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

% *Date of decision:* 22.08. 2017

+ O.M.P. (COMM) 18/2017 and IA No. 585/2017(stay)

PUNEET KUMAR JAIN Petitioner

versus

MSTC LIMITED Respondent

+ O.M.P. (COMM) 264/2017 and IA Nos. 8090/2017(stay),
8092/2017(delay) & 8093/2017 (permission to file lengthy list of
dates)

PUNEET KUMAR JAIN Petitioner

Through

versus

MSTC LIMITED & ORS. Respondents

Presence: Mr. Jitender Singh, Adv. for the petitioner.

Mr. Rohit Rao, Mr. Shiv Gupta and Mr. Mukund P. Unny, Adv.
for R-1 & 2(MSTC Ltd.)

Ms. Jasmine Damkewala, Adv. for R-3

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. OMP (COMM) 18/2017 is filed by the petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as 'the Act'*) seeking to impugn the order/Award dated 03.12.2016 passed by the learned Arbitrator by which order the claim petition of the petitioner stood rejected.

It is further urged that a second Award has been passed on the same claim petition of the petitioner when the learned Arbitrator was *functus officio* on 13.03.2017. This Award dated 13.03.2017 is challenged in OMP (COMM) 264/2017.

2. Some of the relevant facts are that respondents' No. 1 and 2 invited bids for sale of goods owned by respondent No.3 vide e-auction in October and November, 2012. The goods comprised of Syn Gas Compressor complete Unit complete with auxiliaries, etc. of Amonia-V plant of RC Trombay Unit on "as is where is basis". The auction was a global e-auction and foreign bidders were also allowed to participate. Foreign bidders were required to make their offer in US \$ and domestic bidders were required to make the bid in Indian Rupees.

3. It is the contention of the petitioner that being an Indian Bidder, it made the highest bid of Rs.54,54,054/- towards the goods. The auction closed on 09.11.2012. On 09.11.2012 at 4.34 P.M. a communication was received on e-mail from respondent Nos.1 and 2 where it was noted that the offer of the petitioner being US \$ 5454054 was the highest bid. The case of the petitioner is that he made the bid not in US Dollars but in Indian Rupees. It is also claimed that the respondent sent another intimation on 09.11.2012 late at night at 10.30 P.M. whereby the bid of the petitioner was accepted being in Indian Rupees i.e. Rs.54,54,054/- and a demand was made for payment of Rs.13,63,514/- i.e. 25% of the entire sale consideration to be made within five days. The petitioner is said to have made a demand draft of Rs.11,63,514/- in favour of respondent No. 3 after adjustment of pre-bid EMD of Rs.2 lakhs. Hence, it is the contention of the petitioner that 25% of the sale consideration amounting to Rs.13,63,514/- was deposited by the

petitioner. On 22.11.2012, the petitioner claims to have been shocked on receiving an e-mail from respondent No. 2 whereby he was asked to deposit Rs.7,22,75,323/- towards EMD/SD after adjusting the pre-bid amount of Rs.2 lakhs.

4. It is the case of the respondents that the auction was a global e-auction and the bids were to be made in US \$. The floor price was Rs.1,60,99,889/- equivalent to US \$ 298921. It is further stated by the respondents that in the bid sheet of the E-Auction it transpired that the petitioner initially made a bid of 298922 i.e. one Dollar more than the floor price which was in US Dollars. He became the highest bidder having bid at US \$ 5454054 which was the bid being was equivalent to Rs.29,37,55348/-. It is in these facts and circumstances that the communication dated 09.11.2012 was sent to the petitioner accepting his bid of US \$ 5454054. Hence, the dispute really is as to whether the bid of the petitioner of 5454054 was in Rupees or was in US Dollars.

5. The petitioner on 23.11.2012 served a legal notice and thereafter invoked the arbitration clause by sending a letter on 08.05.2013 and sought appointment of an arbitrator for adjudication of the disputes between the parties.

6. The respondents appointed Sh. B.B. Singh as the sole arbitrator. On a petition filed under Section 9 of the Act by the petitioner, this court restrained the respondents from disposing of the subject matter of the property in issue. The petition was disposed of by this court with a direction that the said Section 9 petition would be treated as an application under Section 17 of the Act and the learned Arbitrator would decide the matter after hearing the parties. Subsequently, the petitioner filed an arbitration

petition being Arb.P.No. 318/2014. On 09.02.2015 this court directed respondents No. 1 and 2 to communicate the name of the new arbitrator to the petitioner. It is thereafter that the present arbitrator Mr. Srikumar Gupta, Advocate was appointed as a sole arbitrator.

7. The learned Arbitrator on 03.12.2016 passed the first impugned order/award. The order notes that the petitioner has filed a claim statement praying for direction to the respondents to deliver the goods to the petitioner after receiving the balance consideration of Rs.40,90,540/- and compensation of Rs.50lakhs and other reliefs. It also notes that respondent No.3 has filed a counter claim against the petitioner for an amount of Rs.1,67,50,460/- which was the next highest bid which respondent No. 3 would have realized in the auction if the petitioner had not participated. The order notes that it is the 24th sitting of the arbitration. It further notes that the petitioner is absent without intimation from the 16th sitting. It noted that earlier for the 16th, 17th, 20th and 21st sittings, an adjournment was sought by e-mail. On the 18th, 19th, 22nd and 23rd sittings, the petitioner was absent without intimation. Noting that despite several opportunities given to the claimant/petitioner, none is present for the said party in the hearing, the learned arbitrator rejected the claim of the claimant/petitioner.

8. Subsequently the proceedings for the counter claim of respondent No.3 continued. The learned arbitrator thereafter passed an Award on 13.03.2017. In the said award he concludes that from the terms and conditions of the e-Auction, it is abundantly clear that it was a Global e-Auction where all bidders were required to make a bid in US \$ and domestic bidders were required to make the payments of the bid value in INR at the equivalent exchange rate for US Dollars. The claimant/petitioner was well

aware of this condition as his first bid was just one figure above the floor price i.e. US \$ 298922. The Award further concludes that if the bid of the petitioner was in Indian Rupees as claimed by the petitioner then the bid of Rs.5454054 was far below the floor price. Merely because some auto generated mail has been received from the respondents, the petitioner is trying to take advantage of this fact ignoring the terms and conditions of the contract and other communications received by the petitioner including the first e-mail dated 09.11.2012. The learned Arbitrator also noted that the petitioner did not comply with the directions of the Tribunal and with willful intent avoided the sittings on the several dates fixed. The learned Arbitrator, hence, concludes that he is not inclined to pass an award in favour of the petitioner and passed a nil award on the claim of the Petitioner, despite the fact that earlier on 03.12.2016, the learned Arbitrator had already rejected the claim of the petitioner.

On the counter claim of respondent No.3, the learned Arbitrator noted that the counter claim is made based on the next highest bid amounting to US \$ 311000. The Award concludes that the counter claim is based on assumption and not on the basis of actual price on which the unit was sold after the injunction order was vacated. Hence, the counter claim was rejected. An award for cost was passed against the petitioner being a sum of Rs1,43,096/- being the share of respondents Nos. 1 and 2 and Rs.1,02,500/- being the share of respondent No.3. Hence, an Award for a total sum of Rs.2,45,596/- has been passed for cost against the petitioner.

9. I have heard learned counsel for the parties.

10. I will first deal with the submissions of the learned counsel for the parties regarding OMP (COMM.) No.18/2017, namely the award/order dated

13.12.2016. The learned counsel for the petitioner has vehemently argued that the said order/award is contrary to Section 25(c) of the Act, and is hence liable to be set aside. It is urged that under Section 25(c) of the Act where a party fails to appear, the Tribunal should continue the proceedings and make the arbitral award on the evidence before it. It is urged that the Arbitral Tribunal has wrongly terminated the proceedings instead of passing a detailed award. He further stresses that the petitioner had acted bonafidely. The respondent have wrongly chosen not to refund to the petitioner the sum of Rs.2 lakhs which was the pre-bid EMD and the sum of Rs.11,63,514/- which he had paid after acceptance of his bid. He has relied upon clauses of the general terms and conditions to claim that his bid made in Rupees was in order. He has also relied upon letter dated 09.11.2012 sent at 10.35 PM by the respondent where he was asked to make a deposit of Rs.13,63,514/- within seven days and also communication dated 11.11.2012 to the same effect.

11. Learned counsel for the respondents have stressed that the petitioner has made a complete mockery of the auction proceedings. It is urged that the petitioner deliberately spiked the entire auction process. He knew all along that floor price was US\$ 2,98,922/-. He deliberately made a bid of 5454054 and claimed that the bid was made in Indian Rupees. Thereafter, taking undue advantage of some auto generated e-mails received by the petitioner; he has started the present litigation. The entire effect of the conduct of the petitioner was that the auction process came to a naught. Highly valuable equipment belonging to respondent No.3 continued to languish and the entire process had to be carried out all over again causing huge loss and damages to the respondents.

12. A perusal of the order passed by the learned Arbitrator on 03.12.2016 shows that the claim of the petitioner was rejected. Para 4 of the said order reads as follows:-

“4) Despite several opportunities being given, the Claimant is not present for hearing in support of his claim. In view of the aforesaid the claim of the Claimant stands rejected.”

13. Section 25(c) of the Act reads as follows:-

“25. Default of a party. xxx

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(c) a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it.”

14. In terms of the above provision, where a party fails to appear at an oral hearing, the Arbitral Tribunal may continue the proceedings and make the award on the evidence before it. The contention of the petitioner is that the claim petition and documents were filed by the petitioner and the Arbitral Tribunal was obliged to pass an order on merits and should not have simply rejected the claim petition.

15. Section 25(c) of the Act states that the learned arbitrator “may continue the proceedings”. Hence, it is not mandatory for the learned Arbitrator to continue the proceedings where a party to a proceeding fails to appear at the hearing. It is at the discretion of the Tribunal who may continue the proceedings and make the Award on the evidence before it.

16. The Supreme Court in *Delta Distilleries Ltd. v. United Spirits Ltd.* (2014) 1 SCC 113 while interpreting Sections 25 and 27 of the Act noted that Section 25 (c) of the Act provides that in the event a party abstains to

appear at an oral hearing or produce documentary evidence, the Arbitral Tribunal may continue the proceedings and make an arbitral award on the evidence before it.

Similarly, this court in *Cruz City 1 Mauritius Holdings vs. Unitech Ltd.* 239 (2017) DLT 649 held as follows:

“28. Whilst this court accepts the contention that the use of the word “may” as used in the context of Section 48 of the Act does not confer an absolute discretion on the courts, it is not possible to accept that the word “may” should be read as “shall” and the court is compelled to refuse enforcement, if any of the grounds under Section 48 are established. First of all, the plain meaning of the word “may” is not “shall”; it is used to imply discretion and connote an option as opposed to compulsion.

29. In *re, Nichols v. Baker*: 59 LJ Ch 661, Cotton L.J. observed that “‘May’ can never mean must, so long as the English language retains its meaning; but it gives a power and then it may be a question, in what cases, when any authority or body has a power given it by the word ‘may’, it becomes its duty to exercise that power”.

Clearly, it is at the discretion of the tribunal whether to continue to make the award on the evidence available before it.

17. However, in my opinion, the plea of the petitioner that Section 25 (c) of the Act is applicable in the facts of this case are not warranted. Section 32 can also be applied by the learned Arbitral Tribunal depending on the facts and circumstances of the case. The two sections would have to be read together.

18. Section 32 of the Act reads as follows:-

“32. Termination of proceedings.—

(1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under subsection (2).

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where—

(a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute,

(b) the parties agree on the termination of the proceedings, or

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) Subject to section 33 and sub-section (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.”

19. It is hence clear from a co-joint reading of the said two Sections 25(c) and 32 of the Act that in case of default on the part of the claimant in not appearing for the hearings and producing documentary evidence, the Arbitral Tribunal has the option of either making the arbitral award based on the evidence before it or it may in exercise of powers under Section 32(2)(c) terminate the proceedings. In the present case, the learned Arbitrator has exercised his discretion noting that for the last 8 hearings, none has been appearing for the petitioner. It is also on record that the petitioner has failed to pay the fees of the learned arbitrator. The order dated 03.12.2016 is in fact a termination of the proceedings by the learned arbitrator in exercise of powers under Section 32 (2) (c) of the Act. The terminology used in the impugned order i.e. nil award would not make any difference.

20. In this context, reference may be had to the judgment of the Supreme Court in *Lalitkumar V.Sanghavi (D) Th.L.Rs. Neeta Lalit Kumar Sanghavi & Anr. v. Dharamdas V.Sanghavi & Ors., (2014) 7 SCC 255*. In that case, the Supreme Court was dealing with a matter where the learned arbitrator

had noted that the claimant was taking no interest and the fees of the arbitrator had not been paid. The arbitration proceedings were accordingly terminated. In those facts, the Supreme Court held as follows:

“13.From the language of Section 32, it can be seen that arbitral proceedings get terminated either in the making of the final arbitral award or by an order of the Arbitral Tribunal under sub-section (2). Sub-section (2) provides that the Arbitral Tribunal shall issue an order for the termination of the arbitral proceedings in the three contingencies mentioned in clauses (a) to (c) thereof.

14. On the facts of the present case, the applicability of Sub-clauses (a) and (b) of Section 32(2) is clearly ruled out and we are of the opinion that the order dated 29th October, 2007 by which the Tribunal terminated the arbitral proceedings could only fall within the scope of Section 32, Sub-section (2), Sub-clause (c) i.e. the continuation of the proceedings has become impossible. By virtue of Section 32(3), on the termination of the arbitral proceedings, the mandate of the arbitral tribunal also comes to an end. Having regard to the scheme of the Act and more particularly on a cumulative reading of Section 32 and Section 14, the question whether the mandate of the arbitrator stood legally terminated or not can be examined by the court “as provided under Section 14(2).”

In terms of the above judgment of the Supreme Court, the remedy of the petitioner was in moving an appropriate petition under Section 14 of the Act. Instead the petitioner has chosen to move the present petition under Section 34 of the Act. However, I do not wish to stress this issue as in the interest of justice this petition can be converted to one under Section 14 of the Act.

Further, in my opinion, there is no merit in the plea of the petitioner. He has remained absent for 8 hearings at a stretch. He has also not paid the fees of the learned arbitrator. It is manifest having delayed the auction

proceedings and sending the whole process into long legal battle, he was not pursuing the arbitration proceedings. The petitioner was taking no interest in the arbitration proceedings. The learned Arbitrator was not obliged to despite not having received his fees and despite not receiving any assistance from the petitioner to pass an award on the claim petition filed by the petitioner. In these circumstances, the learned arbitrator has rightfully exercised his discretion and terminated the proceedings. Accordingly, I dismiss OMP (COMM.) 18/2017.

21. I will now deal with OMP (COMM.) 264/ 2017.

22. The plea of the petitioner here is that the proceedings already stood terminated/a null award has already been passed against the petitioner on 03.12.2016. Hence, he urges that the learned arbitrator was *functus officio* and could not have gone ahead and adjudicated the dispute/claim petition of the petitioner on merits.

23. The learned arbitrator has passed an arbitral award on 13.03.2017 adjudicating the claim petition of the petitioner and rejecting the same on merits. What the petitioner has argued in OMP (COMM.) 18/2017 essentially is that the learned arbitrator instead of rejecting the claim of the petitioner by a non-speaking order or award ought to have passed an order on merits on his claim petition. By its award dated 13.03.2017, the learned Arbitrator has in fact passed an award on merits dismissing the claim petition of the petitioner. As the claim petition is rejected on merits, the petitioner now in support of OMP(COMM) 264/2017 argues that the said rejection is illegal and inasmuch as the learned arbitrator has acted after he become *functus officio*. Hence, when the learned Arbitrator terminates the

proceedings, the grievance of the petitioner is that no reasoned award was passed. When the learned Arbitrator passes a reasoned award against the petitioner, the plea is that he was functus officio.

24. The impugned award relies upon the terms and conditions of the tender to conclude against the petitioner. A perusal of the special terms and conditions of the tender would show that in Clause 1, it is specifically stated that the floor price is equivalent to US \$ equivalent Rs.1,60,99,889. Hence, the floor price was fixed at US \$ 2,98,921/- which has been specifically notified to all the participating bidders. The award rightly holds that the claimant had full knowledge that bids have to be made in US \$. He has on getting an auto-generated email from the respondent No.3 only sought to create confusion and has tried to take advantage of the same.

25. However, in any case and in view of the fact that the proceedings stood terminated by order dated 03.12.2016, the learned arbitrator could not have adjudicated the claim petition of the petitioner and dismissed the same by the award dated 13.03.2017. The award has been passed contrary to Section 32 of the Act. The award is in contravention of the fundamental policy of Indian law and is accordingly liable to be set aside.

26. The Supreme Court in the case of *Associate Builders vs. DDA, AIR 2015 SC 620* held as follows:-

“24. In *DDA v. R.S. Sharma and Co.*, MANU/SC/3624/2008 : (2008) 13 SCC 80, the Court summarized the law thus:

“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
 - (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 contrary 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.

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Fundamental Policy of Indian Law

27. Coming to each of the heads contained in the Saw Pipes judgment, we will first deal with the head "fundamental policy of Indian Law". It has already been seen from the Renuagar judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian 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."

27. Accordingly, I set aside that portion of the award dated 13.03.2017, which deals with the claim petition of the petitioner. The adjudication of the counter claim filed by the respondents, however, is upheld and the award to that extent is held to be valid.

28. OMP(COMM) 264/17 stands disposed of as above. All applications also are disposed off as above.

29. As noted above, OMP(COMM) 18/2017 is dismissed.

**(JAYANT NATH)
JUDGE**

AUGUST 22, 2017/rb

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