

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 407 OF 2015

IN

ARBITRATION PETITION NO.958 OF 2012

WITH

NOTICE OF MOTION (L) NO. 1796 OF 2015

Waverley Private Limited)
having its registered office at)
Showroom No.2, Girton School Lane,)
Nugegoda, Sri Lanka.) .. Petitioner

Versus

Diversey India Private Limited)
having its registered office at)
501, 5th Floor, Ackruti Centre Point,)
MIDC Central Road, Andheri (E),)
Mumbai 400 093) .. Respondent

Mr.Vishal Talsania a/w Ms. Mansi Patel i/by M/s.Thakore Jariwala &
Associates for the Petitioner
Mr.M.PS. Rao, Senior Advocate a/w Mr. Nilesh Khandray i/by
M/s.Mallar Law Consulting for the Respondent

**CORAM: ANOOP V. MOHTA AND
G. S. KULKARNI, JJ.**

**CLOSED FOR JUDGMENT ON: February 9, 2016
PRONOUNCED ON : March 04, 2016**

JUDGMENT (Per Anoop V. Mohta, J.)

Rule, returnable forthwith. Heard finally.

2 The Appellant (original Respondent) has challenged judgment dated 9 June 2015 by invoking Section 37 of the Arbitration and Conciliation Act, 1996 (for short “the said Arbitration Act”).

3 The learned Judge, by impugned judgment/order, allowed Section 34 Application filed by the original Claimant/Respondent and passed the following order :

“The impugned award dated 4th May 2012 in so far as the issue of jurisdiction rendered in paragraph 17.1 (i) of the impugned award holding that the arbitral tribunal has no jurisdiction to hear the claimant's claim for the sum of USD 37,505.60 claimed in the invoices listed in Annexure B of the request for

Arbitration dated 20th July 2010 is set aside. Rest of the award is upheld. No order as to costs.

At the request of the learned counsel appearing for the respondent, operation of the order passed today is stayed for a period of two weeks from today.”

4 The learned Judge has recorded the relevant facts for the purposes of deciding the issue in paragraphs 2 to 9, 12, 13 to 15, 19 to 22, which read thus :

“2. Prior to June 2005, the respondent was acting as a distributor for the petitioner in certain areas earmarked in Sri Lanka. There was no written agreement between the parties prior to June 2005. On 14th June 2005, the parties entered into an agreement for sale of products manufactured by the petitioner which were to be distributed by the respondent in the earmarked territory in Sri Lanka. On 13th June 2006, the first agreement came to an end.

3. During the period from 14th June 2006 to 31st

March 2007, the products of the petitioner continued to be distributed in the territory of Sri Lanka. No agreement was signed for the said period of 14th June 2006 to 31st March 2007 between the parties.

4. On 1st April 2007, the petitioner and the respondent entered into an agreement. The said agreement was to be operated for a period of two years ending 31st March 2009. Under the said agreement, the petitioner appointed the respondent as its distributor in the Institutional and Industrial Channels of Trade for the purpose of selling or otherwise for the products of the petitioner in the specified territory on the terms and conditions set out therein. Under the said agreement, the respondent was granted 75 days' credit from the date of invoicing for the products purchased from the petitioner and the respondent was to establish Letter of Credit or TT to avail the said credit facility. Under clause 6.3 of the agreement, either party could terminate the said agreement without being required to assign any reason at any time by giving the other party 90 days prior written notice.

5. Clause 6.1 of the said agreement is extracted as under :-

“6.1 Term- The terms of this Agreement commences on the Effective Date and continues in force for a period of two years, unless earlier terminated as provide therein or where it is mutually agreed by both parties to terminate this Agreement if both parties to agree in writing the term of this Agreement may be extended for another one year term on the same terms and conditions unless otherwise mutually agreed upon.”

6. Clause 9.1 of the said agreement provided for arbitration which is extracted as under :-

“9.1 Law and Legal Proceedings - This Agreement and the relationship of the parties hereunder : will be governed by and interpreted in accordance with the laws of India without regard to its principles respecting the conflicts of laws. Application of the U N Convention on the International Sale of Goods is hereby rejected Any and all disputes, claims and controversies between the parties arising out of or relating to this Agreement, the alleged breach of this Agreement and the rights and obligations of the parties hereunder shall be resolved exclusively by binding arbitration. Arbitration shall be administered by the International Chamber of Commerce which shall apply its international commercial arbitration rules as modified by this Agreement. The decision of any such arbitrator(s) shall be final and judgment on the award rendered may be entered in any Court having jurisdiction thereof. Such Arbitrator(s) shall have the authority to impose all manner of remedies. Arbitration proceedings shall be conducted in Mumbai, India in the English Language.”

7. On 6th April 2008, the respondent by its email addressed to the petitioner, terminated the agreement dated 1st April 2007 however made effective from 1st September 2008. In the said email, the respondent requested the

petitioner to make an arrangement to purchase the balance stocks including the demonstration equipments and the spare parts and informed that the respondent would settle the dues of the petitioner as well. It is the case of the petitioner that the petitioner was unable to appoint another distributor/agent for sale of its products in the specified territory in Sri Lanka.

8. On 27th August 2008, a meeting was held between Mr. Sukrit Ghosh, the then Sales & Marketing Manager of the petitioner and Mr. Gnana Samaratunga, Managing Director of the respondent. The said meeting was also attended by Mr. Nikhil Sawant, Director – Healthcare & Hospitality of the petitioner. It is the case of the petitioner that in the said meeting, the parties agreed that the respondent would continue as an agent and/or distributor of the products of the petitioner at least until 20th September 2008. It is the case of the petitioner that the said record of discussion what was transpired on 27th August 2008 was spelt out in the three emails all dated 4th September 2008 that were exchanged between the

parties.

9. On 4th September 2008, the respondent sent an email to the petitioner at 10.39 a.m. recording that it was agreed that the respondent would distribute the chemicals of the petitioner and act as a distributor for one more month ending 20th September 2008. In the said email, it was also recorded that it was further agreed that the petitioner would find a new distributor during the said period and would ensure that the stocks and chemicals were taken over from the respondent after due payments during the said period.

12. It is the case of the petitioner that under the said extended agreement, the petitioner supplied the goods to the respondent for the period from September 2008 upto 25th October 2008 under the cover of invoices drawn in the name of the respondent. During that period, the petitioner raised invoices in the name of the respondent and all documents of title such as invoice, bills of lading

etc. were all duly accepted by the respondent as agent/distributor and also further caused the goods to be sold in the specified areas in Sri Lanka.

13. The present dispute was in respect of invoices substantially drawn during the period September 2008 until October 2008. It is the case of the petitioner that some time in the month of January 2009, reconciliation of the accounts between the parties in respect of the goods of the petitioner sold and delivered from the period June, 2005 to 25th October 2008 took place. The said statement of account dated 31st January 2009 showed balance of USD 19.96 which was admitted and acknowledged as payable by the respondent to the petitioner and another statement of account which disclosed that a sum of US\$ 41363.93 was agreed to be payable by the respondent to the petitioner. The said statement of account was duly signed and/or initialed by the parties. It was the case of the petitioner that all statements of accounts were signed and/or initialed by the Managing Director of the respondent.

14. On 17th March 2009, the respondent addressed a letter to the petitioner and made a claim of US\$ 4899495.05 for the period July 2005 to October 2009 on the alleged ground that there was a delay of delivery due to mismanagement of operation in the transaction by the petitioner.

15. On 23rd July 2009, the petitioner addressed a letter to the respondent informing that after considering the liabilities of the petitioner, balance of US\$ 40607.93 was found payable by the respondent to the petitioner.

19. Before the learned arbitrator, the petitioner filed a statement of claim, inter alia, praying for a sum of USD 41,332.94 with interest @21% p.a. or at such other rate as the learned arbitrator would deem appropriate and for costs.

20. The respondent filed their reply and counter-claim. In the said reply, the respondent raised a plea of jurisdiction of the learned arbitrator to adjudicate upon the

claim of the petitioner for USD 41,332.94 on the ground that the said part of the claim was related to the period after 31st August 2008. The respondent also made a counter-claim against the petitioner for the sum of Sri Lankan Rupees Rs.5,224,588.97 (equivalent to USD 47,496.26) towards alleged financial losses caused to the respondent by the petitioner.

21. The learned arbitrator framed four issues including the issue whether the claim of the petitioner would fall within the ambit of arbitration clause. The petitioner had also made an application before the learned arbitrator to adduce the additional affidavit of Mr.Sukrit Ghose after closure of hearing.

22. On 4th May 2012, the learned arbitrator made an award holding that the learned arbitrator had no jurisdiction to hear the claim of the petitioner for the sum of USD 37,505.60 claimed in the invoices listed in Annexure B of the request for arbitration dated 20th July 2010. The learned arbitrator allowed the claim of the

petitioner for USD 3,827.34 with simple interest @ 9% p.a. from 14th October 2009 i.e. from the date of demand for payment till the date of the award and simple interest @18% p.a. from the date of the award till the date of payment. The learned arbitrator also held that he had no jurisdiction to hear the counter-claim of the respondent for the sum of Sri Lankan Rupees 5,224,588.97. The learned arbitrator directed both the parties to bear their own costs and expenses of the said arbitration. The respondent did not challenge any part of the award dated 4th May 2012. The petitioner, however, has challenged the said award dated 4th May 2012 in so far as the claim of the petitioner in respect of USD 41332.96 is concerned which was rejected by the learned arbitrator on the ground of jurisdiction in this petition.”

5 By noting the rival contentions of the parties, including referring to the judgments so cited, apart from the pleadings and the respective evidence led by the parties recorded the reasons, to set aside the arbitral award, which we are in agreement, after going through the whole pleadings so read and referred by the parties.

Paras 51 to 53 of the judgment read thus:

“51. A perusal of the award clearly indicates that the learned arbitrator though did not render any finding that the said three emails all dated 4th September 2008 exchanged between the parties were fabricated or did not exist and on the contrary referred to the said emails in paragraph 13.10 of the agreement, the learned arbitrator held that even if there was an oral agreement as alleged by the claimant, such an oral agreement was outside the terms of the agreement dated 1st April 2007. In my view the award shows ex facie contradictions and patent illegality on the face of the award. Once the learned arbitrator had not rejected those three emails all dated 4th September 2008 and had referred to the said emails in the impugned award for rejecting the claim of the petitioner, the learned arbitrator could not have taken a view that even if there was an oral agreement, such agreement was outside the terms of the agreement dated 1st April 2007. Since the

agreement was arrived at by exchange of emails, in my view, there could not have been any oral agreement between the parties. In this case, discussions arrived at between the parties in the meeting held on 27th August 2008 were recorded by exchange of emails. A perusal of Section 6.1 of the agreement also makes it clear that the parties in writing could extend the said agreement dated 1st April 2007 for another one year on the same terms and conditions unless and until mutually agreed upon. In this case, the parties agreed that the said agreement dated 1st April 2007 would be continued till 20th September 2008 and even beyond. In my view, the said three emails clearly extended the agreement dated 1st April 2007 prior to the letter of termination having come into effect.

52. I am not inclined to accept the submission of the learned counsel for the respondent that even if those three emails were exchanged, the same were not in

accordance with Section 6.1 of the agreement on the ground that the extension if at all could only be for one year and not for smaller period. A plain reading of Section 6.1 clearly indicates that the parties could mutually agree upon the extension even for a period of less than one year.

53. In my view, the finding of the learned arbitrator that in view of the respondent having given 90 days' prior written notice as per clause 6.3 of the agreement, the agreement is validly terminated with effect from 1st September 2008 is totally perverse and discloses patent illegality. In my view, since the parties had already agreed to extend the period of the agreement dated 1st April 2007, the said letter of termination did not come into effect and was given a go-bye.”

6 The learned Judge even read and referred the contents of the emails including the supporting evidence led by the parties and given the finding of facts in this regard in paragraph 55 which reads

thus:-

“55. A perusal of the record makes it clear that the respondent never made any such allegations in any of the correspondence exchanged between the parties. Be that as it may, since the respondent admitted that the consignments were sent by the petitioner and bill of lading were issued in the name of the respondent, the respondent had to accept those documents, it is clear that both the parties had acted upon all such transactions having taken place after 31st August 2008. The respondent did not examine M/s. Jayes Investment (Pvt) Ltd. in support of their case before the learned arbitrator. The respondent also did not examine Ms.Rashmi from whose email ID, the said two emails were sent to the petitioner. Since the respondent had accepted the documents issued by the petitioner post 31st August 2008 and had acted upon such transactions, it is clear that the agreement dated 1st April 2007 was duly extended by the parties as recorded in the said emails. I am

thus not inclined to accept the submission of the learned counsel for the respondent that any of such emails were fabricated or were of no consequence.”

7 The law revolving around Section 7(4)(b) of Arbitration Act is very clear whereby exchange of letters, telex, telegrams or other means of communication also amounts to an arbitration agreement in writing. The parties, as recorded through the exchange of emails, recorded the agreements thereby all the terms and conditions of the agreement dated 1 April 2007 of the basic arbitration agreement got extended. Therefore, the conclusion that through these three emails, the parties have agreed and extended the contractual obligation and in fact acted accordingly need no interference. Having once extended the agreement in toto, any dispute between the parties for the transaction based upon the same required to be adjudicated on the basis of main agreement itself. The finding, therefore, based upon the facts and the law of *Bharat Petroleum Corporation Ltd v. Great Eastern Shipping Co Ltd*¹ and further in *Trimex International FZE Limited, Dubai v. Vedanta*

1 AIR 2008 SC 357

*Aluminium Limited, India*² support the reasons which we also find is well within the frame work of law and the record.

8 The Supreme Court in *Oil and Natural Gas Corporation Limited v. Western Geco International Limited*³ has observed as under:

“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 in *Associated Provincial Picture Houses Ltd v. Wednesbury Corpn.* (1948) 1 KB 223 : (1947) 2 All ER 680 (CA).”

This Court in *Sahyadri Earthmovers v. L and T Finance Ltd*⁴ has recorded as under with regard to the basic parameters for the Arbitrator to follow, apart from other the following clauses are

2 (2010) 3 SCC 1

3 (2014) 9 SCC 263

4 2011 (4) Mh. L. J. 200

relevant for this case :

“CPC & Evidence Act

(xviii) Though Code of Civil Procedure and the Evidence Act are not applicable strictly, (section 19), but the settled principles do apply. The power of Arbitral Tribunal to determine the admissibility, relevance, materiality and weight of any evidence just cannot be overlooked.

Substantial laws-customs-commercial usages and practice

(xx) The Arbitrator is bound by the substantive laws of the land as well as procedural laws and practice and principle apart from the custom and usage of the trade referring the business and commerce between the parties, in all respects.

To Analyse the evidence and the record

(xxi) The Arbitrator is required to consider all the material and evidence/documents placed by the parties on record read with the evidence led by the parties. The Arbitrator is, therefore, bound to analyse and appreciate the same by giving proper and correct interpretation of terms of the contract subject to provisions of law, before passing reasoned interim or final award. The Arbitrator to pass reasoned interim and/or final award, unless agreed otherwise.

The Doctrines to be followed

(xxiii) The Arbitrator cannot disregard the substantive and procedural law. The Arbitrator is therefore bound to take note of law; of interpretation, precedent, obiter dicta, ratio decidendi, Estoppel, acquiescence, waiver and res judicata, public policy,

natural justice, fair play and equity.”

9 We find no reason to disturb the finding so recorded that the Petitioner had proved the existence and contents of the three emails. The reconciliation statement duly signed by the parties further confirm the same covering the transactions after 31 August 2008. Mere termination, through a notice, that itself cannot be the reason to dislodge the claim so raised based upon the agreed clauses. The agreement expired by efflux of time is also unacceptable, having once extended the same, through the email which is permissible mode of written arbitration agreement on same earlier terms and conditions. The parties, as recorded, have in fact acted upon. The typing error and/or any error in the email that itself, in the present facts and circumstances, cannot be the reason to overlook the other contents of the same. The learned Judge has, therefore, has taken note of the totality of the facts and circumstances and provided the finding while reversing the award passed by the Arbitral Tribunal to the extent so recorded above.

10 In the present case and as recorded by the learned Judge

that the finding recorded by the learned Arbitrator are perverse, illegal and as this is not a case of appreciation of evidence. On the contrary, the finding is that the learned Arbitrator refused to exercise jurisdiction by holding that the Petitioner was not entitled for claim by overlooking the emails and the contents thereof supported by evidence and, therefore, the Arbitrator's finding is apparent on the face of the record was illegal and perverse. The judgments, therefore, of *Ravindra Kumar Gupta and Company v. Union of India*⁵; *Ropa Plastics Pvt Ltd v. IPN Pakcaging Pvt Ltd.*,⁶ and in *M/s. Bhavani Cotex v. M/s. C.A. Galiakotwala & Co Pvt. Ltd*⁷, rightly observed, are of no assistance.

11 Therefore, taking overall view of the matter and considering the power and scope of Appellate Court under Section 37 of Arbitration Act and we have also noted that the reason provided by the learned Judge is well within the frame work of law and the record. Recently, the Supreme Court in *M/s.Chebrolu Enterprises v. Andhra Pradesh Backward Class Coop.Finance Corpn Ltd in Civil Appeal No.8918/2015 on 28.10.2015* has reinforced thus “This Court or even the Appellate Court would not look into the finding of facts unless they are perverse.”. No case is made out to interfere with the impugned judgment.

5 (2010) 1 SCC 409

6 2014 (3) Mh. L. J. 150

7 Unreported judgment dt. 21.01.2014 in Arb. Pet. No.314/2013 by Bombay High Court

12 In the result, the Appeal is accordingly dismissed. Rule stands discharged. There shall be no order as to costs.

12 In view of dismissal of Appeal, Notice of Motion (L) No. 1796 of 2015 does not survive and stands disposed of accordingly.

(G. S. KULKARNI, J.)

(ANOOP V. MOHTA, J.)