

\$~16.

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

+ **FAO(OS) (COMM) No. 111/2018**

Date of decision: 18th May, 2018

M/S DARRAMEKS HOTELS & DEVELOPERS PVT LTD

..... Appellant

Through Mr. Punit D. Tyagi & Mr. Ankit Parhar,
Advocates.

versus

M/S ALTUS GRUOP INDIA PVT LTD.

..... Respondent

Through Nemo.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL):

This intra-Court appeal under Section 37(1) (c) of the Arbitration and Conciliation Act, 1996 (A&C Act, for short) read with Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Court Act, 2015 impugns order dated 20th March, 2018 whereby the Learned Single Judge has partly allowed the objections under Section 34 of the A & C Act filed by the respondent, M/s Altus Group India Private Limited.

2. We have heard Learned counsel for the appellant, who submits that Sub-clause (IV) of Clause (9) of the contract relating to termination of the agreement was rightly interpreted by the learned Arbitrator in the Award dated 6th July, 2015. Further, the interpretation given by the Arbitrator

being plausible, interference was not justified. Learned counsel for the appellant has relied on *National Highway Authority of India versus ITD Cementation India Limited*, (2015) 14 SCC 21 and submits that the Court can only interfere in case of perverse interpretation and only if the Arbitrator construes the contract in a way that no fair minded or reasonable person would do and the Courts would not sit in appeal on interpretation of the terms of the contract as an appellate forum.

3. By Professional Service Agreement (PSA) dated 14th February, 2011 respondent was appointed as Project Manager and Cost Consultant with respect to the project “Vivanta by Taj” at village Singhthali near Rishikesh, Uttarakhand.

4. Clause (9) of the aforesaid agreement relates to termination and reads as under:-

“9. TERMINATION

I. The Owner may terminate the Agreement with a prior notice of 30 days.

II. The Project Management Consultant may terminate this agreement only in case the Owner fails to pay its correctly invoiced fees within 30 days of receipt of a reminder by courier letter informing Owner of due amounts.

III. Upon the termination or expiry of this Agreement, the Project Management Consultant shall return to the Owner any and all data, technical details, designs, drawings and the like and shall not retain any copies and/or extract thereof.

IV. Either party may upon Thirty (30) days notice in writing to the other terminate this Agreement.

V. In the event of termination of the Agreement, the Owner shall pay to the PMC the fee corresponding to the Services which were completed up to the date of contract termination.”

5. The issue and question, raised before the Arbitrator was whether the respondent could have terminated the agreement under Sub-clause (IV) of Clause (9) of the agreement by thirty days notice in writing dated 23rd December, 2011. The contention of the appellant and as held by the Learned Arbitrator was that only the appellant, i.e., the owner was entitled to terminate the agreement with prior notice of thirty days under Sub-clause (I), whereas the respondent did not have such option under Sub-clause (IV). Reference and reliance was placed upon Sub-clause (II) of Clause (9), which states that the Project Manager and Consultant could terminate the agreement only in case the owner had failed to pay the correct invoice fees within thirty days of the receipt of the reminder by courier letter informing the owner of the amounts due.

6. We do not find any merit in the said stand and stance as Sub-clause (IV) of Clause (9) is clear and categorical and does not suffer from any doubt or ambiguity. Either party had option to terminate the contract by giving thirty days notice in writing. Sub-clause (II) on the other hand is a specific clause, which empowered and gave option to the respondent i.e., to the Project Manager and Consultant to terminate the agreement in case of non-payment of fees within thirty days from receipt of reminder by a courier letter. There would be instant termination on satisfaction of the stipulations under Sub-clause (II), whereas in case of Sub-clause (IV) termination would take place vide thirty days prior notice. Sub-clause (II) had dealt with a specific eventuality, i.e., non-payment of fee by the owner/appellant to the Project Management and Consultant/respondent. Sub-clause (IV) obviously was incorporated with the intention giving an option to the either party to

terminate the contract. No doubt, Sub-clauses (I) and (IV) would overlap insofar as right of the owner, i.e., the appellant is concerned, but this cannot be a ground to hold that Sub-clause (IV) would not be available to the respondent. Sub-clause (IV) in plain and simple words thus states that either party could terminate the contract by giving thirty days notice in writing to the other. In a way, both the appellant and the respondent were placed equally and given same right and option of termination by thirty days notice.

7. Learned single Judge in the impugned order has referred to and quoted from several decisions of the Supreme Court in ***Central Bank of India, Limited, Amritsar versus Hartford Fire Insurance Co., Limited***, AIR 1965 SC 1288, ***Her Highness Maharani Shantidevi P. Gaikwad versus Savjibhai Haribhai Patel and Ors.***, (2001) 5 SCC 101, ***Associate Builders versus Delhi Development Authority***, (2015) 3 SCC 49, ***Nabha Power Limited (NPL) versus Punjab State Power Corporation Limited (PSPCL) & Another***, 2017 (12) SCALE 241. Reference was also made to judgments of the Delhi High Court in ***Classic Motors Limited versus Maruti Udyog Limited***, (1997) 65 DLT 166 and judgment of the Bombay High Court in ***Oil and Natural Gas Corporation Limited versus M/s Streamline Shipping Company Private Limited***, 2002 SCC Online Bom 303. After examining scope and ambit of judicial interference, it has been held that clause 9(IV) being explicit was the final word on the intent of the parties and clearly had authorized either party to terminate the agreement without cause by simply giving notice to the other. The Award, on the other hand, was counter and contrary to clause 9(IV) and the learned Arbitrator had, therefore, committed a fundamental error in holding that the contract

had not provided for option to the respondent for termination of the agreement without cause.

8. The view we have taken upholding the decision of the learned single Judge does not conflict with the ratio in *ITD Cementation India Limited* (supra). Construction of the terms of the agreement is within the jurisdiction of the Arbitral Tribunal and if the view taken is a plausible one, Courts would not interfere and substitute its view in place of the interpretation accepted in the Award. This however, is not to say that in no case the Court can interfere even when interpretation is plainly abstruse and esoteric. In *Nabha Power Limited* (supra), it was observed by the Supreme Court that a multi-clause contract has to be understood and interpreted in a manner that a particular clause of the contract should not do violence to another part/clause of the contract. In *Western Geco International Limited* (2014) 9 SCC 263, it was observed that "fundamental policy of Indian law" connotes some matter, which concern public good and public interest and an Award which on the face of it is patently in violation of statutory provisions is not in public interest as it would adversely affect administration of justice. It was thereafter elucidated:

" 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."

9. In *Associate Builders* (supra), the Supreme Court had elaborated on the term "patent illegality" in relation to an arbitration award after referring to *McDermott International Inc.* (supra) held as under:-

"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."

10. Recent decision of the Supreme Court in ***HRD Corporation versus GAIL (India) Limited***, 2017 (10) SCALE 71 refers to the amendments made in Section 34 of the A&C Act vide Arbitration and Conciliation (Amendment) Act, 2015 and observes:-

"Section 28(3) has also been amended to bring it in line with the judgment of this Court, in Associate Builders (supra), making it clear that the construction of the terms of the contract is primarily for the arbitrator to decide unless it is found that such a construction is not a possible one."

It was also held:-

"18. Shri Divan is right in drawing our attention to the fact that the 246th Law Commission Report brought in amendments to the Act narrowing the grounds of challenge co-terminus with seeing that independent, impartial and neutral arbitrators are appointed and that, therefore, we must be careful in preserving such independence, impartiality and neutrality of arbitrators. In fact, the same Law Commission Report has amended Sections 28 and 34 so as to narrow grounds of challenge available under the Act. The judgment in *ONGC v. Saw Pipes Ltd.*, (2003) 5 SCC 705, has been expressly done away with. So has the judgment in *ONGC v. Western Geco International Ltd.*, (2014) 9 SCC 263. Both Sections 34 and 48 have been brought back to the position of law contained in *Renusagar Power Plant Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644, where "public policy" will now include only two of the three things set out therein, viz., "fundamental policy of Indian law" and "justice or morality". The ground relating to "the interest of India" no longer obtains. "Fundamental policy of Indian law" is now to be understood as laid down in *Renusagar* (supra). "Justice or morality" has been tightened and is now to be understood as meaning only basic notions of justice and morality i.e. such notions as would shock the conscience of the Court as understood in *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49. Section 28(3) has also been amended to bring it in line with the judgment of this Court in *Associate Builders* (supra), making it clear that the construction of the terms of the contract is primarily for the arbitrator to decide unless it is found that such a construction is not a possible one.

19. Thus, an award rendered in an international commercial arbitration - whether in India or abroad - is subject to the same tests qua setting aside under

Section 34 or enforcement under Section 48, as the case may be. The only difference is that in an arbitral award governed by Part I, arising out of an arbitration other than an international commercial arbitration, one more ground of challenge is available viz. patent illegality appearing on the face of the award. The ground of patent illegality would not be established, if there is merely an erroneous application of the law or a re-appreciation of evidence."

11. The present case, according to us, falls within the four corners of the expression "patent illegality" as expounded and explained in the said decisions, as clause 9(IV) has been completely misconstrued and made inconsequential and redundant. There is apparent and patent fallacy and flaw in the interpretation which is contrary to the plain language and therefore must be checked and corrected. This is not a case of fair minded or reasonable construction, but a construction which is *ex facie* contrary to the written and agreed clause and the interpretation is completely erroneous. Interference was, therefore, justified and required. Accordingly, we do not find merit in the present appeal and the same is dismissed, without any order as to cost.

SANJIV KHANNA, J.

CHANDER SHEKHAR, J.

MAY 18, 2018
VKR