

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

+ **O.M.P.1138/2014**

% **Date of Decision: 16th October, 2015**

SUDESH GALAUT AND ORS. Petitioners
Through: Mr. Rajendra Sahu, Mr.S.S. Rana,
Advocates.

versus

M/S OM PRAKASH & CO. Respondent
Through: Mohd. Babar, Advocate.

CORAM:
HON'BLE MR. JUSTICE J.R. MIDHA

JUDGMENT

1. The petitioners have filed the objections under Section 34 of the Arbitration and Conciliation Act, 1996 to the award dated 26th July, 2014. For the sake of convenience, the petitioners are referred to as “objectors” and the respondent is referred to as “claimant”.

2. The claimant filed a statement of claim for recovery of Rs.30,01,461/- against the objectors before Delhi Hindustani Mercantile Association on 23rd August, 2013. The averments made by the claimant in the statement of claim are as under:

2.1. The claimant is a partnership firm and Om Prakash Chandana, one of the partners, is authorized to institute the claim against the objectors.

2.2. The claimant is a member of Delhi Hindustani Mercantile Association.

2.3. The claimant sells and supplies fabrics on wholesale basis.

2.4. The claimant supplied fabrics to late D.N. Gahlaut and a sum of Rs.20,28,015/- is due and payable.

- 2.5. D.N. Gahlaut has expired and the objectors being the wife and sons of late D.N. Galaut are liable to make the payment.
- 2.6. The terms and conditions of the contract are mentioned in the bills/invoices of the claimant.
- 2.7. The claimant is entitled to interest of Rs.9,73,446/- on the principal amount of Rs.20,28,015/-. The total liability of the objectors is 30,01,461/-.
- 2.8. The bills of the claimant bear the arbitration clause according to which the disputes have to be referred to the sole arbitrator to be appointed by Delhi Hindustani Mercantile Association.
- 2.9. The claimant demanded the outstanding amount from the objectors vide notice dated 10th July, 2013.
- 2.10. Delhi Hindustani Mercantile Association appointed three arbitrators to adjudicate the statement of claim filed by the claimant.
- 2.11. The notice issued to the objectors was duly served in pursuance to which the objectors vide emails dated 14th November, 2013, 15th January, 2014, 21st January, 2014 and 22nd May, 2014 sought adjournment. Objector No.1 appeared before the arbitral tribunal on 27th March, 2014 but stopped appearing thereafter. The objectors were proceeded *ex parte* on 8th May, 2014.
- 2.12. The claimant submitted *ex parte* evidence by way of affidavit of Om Prakash Chandana, partner of the claimant firm on 5th June, 2014 in which he reiterated the averments made in the statement of claim. The witness marked the authority letter of the firm as Ex.CW-1/1, photocopies of the bills as Ex.CW-1/3 (Colly), the copy of the legal notice and postal receipts as Ex.CW-1/4 and Ex.CW-1/5.
3. The learned arbitral tribunal allowed the claim on the ground that the computer copy of the balance sheets for the years 2008-09 to 2014-15

reflected a balance of Rs.20,28,015/- against the objectors. The arbitral tribunal allowed interest @ 15% on the said amount.

4. Learned counsel for the petitioner has urged following grounds at the time of hearing of the objections:

- 4.1. The claimant firm is not registered under the Partnership Act and, therefore, the claim is barred by Section 69 of the Partnership Act. Reliance is placed on *Jagdish Chander Gupta v. Kajaria Traders (India) Ltd.* AIR 1964 SC 1882 *U.P. State Sugar Corporation Ltd. v Jain Construction Co. & Anr.* (2004) 7 SCC 332 *Himachal Pradesh Co-operative Housing Society v. Umesh Goel* (2008) ILR 1 Delhi 1353.
- 4.2. There is no privity of contract between the claimant and the objectors. Petitioner No.1 is the wife whereas petitioners No.2 and 3 are the sons of late D.N. Gahlaut, who died on 08th November, 2011.
- 4.3. The business of late D.N. Gahlaut was closed after his death. The objectors were not involved in the business activities of late D.N. Gahlaut and they are not aware about any business dealings between late D.N. Gahlaut and the claimant.
- 4.4. Late D.N. Gahlaut expired on 08th November, 2011 and no demand was made by the claimant till 10th July, 2013. The claimant issued a legal notice to the objectors on 10th July, 2013 to which the objectors sent a reply dated 23rd July, 2013 in which they denied any liability in the matter.
- 4.5. The arbitration was invoked after approx. one year and eight months of the demise of late D.N. Gahlaut.
- 4.6. The claimant has not proved its claim before the arbitral tribunal. The statement of account referred to and relied upon by the arbitral tribunal was neither proved nor exhibited during the arbitration

proceedings. No evidence was led to prove the photocopies of the bills on which the claimant marked Ex.CW-1/3 (Colly). The witness neither proved the signatures of the claimant on the said bills nor the signatures of the person, who received the goods.

- 4.7. The claimant did not lead any evidence to prove material particulars, namely, the dates on which the order was placed; who placed the order; dates of supply of the material; who received the material; mode of sending the material.
- 4.8. Since the copies of the bills have not been proved in accordance with law, marking of exhibit on Ex.CW1/3 (Colly) is of no consequence. Reliance is placed on *Sudir Engineering Co. v. Nitco Roadways Ltd.* 1995 (34) DRJ 86.
- 4.9. The claimant has given no explanation as to why no demand was made for more than 1½ years after the death of late D.N. Gahlaut.
- 4.10. No cogent reasons have been given by the arbitral tribunal for its decision.

5. The law with respect to the scope of Section 34 of the Arbitration and Conciliation Act, 1996 is well settled. In *Oil and Natural Gas Corporation v. Saw Pipes Ltd.*, 2003 (5) SCC 705, the Supreme Court has considered the scope of interference in arbitral award on the ground of public policy in great detail and observed that the phrase ‘public policy of India’ is required to be given a wider meaning so as to prevent frustration of legislation and justice. The Supreme Court held that an arbitral award could be set aside, if it is contrary to (i) the fundamental policy of Indian Law; or (ii) the interest of India; or (iii) justice or morality; or (iv) if it is patently illegal. However, the Court cautioned that the illegality must go to the root of the matter. If the illegality is of trivial nature, the arbitral award cannot be taken to be against public policy. The Court further observed that the award could be

set aside if it is so unfair and unreasonable that it shocked the conscience of the Court.

6. In ***Delhi Development Authority v. R.S. Sharma***, (2008) 13 SCC 80, the Supreme Court summarized the principles as under:

“21. From the above decisions, the following principles emerge:

- (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*
- (b) the interest of India; or*
- (c) justice or morality.*
- (d) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court.*
- (e) 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.”*

7. In ***Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Ltd.***, JT 2009 (12) SC 135, the Supreme Court summarised the position in paragraph 26 as follows:

“26. It is not necessary to multiply the references. Suffice it to say that the legal position that emerges from the decisions of this Court can be summarised thus:

- (i) In a case where an arbitrator travels beyond the contract, the award would be without jurisdiction and would amount to legal misconduct and because of which the award would become amenable for being set aside by a Court.*
- (ii) An error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award.*
- (iii) If a specific question of law is submitted to the arbitrator and he answers it, the fact that the answer involves an*

erroneous decision in point of law does not make the award bad on its face.

(iv) An award contrary to substantive provision of law or against the terms of contract would be patently illegal.

(v) Where the parties have deliberately specified the amount of compensation in express terms, the party who has suffered by such breach can only claim the sum specified in the contract and not in excess thereof. In other words, no award of compensation in case of breach of 10 contract, if named or specified in the contract, could be awarded in excess thereof.

(vi) If the conclusion of the arbitrator is based on a possible view of the matter, the court should not interfere with the award.

(vii) It is not permissible to a court to examine the correctness of the findings of the arbitrator, as if it were sitting in appeal over his findings.”

8. In ***Oil and Natural Gas Corporation Ltd. v. Western Geco International Limited***, (2014) 9 SCC 263, the Supreme Court further elaborated the principles relating to Section 34 and held as under:

*“35. What then would constitute the “fundamental policy of Indian law” is the question. The decision in ONGC [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] 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 fora 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 bona fide 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.

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38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated audi alteram partem rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)] of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

40. *It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest.*”

(emphasis supplied)

9. In *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49, the Supreme Court further elaborated the scope of Section 34 and held as under:

“Fundamental Policy of India Law

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29. *It is clear that the juristic principle of a “judicial approach” demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.*

30. *The audi alteram partem principle which undoubtedly is a fundamental juristic principle in Indian law is also contained in Sections 18 and 34(2)(a)(iii) of the Arbitration and Conciliation Act. These sections read as follows:*

“18. Equal treatment of parties.—The parties shall be treated with equality and each party shall be given a full opportunity to present his case.

*34. Application for setting aside arbitral award.—(1)****

(2) An arbitral award may be set aside by the court only if—

(a) the party making the application furnishes proof that—

(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;”

31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

- (i) a finding is based on no evidence, or
- (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or
- (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

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Justice

36. The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law. An award can be said to be against justice only when it shocks the conscience of the court. An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him Rs 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be liable to be set aside on the ground that it is contrary to “justice”.

Morality

37. The other ground is of “morality”. Just as the expression “public policy” also occurs in Section 23 of the Contract Act, 1872 so does the expression “morality”. Two illustrations to the said section are interesting for they explain to us the scope of the expression “morality”:

“(j) A, who is B's Mukhtar, promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1000 rupees to A. The agreement is void, because it is immoral.

(k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the

letting may not be punishable under the Indian Penal Code (45 of 1860).”

Patent Illegality

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42. *In the 1996 Act, this principle is substituted by the “patent illegality” principle which, in turn, contains three subheads:*

42.1. *(a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:*

“28. Rules applicable to substance of dispute.—(1)
Where the place of arbitration is situated in India—

(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;”

42.2. *(b) A contravention of the Arbitration Act itself would be regarded as a patent illegality — for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.*

42.3. *(c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:*

“28. Rules applicable to substance of dispute.—(1)-
(2)***

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of

the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.”

(emphasis supplied)

10. Applying the aforesaid principles to the present case, this Court is of the view that the claimant has miserably failed to prove its claim before the arbitral tribunal. The photocopies of the bills marked as Ex.CW-1/3(Colly.) were not proved by the claimant. The claimant did not even prove the dates on which the orders were placed, who placed the order, the dates of supply of the material, who received the material and mode of sending the material. In fact, there was no legally admissible evidence in favour of the claimant. The arbitral award reflects total non-application of mind. The decision arrived at by the arbitral tribunal is irrational and unsustainable. The claimant has also not explained as to why no claim was made for a period of more than one and a half years after the death of late D.N. Gahlaut. The arbitral tribunal based its decision on legally inadmissible evidence namely the balance sheets of the claimant which were not even proved by the claimant. That apart the claimant firm is not even a registered partnership firm and, therefore, the claim is barred by Section 69 of the Partnership Act. The impugned award is, therefore, liable to be set aside.

11. For the reasons stated above, the petition is allowed and the arbitral award dated 26th July, 2014 is hereby set aside.

**J.R. MIDHA
(JUDGE)**

OCTOBER 16, 2015

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