 1957 SC 444 :
1957 SCR 370, followed:

Section 34 read conjointly with other provisions of the Act indicates that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it could not be set aside by the court. Holding otherwise would be contrary to the basic concept of justice. If the Arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside under Section 34 .

(Para 13)

Such interpretation of Section 34(2)(a)(v) would be in conformity with the settled principle of law that the procedural law cannot fail to provide relief when substantive law gives the right. The principle is - there cannot be any wrong without a remedy.

(Para 14)

M.V.Eilsabeth V.Harwan Investment & Trading (P) Ltd., 1993 Supp (2) SCC 433, Dhannalal V.Kalawatibai, (2002) 6 SCC 16, relied on

Therefore, if the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered with under Section 34. However, such failure of procedure should be patent affecting the rights of the parties.

(vii) In the decision of Hon'ble Supreme Court in State of Uttarpradesh V. Allied Contructions reported in (2003) 7 SCC at Page 396, it is observed and held as follows:-

"The award is a speaking one. The arbitrator has assigned sufficient and cogent reasons in support

thereof. Interpretation of a contract, it is trite, is a matter for the arbitrator to determine (Para 4)

Sudarsan Trading Co., V. Government of Kerla (1989) 2SCC 38: Air 1989 SC 890, referred to

Section 30 of the Arbitration Act, 1940 providing for setting aside an award is restrictive in its operation. Unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a Judge chosen by the parties and his decision is final. The court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the interference therewith would still be not available within the jurisdiction of the court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law. An error apparent on the face of the records would not imply closer scrutiny of the merits of documents and materials on record. Once it is found that the view of the arbitrator is a plausible one, the court will refrain itself from interfering.

(viii) In the decision of Hon'ble Supreme Court in Pure Helium India P. Ltd., V. Oil & Natural Gas Commission reported in (2003) 8 Supreme Court Cases at Page 593 at Special Pages 595 and 596, it is held as follows:-

The jurisdiction of the court in interfering with a non-speaking award is limited.
(Para 41)

The questions framed by the Division Bench of the High court are self-contradictory and inconsistent. Whereas in framing Question (a) a right approach has been adopted by the Division Bench, a wrong one had been adopted in framing Question (b). If the claim of the claimant is not arbitrable having regard to the bar/prohibition created under the contract, the court can set aside the award but unless such a prohibition/bar is found out, the court cannot exercise its jurisdiction under Section 30 of the Act. In this case there does not exist any provision which does not permit or give the arbitrator the power to decide the dispute raised by the claimant nor there exists any specific bar in the contract to raise such a claim. (Paras 20, 42 and 40)

State of U.P.V.Allied Contructions, (2003) 7 SCC 396: (2003) 6 Scale 265; W.B.State Warehousing Corpn. V.Sushil Kumar Kayan, (2002) 5 SCC 679;

K.R.Raveendranathan V.State of Kerala, (1998) 9 SCC 410; P.V.Subba Naidu V.Gov., of A.P., (1998) 9 SCC 407; H.P.SEB V.R.J.Shah and Co., (1999) 4 SCC 214; Shyama Charan Agarwala & Sons V.Union of India, (2002) 6 SCC 201; Bharat cooking Coal Ltd., v.Annapurna Construction, (2003) 8 SCC 154: (2003) 7 Scale 20; Food Corpn. Of India V.Surendra, Devendra & Mahendra Transport Co;, (2003) 4 SCC 80, relied on Rajasthan State Mines & Minerals Ltd., V.Eastern Engg. Enterprises, (1999) 9 SCC 283, conclusions affirmed Sudarsan Trading Co., V. Govt of Kerala, (1989) 2 SCC 38: AIR 1989 SC 890; Hindustan Construction Co. Ltd. V. State of J&K (1992) 4 SCC 17, cited

The terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. Construction of the contract agreement, therefore, was within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot, thus, be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties as also the circumstantial evidence. (Paras 25 and 27)

First Respondent's other case Laws

25.On behalf of the 1st Respondent, the following Decisions are relied on:-

a) In the decision of Hon'ble Supreme Court in Bharat Cooking Coal Ltd., V. L.K.Ahuja reported in (2004) 5 Supreme Court Cases at Page 109 and at Special Page 114 at Paragraph No.11, it is observed as follows:-

"11. There are limitations upon the scope of interference in awards passed by an arbitrator. When the arbitrator has applied his mind to the pleadings, the evidence adduced before him and the terms of the contract, there is no scope for the court to reappraise the matter as if this were an appeal and even if two views are possible, the view taken by the arbitrator would prevail. So long as an award made by an arbitrator can be said to be one by a reasonable person no interference is called for. However, in case where an arbitrator exceeds the terms of the agreement or passes an award in the absence of any evidence, which is apparent on the face of the award, the same could be set aside."

b) In the decision of Bhagwati Oxygen Ltd., V. Hindustan Copper Ltd., reported in (2005) 6 Supreme Court Cases at Page 462 at Special Page 463, it is observed and held as follows:-.

"As per the contract, BOL had undertaken to provide a VIST for storage of liquid oxygen of 50,000 litres. However, the VIST was not established by NOL and there was no provision for storage of liquid oxygen. The arbitrator observed the HCL neither insisted on establishment of the VIST nor objected to its nonestablishment. Regarding purity of oxygen, the arbitrator observed the HCL never complained regarding the fall of purity of oxygen during the relevant period. Referring to the letter written by HCL to BOL, the arbitrator observed that HCL continued to accept oxygen gas supplied by BOL without avoiding the contract on the ground that there was breach of agreement by BOL in respect of the quality of oxygen. The arbitrator observed that there was neither excess consumption of furnace oil nor drop in production by HCL. Following Associated Hotels, (1968) 2 SCR 548, and Harsh Wardhan, (1988) 1 SCC 454 the arbitrator held that even if it was the case of HCL that there was non-compliance with certain terms and conditions by BOL, there was waiver and abandonment of the rights conferred on HCL and it was not open to HCL to refuse to make payment to BOL. Since no such payment was made, BOL was right in making grievance regarding non-payment of the amount and accordingly an award was made in favour of BOL. The Single Judge as well as the Division Bench of the High Court upheld the award. In view of the finding recorded by the arbitrator and non-interference by the High Court no case has been made out by HCL as regards the claim allowed by the arbitrator in favour of BOL to the extent of ordering payment for supply of oxygen gas to HCL. Hence, the appeal filed by HCL deserves to be dismissed" .

(Paras 21 and 22)

Further in the aforesaid decision, at Page 464, it is held as follows:-

" An arbitrator is a judge appointed by the parties and as such the award passed by him is not to be lightly interfered with. The court while exercising the power under Section 30, cannot reappreciate the evidence or examine correctness of the conclusions arrived at by the arbitrator. The jurisdiction is not appellate in nature and an award

passed by an arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the court to interfere with the award merely because in the opinion of the court, another view is equally possible. It is only when the court is satisfied that the arbitrator had misconducted himself or the proceedings or the award had been improperly procured or is "otherwise" invalid that the court may set aside such award."

(c) In the decision of Hon'ble Supreme Court in Hindustan Zinc Limited V. Friends Coal Carbonisation reported in (2006) 4 SCC at page 445 at Special Page 456 at Paragraph No.24 it is observed and held as follows:-

"24. The appellant has given calculation fully and correctly which shows that the escalation was only 11,42,203.90. This was what was awarded by the trial court and this amount had been paid with interest of Rs.12,75,442, in all Rs.24,17,646 on 06.02.1999. In spite of our directions on 21.03.2006, the respondent has not given the actual calculations but has furnished only the final figure of claim. The respondent's memo makes it clear that the respondent wants the escalation to be calculated for supplies from 14.07.1992 with reference to the base price of Washery Grade II coal and not with reference to Washery Grade I Coal. This is impermissible. The order of the Division Bench is unsustainable as it failed to interfere with the portion of the award which is opposed to the specific terms of the contract. On the other hand, the trial Court had correctly decided the matter".

d) In the decision of Hon'ble Supreme Court in Oil and Natural Gas Corporation Limited Vs. Western Geco International Limited reported in (2014) 9 Supreme Court Cases at Page 263 and at Special Page 277 and 278 whereby and whereunder at Paragraph Nos. 34 and 35, it is observed and held as follows:-

"34. It is true that none of the grounds enumerated under Section 34(2)(a) were set up before the High Court to assail the arbitral award. What was all the same urged before the High Court and so also before us was that the award made by the arbitrators was in conflict with the "public policy of India", a ground recognised under section 24(2)(b) (ii) (supra). The expression "public policy of India" fell for interpretation before this Court in ONGC Ltd., V. Saw Pipes Ltd., 3 (2003) 5 SCC 705 and

was, after a comprehensive review of the case law on the subject, explained in para 31 of the decision in the following words: (SCC pp. 727-28)

"31. Therefore, in our view, the phrase 'public policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar case (Renusagar Power Co. Ltd., V. General Electric Co., 1994 Supp (1) SCC 644 does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "fundamental policy of Indian law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a "judicial approach" in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the for a concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights, or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bonafide and deals with the subject in a fair,

reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

e) In the decision of Hon'ble Supreme Court in Associate Builders V. Delhi Development Authority reported in (2015) 3 Supreme Court Cases at Page 49 and at Special Page 52, wherein it is observed and held as follows:-

"Section 34 in conjunction with Section 5 of the Arbitration and Conciliation Act, 1996 (1996 Act) makes it clear that an arbitral award that is governed by Part I of the 1996 Act can be set aside only on the grounds mentioned under Sections 34(2) and (3), and not otherwise. It is important to note that the 1996 Act was enacted to replace the 1940 Arbitration Act in order to provide for an arbitral procedure which is fair, efficient and capable of meeting the needs of arbitration; also to provide that the Tribunal gives reasons for an arbitral award; to ensure that the Tribunal remains within the limits of its jurisdiction; and to minimise the supervisory roles of courts in the arbitral processd. (paras 15 and 16)

Merits of arbitral award can be assailed only when it is in conflict with "public policy of India"

None of the grounds contained in Section 34(2) (a) of the A&C Act, 1996 deal with the merits of the decision rendered by an arbitral award. It is only when the award is in conflict with the public policy of India as prescribed in Section 34(2)(b)(ii) of the A&C Act, 1996 that the merits of an arbitral award are to be looked into under certain specified circumstances.

Discussions

26. At the outset it is to be pertinently pointed out that it is the primary duty of the arbitrators to enforce a promise which the parties have made and to uphold the sanctum of contract where from the jurisdiction of arbitrary flow.

27. It is to be noted that an 'Arbitral Tribunal' is the 'Final Arbitrator' of both the questions of 'Fact and Law' referred to it for determination. The decision of the Arbitrator, being the select judge of the parties, is ordinarily final both on 'Facts and Law' and should not be

lightly interfered with. Likewise, the Review in Court would not be justified to interfere with the Award merely because the views taken by the Arbitrator on the question of fact or law does not accord well within its own views. As a matter of fact, the 'Reviewing Court' is to accept the decision an Arbitrator as long as he had acted within jurisdiction in interpreting the provisions of the Contract and had applied the law to his evaluation of the facts. Indeed, the Arbitration and Conciliation Act, 1956 makes provision for the supervisory role of the courts for review of the 'Arbitral Award' only to ensure fairness as per decision McDermott International Inc. V. Burn Standard Co., Ltd., and Others (2006) 11 Supreme Court Cases 181.

28. It is to be borne in mind that an Arbitrator is the master of 'Facts and Law'. As such, the findings of fact recorded by the 'Arbitral Tribunal' are conclusive and final. It cannot be gainsaid that the finding of fact cannot be assailed on the grounds of admissibility, relevance, materiality and weight of any evidence. In fact, the Arbitration and Conciliation Act, 1996 does not provide for recourse against an 'Arbitral Award' on the facts or for any 'Judicial Review' of the award on its merits. If the Tribunal had jurisdiction, the correct procedures were adhered to, and the correct formalities are observed, the award - good, bad or indifferent is final and binding on the parties. It is not open to a Court of Law to examine the correctness of the award on merits with reference to the materials produced before the Arbitral Tribunal, nor can it re-examine or re-assess the materials on record to see the correctness of the view taken by the Tribunal.

29. Furthermore, the jurisdiction of a Court of Law to set aside an Arbitral Award under Section 34 of the Arbitration and Conciliation Act, 1996 is not an Appellate one and added further, it cannot interfere with erroneous on fact either in the absence of perversity. It is restricted to the grounds adumbrated in it, in the considered opinion of this Court. Also that if the award is passed fairly, after providing adequate opportunities to the respective parties to project their points of view in the manner provided by the Arbitration agreement, the Award is not amenable to correction by a Court of Law. Also in the decision of Delhi State Industrial & Infrastructure Development Corporation Limited reported in (2014) 3 Arb LR 116 (Delhi) (Division Bench) at Paragraph No.9, it is observed and held as follows:-

"9. We may further add that the parties, by agreeing to be bound by the arbitral award and by

declaring it to be final, agree to be bound also by wrong interpretation or an erroneous application of law by the arbitral tribunal and once the parties have so agreed, they cannot apply for setting aside of the arbitral award on the said ground. Even under the 1940 Act where the scope of interference with the award was much more, the Apex Court in *Tarapore and Co., V. Cochin Shipyard Ltd., Cochin*, (1984) 2 SCC 680 = 1985 Ar.LR 2 (SC) and *U.P.State Electricity Board*, (1989) 1 SCC 359 = 1989 (1) Arb. LR 244 (SC) held that the arbitrator's decision on a question of law is also binding even if erroneous. Similarly, in *N.Chellappan V. Secretary, Kerala State Electricity Board*, (1975) 1 SCC 289, it was held that even if the umpire committed an error of law in granting amount, it cannot be said to be a ground challenging the validity of the award; the mistake may be a mistake of fact of law."

However, a Court of Law can set aside the 'Award' only if it is apparent from the award that there is no evidence to support the conclusions or if the award is cemented on any legal view which is latently and patently an erroneous one.

30.If an Arbitrator fails to adjudicate a counter claim and does not consider it, then 'Award' is liable to be set aside in terms of the Arbitration and Conciliation Act, 1996 [26 of 1996]. An 'Arbitrator' is not only required to decide a counter claim but is also required to assail reasons for his decisions.

Factors to be Borne in Mind by an Appellate Court

31.When an Appellate Court deals with the 'Award' assailed in an 'Appeal' it is to bear in mind fully the salient factors:-

(i) A Court of Law cannot substitute its own decision as if sitting in Appeal over the Award.

(ii) Ambit of interference that the 'Award' is limited.

(iii) A Court of Law is to look into whether there is any negation of the 'Principles of Natural Justice'.

(iv) A Court of Law can interfere only if there is an error on the face of the 'Award'.

(v) A Court of Law can interfere if an 'Arbitrator' had brushed aside/ ignored the relevant clause and the terms of the agreement.

(vi) The Award is cemented on a proposition of Law which is erroneous.

(vii) An award could not be set aside just because the

reasons are spelt out in brief.

(viii) Interpretation placed by the Arbitrator ought not be disturbed if it is plausible and not because a Court of Law would have come to a different conclusion.

(ix) No interference would be called for when an Arbitrator renders a finding on a particular question of Law when authorised by the concerned parties.

(x) A Court of Law should not disturb the 'Findings' of the Arbitrator when based on facts.

(xi) There must not be a reappreciation of the evidence by a Court of Law, in as much as the same was considered by an Arbitrator.

32. In an Appeal against an Order refusing to set aside an award, a Court of Law is to examine whether the 'Award' in question can be challenged on the ground of excess of jurisdiction in completeness or misconduct as understood in Law.

33. Be that as it may, it transpires from award of the Arbitrators dated 19.08.2009 that a specific finding was rendered by the Learned Arbitrators that the Appellant/Petitioner had committed breach and further the repudiation of Ex.C2 Agreement by the 1st Respondent/Claimant was correct. Also the learned Arbitrators had in Paragraph Nos.44 and 45 of the Award come to the conclusion that the 1st Respondent/Claimant was entitled to get back the advance of Rupees One Crore paid by them for purchase of 8000 Metric Tonnes of SDS and they will be entitled to return the advance of said amount together with interest at 12% per annum from 03.05.2005 till the date of payment.

34. Apart from that, the learned Arbitrators in their Award dated 19.08.2009 had opined that the claim for damages in sum of Rs.1,17,64,000/-, being the difference between the contract price and the market price of SDS on the relevant date, could not be appealed and hence rejected the same. In so far as the 1st Respondent/Claimant's claim to recover the amount of Rs.9,63,250/- and Rs.4,75,000/- (towards prosecuting legal proceedings, incurring of personal charges, expenses for travelling and accommodation of the representatives of the claimants and its counsel) from the Appellant / Petitioner, the Learned Arbitrators in their Award ultimately held that the expenditure stated to have been incurred could at best be incidental to and form part of the costs of the proceedings and could not be regarded as an independent item of claim and as such directed the 1st Respondent/Claimant to bear these expenses and the Appellant/Petitioner had projected a total

counter claim for a sum of Rs.4,40,91,351/-. In regard to the counter claim towards cause of denaturant and handling charges amounting to Rs.10,20,410/- the same was held against the Appellant/Petitioner by the Learned Arbitrators in their Award.

35.Also, that the learned Arbitrators in their Award came to the conclusion that all the items of counter claim made by the Appellant/Petitioner against the 1st Respondent/Claimant were unsustainable etc., and finally held that no amount much less Rs.4,40,91,351/- could be recovered. Furthermore, the Learned Arbitrators had also not awarded any interest, much less at the rate claimed by the Appellant/Petitioner. Moreover, the each party was directed to bear its costs and resultantly the claim made by the 1st Respondent/Petitioner/Claimant as regards Point No.7 in the Award and the Point No.4 in the Counter Claim against the Appellant/Petitioner were negatived.

36.To put it precisely, a cursory perusal of the Award dated 19.09.2009 passed by the Learned Arbitrators unerringly points out that the claim petition filed by the 1st Respondent/Petitioner was partly allowed and the Award was passed in favour of the 1st Respondent/Claimant against the Appellant for recovery of a sum of Rupees One Crore along with interest at 12% per annum from 03.05.2005 till the date of payment. In fact, the Counter Claim was rejected and further each party was directed to bear its costs.

37.Turning to the facts of the instant case, it is to be pointed out that the 1st Respondent /Claimant entered into an Agreement with the Appellant/Petitioner on 11.03.2005 for the purchase of 8000 Metric Tonnes of Ethyl Alcohol by way of 'Bond Transfer' as the produce was in the custody of the Customs authorities in a 'Bonded Warehouse'. It appears that the factory of the 1st Respondent/Claimant was situated at Mahad, Maharashtra and it had to transport the 'Ethyl Alcohol either by sea or by road. Further, according to the 1st Respondent specific permission of the Government was required to sell the product in question without which the same of the same was prohibited and that the Appellant / Petitioner had not disclosed this fact to the 1st Respondent/claimant. The said non disclosure of material fact by the Appellant/Petitioner is in breach of the terms of Clause 20 of the Agreement dated 11.03.2005 and consequently, the 1st Respondent/Claimant made demand on the Appellant/Petitioner to repay the sum of Rupees One Crore along with interest at 24% per annum from 14.03.2005 etc.,

38. It is the stand of the Appellant/Petitioner that as per the covenant of Clause 6.2 of the Agreement dated 11.03.2005, it is the responsibility of the 1st Respondent/Applicant to obtain the required permission from the concerned authorities. However, it is the categorical stand of the 1st Respondent/Claimant that it is the responsibility of the Appellant/Petitioner to obtain permission from the concerned Authorities to sell the product in question and indeed such permission could be obtained by the Appellant/Petitioner, being the owner of the Produce / Product.

39. At this stage, it is worthwhile for this Court to extract Clause 6.2 of the Agreement which runs as follows: -

"The Buyer shall take the responsibility to get the required specific permission from the Customs/State Excise authority for utilizing the imported Special Denatured Spirit (SDS). Originally, it was imported for the specific purpose of converting the same into Anhydrous Ethanol."

Further, Clause 20 of the Agreement under the Head 'Miscellaneous' reads as follows:-

"Time: Time shall be of the essence for the purpose of any provision of this agreement."

"Disclosure by Parties : The parties hereto state and affirm that they have, prior to, and at the time of entering into this Agreement, made full disclosure of all material circumstances and information known to it respecting the subject matter of the Agreement and transaction which would be likely to influence the conduct or decision of the other party."

40. On behalf of the 1st Respondent it is represented that the 1st Respondent/Claimant had avoided the Agreement mainly due to the fraudulent concealment and misrepresentation of the facts by the Appellant/Petitioner.

41. This Court on going through the tenor and spirit of the Clause 6.2 of the Agreement dated 11.03.2005 is of the considered view that inasmuch as 'Ethyl Alcohol' was imported for the purpose of converting to Anhydrous Ethanol and when it was un-utilised for the said purpose and when it was decided to sell the same to the 1st Respondent/Claimant, it is the duty of the Appellant/Petitioner to secure the permission from the authorities concerned. As a matter of fact, when the

Appellant/Petitioner had not obtained necessary permission from the concerned authorities for selling the produce/product in question, this Court without any haziness or hesitation comes to an resultant conclusion that the Appellant/Petitioner had violated the ingredients of Clause 6.2 of the Agreement.

42. In this Connection, this Court significantly points out that the Commissioner of Prohibition and Excise through letter dated 21.04.2005 addressed to the 1st Respondent/Claimant (with reference to letter from 1st Respondent/Claimant dated 20.04.2005) had stated the following: -

"In the reference cited it was informed that the above company has purchased 8,000 Mts of Special DS imported from Brazil by M/s KCP Sugar & Industries and M/s Jeypore Sugar & Co. Ltd., on bond to bond transfer basis and requested to permit them to transport the goods from the Visakhapatnam to their factory at Mahad in Raigad district of Maharashtra State either by Sea or by road tankers.

In this connection they are informed that the above two companies have imported Special DS for specific purpose and for any change in the purpose or for sale of imported SDS they have to obtain specific permission from the Govt., and without that they cannot sell the material. For this purpose they have to approach the Govt.

As regards the request in the reference cited M/s Laxmi Organic Industries Ltd., are informed that they have no Locus Standi and any representation in this regard has to be made by the owner of the property i.e. M/s KCP Sugar & Industries Corpn. Ltd and M/s Jeypore Sugar & Co. Ltd., Hence their request cannot be considered."

43. It is quite evident from the contents of the said letter that the Appellant/Petitioner had imported Special SDS for a specific purpose and for any change in the purpose or for sale of imported SDS, they have to obtain specific permission from the Government and without that they could not sell the material for which, they have to approach the Government. As such, in the considered opinion of this Court, the Appellant/Petitioner cannot fall back upon the tenor and spirit clause 6.2 of the Agreement dated 11.03.2005.

44. Coming to the aspect of the term 'Import' under Section 2(23) of the Customs Act, same enjoins as follows:-

"Import", with its grammatical variations and cognate expressions, means bringing into India from a place outside India;

Further Section 2(24) of the Act reads as under:-

"Import manifest" or "import report" means the manifest or report required to be delivered under Section 30;

Section 2(25) of the Act reads as under:-

"Imported goods" means any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption"

Section 2(26) defines Importer as follows:- green book

"Importer", in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner or any person holding himself out to be the importer;

45. It is to be pointed out that the term 'Import' signifies etymologically 'to bring in'. To import 'Goods' into the territory of India, therefore means to bring into the Territory of India, Goods from abroad. The course of import starts from one point and ends at another. It starts when the 'Goods' cross the customs barrier in foreign country and ends when they cross the customs barrier in the 'Importing Country'.

46. In the instant case, the Produce / Product is very much in the 'Bonded Ware House' and therefore there is no process of 'Import of Goods'. Viewed in that perspective, the Agreement dated 11.03.2005 entered into by the respective parties (namely the Appellant / Petitioner and the 1st Respondent / Claimant) is not a legally tenable one in the Eye of Law, as opined by this Court.

Result

47. On a careful consideration of respective contentions and also this Court on going through the entire gamut of the Award dated 19.08.2009 passed by the learned Arbitrators and the Impugned order of the Learned Single Judge dated 06.07.2015 in O.P.No.643 of 2009 this Court by applying its Judicial thinking mind comes to an inescapable conclusion that the Appellant / Petitioner had committed the breach of the Agreement dated 11.03.2005 and as such it is liable to repay the advance of Rupees One Crore together with interest at 12%

per annum from 03.05.2005 till the date of payment and in this regard the reasonings and the conclusions arrived at by the Learned Arbitrators as well as the Single Judge of this Court while dismissing the Original Petition, do not suffer from any material irregularities or patent perversities or legal infirmities in the Eye of Law. Looking at from that angle, the Original Side Appeal sans merits.

In the result the Original Side Appeal is dismissed leaving the parties to bear their own costs. Resultantly, the Order dated 06.07.2015 in O.P.No. 643 of 2015 passed by the Learned Single Judge in dismissing the Original Petition is affirmed by this Court for the reasons ascribed in this Appeal.

Sd/-

Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

ssd

To

The Sub Assistant Registrar,
Original Side Section,
High Court, Madras.

+1cc to Mr.G.RM.Palaniappan, Advocate, S.R.No.65356
+1cc to M/s Menon Karthik Mukundan & Neelakandan, Advocate,
S.R.No.65443

O.S.A.159 of 2015

EV(CO)
CA(18/12/2015)

सत्यमेव जयते

WEB COPY