

\$~

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

Judgment reserved on : October 01, 2018

% Judgment pronounced on : October 29, 2018

+ **FAO(OS) 204/2005 & CM APPL. 6405/2012**

STATE TRADING CORPORATION OF INDIA Appellant

Through: Mr. Rakesh Tiku, Sr. Adv. with
Mr. Arpan Wadhawan,
Ms. Gayatri Misra and
Mr. Gaurav Kohli, Advs.

versus

FINNPAP Respondent

Through: Mr. Jayant Mehta,
Mr. Gautam Khaitan and
Ms. Bharti, Advs.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

J U D G M E N T

A.K. CHAWLA, J.

1. The State Trading Corporation (STC) appeals a judgment and order of the learned single judge, under Section 39 of the Indian Arbitration Act, 1940 (in short 'the old Act'). The impugned judgment rejected STC's objections to the award dated 17.12.1998 published by the arbitral tribunal. The award was made rule of the court. Post decretal interest was awarded @ 9% per annum on the principal sum determined till the date of payment.

2. During pendency of this appeal, an application under Order 22 Rule 10 CPC read with Section 151 CPC came to be filed by UPM KYMMENE Corporation (Etelaesplanadi 2, FI-00130 Helsinki, Finland) in short 'the subject application' for being substituted in place of the respondent FINNPAP, which was directed to be heard along with the appeal on merits.

3. The relevant facts are that STC by a telex message dated 16/17.09.1991 had invited offers for standard newsprint of 48.8 gsm + -4% and glazed newsprint of 60 gsm + - 4% reels in terms of STC's standard specifications, sizes and also in terms of STC's standard terms and conditions or standard/glazed newsprint imports on the requirements and the stipulations as provided there-under. In response, Anika International Private Ltd. in short 'Anika', the local representative of the respondent/supplier - Finish Paper Mills Association (hereafter 'FINNPAP') responded by letter dated 30.09.1991. STC, by its telex message dated 16.10.1991, confirmed the order for supply of glazed newsprint of 60 gsm +/- 4% in reels/widths required as per STC's standard specifications for 9000 MT with an option to buy another 5000 MT on the exercise of such option by 31.12.1991, stipulating the price, origin, terms of payment, duration of shipment and the other terms and conditions to be as per STC's standard terms and conditions for import. Later, on 07.11.1991, STC is also said to have forwarded the three copies of the contract no. STC/NP/FINNPAP/31/91-92 dated 16.10.1991 to be signed by FINNPAP. This document dated 16.10.1991 provided for the

arbitration clause. Anika, by its letter dated 17.12.1991 acknowledged the receipt of the document and the confirmed order of 9000 MT with option to purchase further 5000 MT. Anika however sought some clarifications on behalf of FINNPAP for the signing of the contract. 9000 MT of the newsprint was supplied by FINNPAP which also received the payment there-against.

4. On 30.12.1991, STC by a telex message exercised its option to import further 5000 MT of glazed newsprint on the same terms and conditions. Anika confirmed acceptance thereof vide letter dated 31.12.1991 and sought release of specifications so that the production of the said quantity could be planned during January and February. STC by its letter dated 03.01.1992 released three more specifications for the said supply. STC argued that on 13.01.1992 through telex message, it requested FINNPAP to not to go ahead with production of the optional quantity of 5000 MT glazed newsprint, till further communication. On the same day i.e. 13.01.1992, FINNPAP confirmed to STC through fax that it had produced 3000 MT very fast in order to make it for the first shipment of total 5000 MT. Disputes thus arose amongst the parties which were referred to a tribunal comprising of three Arbitrators. The parties led their evidence on the issues framed. The learned arbitrators were unanimous on several issues. On two issues, one arbitrators arrived at an opinion contrary to the other two. By the majority award, a sum of US\$ 1,30,681.52 with proportionate costs and

interest @ 18% per annum w.e.f. 01.05.1992 till the date of payment, dismissing the remaining claim of FINNPAP was given. By the minority award, the claims made by FINNPAP were dismissed.

5. The award was filed under the old Act; the proceedings were registered as CS(OS) 346-A/1999. Upon the court issuing notices in the proceeding, objections were filed by the STC to the award. The learned Single Judge by the impugned order dismissed the objections and directed that the majority award dated 17.12.1998 be made rule of court; the impugned judgment also awarded post decretal interest @ 9% p.a. on the principal sum. Aggrieved, STC has preferred the present appeal.

6. On the pleadings of the parties, the Arbitral Tribunal framed the following issues :

- (i) Whether there is no valid arbitration agreement between the parties?
- (ii) Whether there was any foreign exchange problem, as alleged by the defendant? If so, its effect?
- (iii) Whether the defendant were not obliged to purchase 5000 MT of glazed newsprint under the optional clause, exercised in the defendant's fax dated 30th December 1991?
- (iv) Whether 3000 MT of glazed newsprint was not ready and awaiting shipment as stated in the

statement of claim?

- (v) Whether the claimant suffered damages. If so, to what amount they are entitled to?
- (vi) Relief

7. In support of its case, FINNPAP examined two witnesses namely, Mr. K.L. Wig, Chairman (of Anika) and Mr. Pentti Kallio, Managing Director of FINNPAP. STC on its part examined Mr. R.P. Sehrawat, its Chief Marketing Manager. On issue nos. (i) to (iii), the Arbitrators had rendered concurrent findings. Finding on issue nos. (iv) and (v) are sought to be agitated in this appeal as well.

8. Mr. Tiku, learned Sr. Counsel for STC on his part submitted that the entire subject matter hinges on the question as to whether FINNPAP had actually manufactured 3000 MT of the newsprint as per the specifications of STC at the point of time when FINNPAP was asked to not to go ahead with the production and thereby, suffered any loss. According to him, there was no credible evidence or material on record to show that the newsprint to the extent of 3000 MT was manufactured for STC when STC asked FINNPAP to withhold export. It was also contended that the Tribunal erred in not taking note of the fact that the depositions of the witnesses of FINNPAP, who deposed that some quantity of newsprint out of the alleged 3000 MT of glazed newsprint was sold out to the alternate buyers, was not believable in the given facts and circumstances. To support such

plea, it was contended that as per the FINNPAP's own case, it had sold a part of such material i.e. 1883 MT to alternative Indian buyers in the diameter of 100 cm instead of 91.4 cm diameter and it belied the version of FINNPAP, more so, in the absence of any material or explanation for the mode and/or the manner thereof.

9. Mr. Jayant Mehta, learned counsel appearing for the company seeking substitution in place of FINNPAP on his part justified the conclusions arrived at by the Arbitral Tribunal and the learned Single Judge. According to Mr. Mehta the oral testimony on behalf of FINNPAP that the goods were available, went un rebutted. It was argued that given the time frame for supply of the additional quantity of 5000 MT, the claim that on 13-01-1992, 3000 MT was available is not an improbable or implausible one. It was highlighted that since the nature of the goods that were the subject matter of the contract were such that FINNPAP could produce and procure them in a short time, there was no improbability in the claim, given its immense production capacity.

10. It is pertinent to note that, the contentions of Mr. Tiku, learned Sr. counsel, seek to agitate the findings on facts. The question therefore, is whether the findings of the tribunal, which have not been interfered with by the learned Single Judge, are so palpably erroneous or perverse which have the effect of shaking the conscience of the court require consideration by this court.

11. The present appeal is under Section 39 of the old Act. The principles for any interference in the awards arising there-under were reiterated by Hon'ble Supreme Court in *State of Rajasthan & Anr. vs. Ferro Concrete Construction Pvt. Ltd.*, (2009) 12 SCC 1 (in paras 20 and 21), as under :

"20. It was well settled that under the Arbitration Act, 1940, an award was not open to challenge on the ground that the arbitrator has reached a wrong conclusion or failed to appreciate facts, as under the law, the arbitrator is made the final arbiter of the dispute between the parties. While considering the challenge to an award, the court will not sit in appeal over the award nor reappreciate the evidence for the purpose of finding whether on the facts and circumstances, the award in question could have been made. When there is no allegation of moral misconduct against the arbitrator with reference to the award, and where the arbitration has not been superseded, there were only two grounds of attack. First was that there was legal misconduct on the part of the arbitrator in making the award. Second was that there was an error apparent on the face of the award.

21. This Court explained the principles relating to interference with awards under the 1940 Act in *State of Rajasthan v. Puri Construction Co. Ltd.* [(1994) 6 SCC 485] thus: (SCC pp. 502-03, para 31)

"31. ... Similarly, an award rendered by an arbitrator is open to challenge within the parameters of several provisions of the Arbitration Act. Since the arbitrator is a Judge by choice of the parties, and more often than not, a person with little or no legal background, the adjudication of disputes by an arbitration by way of an award can be

challenged only within the limited scope of several provisions of the Arbitration Act and the legislature in its wisdom has limited the scope and ambit of challenge to an award in the Arbitration Act. Over the decades, judicial decisions have indicated the parameters of such challenge consistent with the provisions of the Arbitration Act. By and large the courts have disfavoured interference with arbitration award on account of error of law and fact on the score of misappreciation and misreading of the materials on record and have shown definite inclination to preserve the award as far as possible. As reference to arbitration of disputes in commercial and other transactions involving substantial amount has increased in recent times, the courts were impelled to have fresh look on the ambit of challenge to an award by the arbitrator so that the award does not get undesirable immunity. In recent times, error in law and fact in basing an award has not been given the wide immunity as enjoyed earlier, by expanding the import and implication of 'legal misconduct' of an arbitrator so that award by the arbitrator does not perpetrate gross miscarriage of justice and the same is not reduced to mockery of a fair decision of the lis between the parties to arbitration. Precisely for the aforesaid reasons, the erroneous application of law constituting the very basis of the award and improper and incorrect findings of fact, which without closer and intrinsic scrutiny, are demonstrable on the face of the materials on record, have been held, very rightly, as legal misconduct rendering the award as invalid. It

is necessary, however, to put a note of caution that in the anxiety to render justice to the party to arbitration, the court should not reappraise the evidence intrinsically with a close scrutiny for finding out that the conclusion drawn from some facts, by the arbitrator is, according to the understanding of the court, erroneous. Such exercise of power which can be exercised by an appellate court with power to reverse the finding of fact, is alien to the scope and ambit of challenge of an award under the Arbitration Act. Where the error of finding of facts having a bearing on the award is patent and is easily demonstrable without the necessity of carefully weighing the various possible viewpoints, the interference with award based on erroneous finding of fact is permissible. Similarly, if an award is based by applying a principle of law which is patently erroneous, and but for such erroneous application of legal principle, the award could not have been made, such award is liable to be set aside by holding that there has been a legal misconduct on the part of the arbitrator. In ultimate analysis, it is a question of delicate balancing between the permissible limit of error of law and fact and patently erroneous finding easily demonstrable from the materials on record and application of principle of law forming the basis of the award which is patently erroneous.”

12. On the touchstone of foregoing principles governing the scope of interference in the arbitral awards, we observe that the findings of the Arbitral Tribunal are well reasoned and founded

on the appreciation of the evidence and the material on record. Whether FINNPAP confirmed the manufacture of 3000 MT of the newsprint prior to STC's sending telex to not to go ahead with the production of the optional quantity of 5000 MT newsprint till further information, was extensively dealt with by the Arbitrators giving the majority award and the relevant extract thereof to arrive at a finding to the contrary is, as under :

"..... Sh. R.P. Sehrawat admits that Ext.11/STC's documents was received at STC's office on 13.1.1992 at 17.59 hours but it reached him on 14.1.1992 at 11.35 hours. He also admitted that fax Ext.10/STC's document was sent by STC on 13.1.1992 at 19.10 hours. Later on he changed his statement and he denied that the claimant sent its fax on 13.1.1992 prior to receiving the telex of STC of the same date and explained that the time mentioned on Finnpap's Fax is of its transmission being 17.59 hours local time which is 3 hours 30 minutes behind. No expert evidence has been produced by STC as to the capability of the STC's fax machine to record time of the transmitting country as ordinarily the time recorded by fax machine is the local time and that must be so in STC's fax machine. The fax dated 13.1.1992 of the claimant was addressed to Mr. Sehrawat of STC, and the fax dated 13.1.1992 of STC was sent by Shri D.K. Agarwal, GM. The claimant immediately on receipt of fax dated 13.1.1992 of STC sent another fax on 14.1.1992, Ext.12/STC's documents, to Shri D.K. Agarwal, GM reiterating the position of sending an earlier fax to Mr. Sehrawat regarding their started production for the 5000 MT of glazed newsprint. Anika on behalf of the claimant also addressed a letter dated 17.1.1992, Ext.14/STC's documents, reiterating that Finnpap confirmed vide

their fax of 13.1.1992 sent direct to STC that 3000 tons material will be ready for shipment by end of January (January lot) and that production has already been planned from Kirkniemi for February lot and that "we understand on receipt of this communication, STC sent a message to Finnpap stating that due to foreign exchange problems the cargo should not be manufactured." Anika stated that the cargo had already been manufactured as per STC's order and specifications. Shri R P Sehrawat was specifically questioned in cross-examination whether STC disputed the fact contained in letter dated 17.1.1992 that STC sent its telex communication dated 13.1.1992 to the claimant after receiving the claimant's fax message of 13.1.1992 and he admitted that they did not send any communication in reply to this but added because in their message of 13.1.1992 they had communicated to Finnpap not to go ahead with the production of goods. The Counsel persisted and Shri Sehrawat admitted that they did not send any communication whatsoever to either Finnpap or to Anika stating that the claimant's fax of 13.1.1992 was sent after the claimant had received STC's telex of 13.1.1992. A vital factual-position when not disputed is considered as factually existing. It is thus established that the claimant sent its fax in the normal course before receiving STC's fax of 13.1.1992 and it represents the state of affairs as on that date."

Here, it is noteworthy that the arbitrator giving the minority award has not expressed any opinion on this vital aspect and the learned Single Judge having dealt on this aspect, has not found any reason to interfere with such finding.

13. Coming to another aspect as to whether FINNPAP had manufactured 3000 MT of the newsprint as per the specifications

of STC, the conclusions drawn by the Arbitral Tribunal are again based upon the material and the evidence before it. The relevant observations of the Arbitral Tribunal in that context are, as under:

"Paras 3 and 16 of affidavit dated 2.10.1996 of Mr. Pentti Kallio deposed that the claimant placed orders on mills, duly authorized by the defendant and letter dated 6.1.1992, Ext.9/STC's documents of Anika asserts that the manufacture has been planned as per the delivery schedule required by STC. Mr. Pentti Kallio deposed in para 3 of the affidavit dated 18.3.1997 that once the specifications are fed into the computer and the process starts, it cannot be halted and the manufacture has to be completed. The said letter dated 13.1.1992 was sent in normal course on the basis of the confirmation received from the mills, namely, Rauma and Myllykoski as deposed by Mr. Kallio during his cross-examination on 29.4.1997 that the mills, whom the orders for the opinion quantity of 5000 MT of glazed newsprint were forwarded by the Claimant, confirmed to the claimant that as on 13.1.1992, 3000 MT of glazed newsprint in terms of the specifications provided by the defendant, had already been manufactured. Although the onus of the issue is on the defendant who has led no evidence of Mr. Pentti Kallio in his affidavits and cross-examination before us corroborated by the fax letter dated 13.1.1992, Ext.11/STC's documents that 3000 MT of glazed newsprint was ready and awaiting shipment. We hold issue No.4 (incorrectly mentioned as issue no.1 in the copy of the award filed alongwith the appeal) against the defendants."

14. Suffice to say, the onus to prove to the contrary, was upon STC, which it failed to discharge inasmuch as on its part it did not lead any credible evidence but for the bald deposition of Mr.

Sehrawat. Moreover, STC failed to even adduce any evidence and prove that it was facing any foreign exchange problems, which was propounded as the predominant reason to ask FINNPAP to not to go ahead with production of newsprint but for the bald deposition of Mr. Sehrawat. The fact that the STC's plea that the telex dated 13.01.1992 was issued by it prior to the receipt of fax dated 13.01.1992 of FINNPAP was repelled by the Arbitral Tribunal also has an effect of drawing an adverse inference against STC and we do not see any perversity in the conclusions arrived at by the Arbitral Tribunal or any reason to interfere with the conclusions drawn by the learned Single Judge.

15. As regards the sums awarded, the court notices that damages were awarded to FINNPAP only against the loss it suffered, having sold 1883.906 MT out of the 3000 MT manufactured by it to be supplied to STC. This aspect was also dealt with by the Arbitral Tribunal on the basis of the evidence and the material adduced before it in the following words :

"Shri Ajay Verma is right that the claimant specifically and solely claimed damages on the basis of loss sustained on account of having had to sell the newsprint manufactured at a lower price and thus cannot claim damages on account of loss of profit. No evidence has been led by the claimant to establish its cost price of the newsprint manufactured for STC or profit which the claimant would have earned if the quantity of 5000 MT had been lifted by STC. We have held that 3000 MT of glazed newsprint was manufactured ready and awaiting shipment. What happened to remaining quantity is not established and

sale of only 1883.906 MT out of that quantity has been established by the evidence on record discussed earlier. The sale of M/s Chitra Bhumi in reel diameter of 91.4 cms is at a price of US\$ 640 Per MT of a quantity of 115.021 MT being the difference between contract price of US\$ 609 FOB, and converted FOB price (640-95) 535 is to the extent of US\$ per metric ton. Similar is the loss in all other consignments except 3 in which it was more. The total loss calculated for 1883.906 MT is US\$ 1,30,681.52. The claimant suffered loss to the extent of US\$ 1,30,681.52 and they are entitled to recover the same from the defendant. There is another way to look at the loss suffered. When a contract to accept and pay for the goods is broken, the proper measure of damages in general is the difference between the contract price and the market price of such goods at the time the contract was broken, for the seller may take his goods into the market and obtain the current price. The claimant could not sell the manufactured quantity in India before 1.4.92 as the import was decanalised only from that date. Moreover, the claimant did not treat the contract rescinded till April 1992 and sent the legal notice on 9.4.92 calling upon the defendant to lift the cargo failing which to pay for the damages/compensation.

The sale to M/s Chitra Bhumi in the reel diameter of 91.4 cms is as per the specifications of STC and out of the quantity of 3000 MT manufactured for STC. The loss suffered is to the extent of US\$ 64 per metric ton on the sale of the quantity. So we have the market price of the goods at the time the contract was broken or soon thereafter. The claimant would have been entitled to the recovery of US\$ 64 per ton on 3000 MT manufactured quantity but the claimant led no evidence as to how the remaining quantity (apart from 1883.906 MT) was dealt with. The claimant has led no evidence in respect of the remaining quantities or

what steps the claimant took to mitigate the loss. We, therefore, hold that the claimant suffered loss to the extent of US\$ 1,30,681.52 and they are awarded the same amount against the defendant."

16. The above conclusions of the Arbitral Tribunal are self-explanatory, not only as regards the manufacture but also the sale of a part of the manufactured newsprint by FINNPAP to alternative Indian buyers; as against this, STC did not lead any evidence in rebuttal. This court too consequently cannot arrive at a different conclusion.

17. In view of the foregoing finding no merit in the appeal, we do not consider it necessary to get into the merits of the subject application. Liberty is however, reserved to the parties to raise any of their pleas subject matter of the subject application during the course of the execution proceedings, which shall be considered and decided by the executing court on their own merits. The Appeal fails and is therefore dismissed; the subject application is accordingly disposed of. There shall be no order on costs.

A. K. CHAWLA, J

S. RAVINDRA BHAT, J

OCTOBER 29, 2018

rc