

\$~4

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

% *Date of Judgment: 19th March, 2018*

+ **FAO(OS)(COMM) 86/2016**

M/S L.G. ELECTRONICS INDIA (P) LTD Appellant

Through Mr. Ravi Sikri, Senior Advocate with
Mr. Sanjay Gupta and Mr. Deepank
Yadav, Advocates

versus

DINESH KALRA Respondent

Through Mr. Sachin Datta, Senior Advocate
with Mr. Manikya Khanna, Advocate

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J. (ORAL)

1. This is an appeal filed under Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015(hereinafter referred to as the 'Commercial Courts Act') read with Section 37 of the Arbitration and Conciliation Act, 1996(hereinafter referred to as 'the Act'). The appellant impugns the order dated 08.07.2016 passed by the learned Single Judge of this Court by which the objections to the award dated 28.06.2013 passed by an Arbitral Tribunal comprising of three former Judges of this Court have been rejected. Dismissal of the petition under Section 34 by the orders dated 08.07.2016 has led to the filing of the present appeal.

2. Before the rival submissions of the learned Senior Counsels appearing for the parties can be considered, we deem it appropriate to set out basic facts which led to the dispute between the parties.
3. Parties entered into an agreement for distribution of products of the appellant by an Agreement dated 24.10.2002. No doubt, the said agreement was with respect to the colour Televisions. The claim of the respondent is based on clause 24 of the Agreement, which reads as under:-

“24. The distributor shall not incur or commit itself or on behalf of the company any expenditure in regard to advertisements/ schemes or of whatsoever nature without written approval of the company’s authorized representative.”
4. The transactions between the parties came to an end on 21.09.2005. The respondent filed a suit for rendition of accounts and for recovery to the tune of Rs.45,56,947/- against the appellant herein in the month of December, 2007 at Varanasi. The appellant herein filed an application under Section 8 of the Act relying upon clause 30 of the agreement, which was initially opposed by filing a reply by the respondent herein. However, soon thereafter the respondent issued a legal notice dated 22.01.2009, informing the appellant herein that he had appointed Justice R.C. Chopra, former Judge of this Court as his nominee. The respondent also filed a petition under Section 11 of the Act in the Delhi High Court. By an order dated 11.09.2009, the petition was allowed and parties agreed to resolve their disputes through the medium of arbitration. The respondent had raised as

many as 8 claims to the tune of Rs.10.54 Crores. The Tribunal dismissed claims no.2 to 8, but allowed claim no.1 in the sum of Rs.36,71,067/- along with interest @ 6% w.e.f. 01.11.2005 till the date of the award, if paid within three months, failing which the petitioner would pay interest @ 12% per annum from the date of the award till the date of payment.

5. Mr. Ravi Sikri, learned Senior Counsel appearing for the appellant submits that the agreement between the parties is clear and unambiguous. The product involved was only colour televisions and this agreement could not have been modified except in writing by the parties. It is thus, contended that the Tribunal as also the learned Single Judge have fallen in grave error and have exceeded their jurisdiction by expanding the scope of agreement, which they were not entitled to do as per settled law. The second and only other ground raised is that the Tribunal and the learned Single Judge have completely lost track of the fact that the claims raised by the respondent herein were hopelessly barred by limitation and were thus liable to be rejected. Mr. Sikri contends that the Tribunal as also the learned Single Judge have fallen in grave error by not taking into account that Section 14 of the Limitation Act would not apply to the facts of the present case.
6. Mr. Sachin Datta, learned Senior Counsel appearing for the respondent however, submits that the learned Arbitrators have interpreted the agreement in its right perspective, examined the evidence and rendered

the award, which has been rightly been upheld by the learned Single Judge. The scope of interference, while hearing an appeal under section 37 of the Act is even narrower. He contends that no grounds have been urged by the learned Senior Counsel for the appellant, which would require interference in the present proceedings.

7. We have heard the learned Senior Counsels for the parties and considered their rival submissions.
8. We deem it appropriate to extract Clause 1 of the Agreement, which is sought to be relied upon by the learned Senior Counsels for both the parties.

“1. The company hereby appoints and the Distributor accepts such appointment as the company’s non-exclusive Distributor for the area and for the specified product or as modified in writing from time to time. The company shall however be at liberty to directly effect supplies in the area allocated to the Distributor or to appoint any other Distributor for the same or any other area and for the same or different products.”

9. It has been contended, as noticed hereinabove, by Mr. Sikri that there was no scope for expansion of this clause by the Tribunal or by the Court as reading of this clause would show that the agreement was with respect to a specified product, i.e., colour television. The learned Senior Counsel has further contended that admittedly this agreement was never modified in writing. Mr. Datta, learned Senior Counsel for the respondent has drawn the attention of this Court to paragraphs 42 and 43 of the award to buttress his argument that the arbitration clause

is wide enough to cover all the disputes between the parties relating to all the products. He contends that it was the understanding between the parties that the arbitration would cover the entire subject matter of the civil suit which was instituted by the respondent in the Civil Courts at Varanasi. Mr. Datta contends that in case this was not the understanding of the appellant, no application under Section 8 of the Act would have been filed. Once having filed such an application, the appellant is estopped from raising such a plea. Additionally, Mr. Datta contends that post the signing of the agreement, the parties started dealing in various products of the appellant, including washing machines, refrigerators, and air conditioners. Initially, when only colour televisions were being supplied, the respondent was given a distributor code, subsequently all goods were supplied to this respondent distributor under the same code. Common bills and invoices were raised, including for televisions and other products in writing and thus, the view of the Tribunal is to be accepted that the agreement covers all goods as it is not an unreasonable view, it is not illegal and which has also been accepted by the learned Single Judge. He submits that the law as it has been developed does not allow the Court to interfere even if another view is possible.

10. No doubt, reading of Clause 1 extracted above would clearly show that parties had entered into an agreement for a specific product, i.e., colour television. Reading of the Clause 1 would also show that it would not be unusual for modification of this clause, as it is often that a distributor deals in various other products as well. No doubt, any

modification was to be in writing. Admittedly, and as held by the learned Tribunal, which was further upheld by the learned Single Judge of this Court, that post the signing of this agreement, the appellant supplied air conditions, refrigerators and washing machines to the respondent with the same distributor code and common bills and invoices were issued and thus, in our view, the Tribunal and the learned Single Judge rightly upheld that the Clause 1 was applied to other products and other goods were supplied on the basis of written documents in the form of invoices and bills. This is not the only ground for us to uphold the award and the order of the learned Single Judge.

11. The respondent was the first to strike when he filed a suit for rendition of accounts and for recovery to the tune of Rs.45,56,947/-. The appellant herein filed an application under Section 8 of the Act seeking stay of the suit while relying on the arbitration clause in the agreement. In case, the appellant was of the view that the subject matter of the suit would not cover the disputes, there was no occasion for the appellant to have filed such an application and subsequently agreeing for appointment of an Arbitrator. No doubt, Mr. Sikri has highlighted the fact that this Section 8 application was opposed by the respondent, but much cannot be read into this submission for the reason that soon thereafter, the respondent issued a legal notice to the appellant invoking the arbitration clause and the respondent filed a petition under Section 11 of the Act and parties agreed that the disputes be resolved through arbitration. Once having chosen to

follow the path of arbitration relating to subject matter, the appellant is estopped from raising the objection that the agreement only pertained to colour televisions. A complete reading of the agreement makes it clear that the agreement is a non-exclusive distribution agreement, which is not limited to a single product i.e. colour television. In fact, after the word product, a dotted line has been made in the agreement which would show that it could include any product, including washing machines, air conditions or refrigerators. Thus, the first submission of the learned Senior Counsel for the appellant is without any force.

12. The second submission of the Ld. Single Counsel for the appellant pertains to limitation. Mr. Sikri, learned Senior Counsel for the appellant has strenuously urged before this Court that the claims of the respondent were hopelessly barred by limitation. The suit was filed as far back as in the year 2008. The Arbitrators were appointed in the year 2009 and the subject matter pertain to an agreement of the year 2002, which came to an end in the year 2005. It is not in dispute that the civil suit was instituted in December 2007 within the period of limitation. The learned Arbitrators have examined this issue in paragraphs 25, 26, 27 and 29 of the award. We may note that out of the 8 claims raised by the respondent herein, the learned Arbitrators were in agreement with the submissions made by the appellant that these claims were beyond the period of limitation and therefore rejected the same. Only Claim no.1 was allowed on the ground that the aforesaid claim was a subject matter of the civil suit, which was

filed within the period of limitation. Mr. Sikri has also contended before us that benefit of Section 14 would only accrue in favour of the respondent in case he was bonafidely pursuing the remedy and not otherwise. Mr. Sikri has also contended that when an application under Section 8 of the Act was filed by the appellant, it was opposed by the respondent. Thus, it cannot be said that he was pursuing this remedy bonafidely. We are unable to accept this argument of the learned Senior Counsel for the appellant for the reason that not only did the respondent invoke the arbitration clause after the filing of the application under section 8 by the appellant herein (defendant in the suit) but the respondent issued a legal notice, he filed a petition under Section 11 of the Act in this Court and disputes were referred for arbitration. Thus, in our view, the Tribunal has rightly relied upon Section 14 of the Limitation Act and held that claim No.1, which was a subject matter of the suit was within the period of the limitation.

13. We may also notice that in the petition filed under Section 34 of the Act, no ground of limitation was raised as pointed out by Mr. Datta. However, Mr. Sikri has contended that it was a legal objection and entertained by the learned Single Judge as reflected in paragraphs 45 to 47, although the learned Single Judge has not given reasons for not accepting the objections so raised by the appellant herein.
14. Mr. Datta has relied upon the judgment in the case of *Thanikkudam Bhagwati Mills Ltd. v. Mrs. Reena Ravindra Khona*, reported at 2007(3) ARBLR161(Bom), more particularly para 9, which is

reproduced below in support of his submission that once an objection was not raised under Section 34 of the Act, it was not open for the appellant to raise it either before the learned Single Judge or before this Court. Para 9 of the judgment reads as under:

“9. It is well-settled law that a petitioner challenging an award under the provisions of the said Act has to raise all the grounds of challenge in the petition so filed. In the absence of ground being specifically raised in the petition filed under Section 34, the petitioner is not entitled to canvass any ground extraneous to those grounds enumerated in such petition and those which are not reflected from the pleadings in the petition. It is also well-settled law that once the judgment or order or the proceeding sheet disclose narration of the facts and happenings in the Court in the course of the hearing of the matter, such recording is to be accepted as revealing the correct description of such happenings in the Court unless the concerned party files before the same Court, immediately after the records in that Court are prepared by the Court, an affidavit disputing such recording by the Court and bringing to the notice of the Court, the facts which could disclose the recording by the Court to be contrary to what had actually happened in the Court. The law in that regard is well-settled. Undisputedly, the appellants have not filed any such affidavit disputing the findings arrived at by the learned single Judge in relation to the fact that the appellants had restricted the challenge to the award in question on only two grounds and both those grounds were not raised in the memo of the appeal filed under Section 34 of the said Act. That apart, the impugned order clearly records that no other ground was canvassed. The contention of the appellants now that there was some misunderstanding between the parties and their lawyer or that the lawyer was not instructed to give up any ground of challenge or that the grounds of challenge were not given up by the appellants are apparently after-thought. The appellants have not been able to point out any material which could convince the Court to believe the appellants' case in this regard, or something which could reveal that the Advocate for

the appellants had in fact insisted for arguing the matter on the grounds which were enumerated in the petition under Section 34, nor there is any material to disclose that the grounds which were sought to be canvassed were not those foreign to the grounds enumerated under the petition.

15. The position of law stands crystallized today, that findings, of fact as well as of law, of the arbitrator/Arbitral Tribunal are ordinarily not amenable to interference either under Sections 34 or Section 37 of the Act. The scope of interference is only where the finding of the tribunal is either contrary to the terms of the contract between the parties, or, ex facie, perverse, that interference, by this Court, is absolutely necessary. The Arbitrator/ Tribunal is the final arbiter on facts as well as in law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Sections 34 or 37 of the Act. This Hon'ble Court in the case of **P.C.L Suncon (JV) v N.H.A.I.,2015 SCC Online Del 13192** , in para 24 stated that :

“24. As a postscript, this Court believes that it is imperative to sound a word of caution. Notwithstanding the considerable jurisprudence advising the Courts to remain circumspect in denying the enforcement of arbitral awards, interference with the awards challenged in the petitions before them has become a matter of routine, imperceptibly but surely erasing the distinction between arbitral tribunals and courts. Section 34 jurisdiction calls for judicial restraint and an awareness that the process is removed from appellate review. Arbitration as a form of alternate dispute resolution, running parallel to the judicial system, attempts to avoid the prolix and lengthy process of the courts and presupposes parties consciously agreeing to submit a potential dispute to arbitration with the object of actively avoiding a confrontation in the

precincts of the judicial system. If a court is allowed to review the decision of the arbitral tribunal on the law or on the merits, the speed and, above all, the efficacy of the arbitral process is lost."

16. The scope of judicial scrutiny and interference by an appellate court under Section 37 of the Act is even more restricted, while deciding a petition under Section 34 of the Act. The Hon'ble Supreme Court in the case of **McDermott International Inc. v. Burn Standard Co. Ltd. and Ors, (2006)11SCC181** held as under:

*"52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. **The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired.** So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."*

17. It has been repeatedly held that while entertaining appeals under Section 37 of the Act, the Court is not actually sitting as a Court of appeal over the award of the Arbitral Tribunal and therefore, the Court would not re-appreciate or re-assess the evidence. In the case of **State Trading Corporation of India Ltd. v. Toepfer International Asia Pte. Ltd**, reported at 2014(144) DRJ 220(DB), in para 16 it has been held as under:

“16. The senior counsel for the respondent has in this regard rightly argued that the scope of appeal under Section 37 is even more restricted. It has been so held by the Division Benches of this Court in Thyssen Krupp Werkstoffe Vs. Steel Authority of India MANU/DE/1853/2011 and Shree Vinayaka Cement Clearing Agency Vs. Cement Corporation of India 147 (2007) DLT 385. It is also the contention of the senior counsel for the respondent that the argument made by the appellant before the learned Single Judge and being made before this Court, that the particular clause in the contract is a contract of indemnification, was not even raised before the Arbitral Tribunal and did not form the ground in the OMP filed under Section 34 of the Act and was raised for the first time in the arguments.”

18. In the case of **Steel Authority of India v. Gupta Brothers Steel Tubes Limited**, (2009) 10 SCC 63, the Supreme Court has laid down that an error relating to interpretations 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. The Supreme Court has further laid down that the Arbitrator having been made the final arbiter of resolution of disputes between the parties, the award is not open to challenge on the ground that the Arbitrator has reached a wrong conclusion. The courts do not interfere with the conclusion of the Arbitrator even with regard to the construction of contract, if it is a plausible view of the matter.
19. The Apex Court in **J.G. Engineers (P) Ltd. v. Union of India**, reported at (2011) 5 SCC 758, demarcated the boundary while explaining the ambit of section 34(2) of the Act. The Court in the

aforesaid judgement relied upon the pronouncement of ONGC Ltd.

Vs. Saw Pipes , in paragraph 19 , held as under:-

“27. Interpreting the said provisions, this Court in ONGC Ltd. v. Saw Pipes Ltd. [MANU/SC/0314/2003 : (2003) 5 SCC 705] held that a court can set aside an award Under Section 34(2)(b)(ii) of the Act, as being in conflict with the public policy of India, if it is (a) contrary to the fundamental policy of Indian law; or (b) contrary to the interests of India; or (c) contrary to justice or morality; or (d) patently illegal. This Court explained that to hold an award to be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. It is also observed that an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court, as then it would be opposed to public policy.”

20. In **Associate Builders vs. Delhi Development Authority**, reported at (2015) 3 SCC 49, the Supreme Court while further explaining the scope of judicial intervention under the appeal in the Act held as under:-

“It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares and Stock Brokers (P) Ltd. v. B.H.H.

Securities (P) Ltd. MANU/SC/1248/2011 : (2012) 1 SCC 594, this Court held:

21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second Respondent and the Appellant are liable. The case as put forward by the first Respondent has been accepted. Even the minority view was that the second Respondent was liable as claimed by the first Respondent, but the Appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the Appellant did the transaction in the name of the second Respondent and is therefore, liable along with the second Respondent. Therefore, in the absence of any ground Under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."

21. This Court, time and again has emphasized on the narrow scope of section 37. In the case of **MTNL Vs. Fujitsu India Private Limited**, reported at 2015(2)ARBLR332(Delhi), the division bench held as under:

"The law is settled that where the Arbitrator has assessed the material and evidence placed before him in detail, the court while considering the objections under Section 34 of the said Act does not sit as a court of appeal and is not expected to re- appreciate the entire evidence and reassess the case of the parties. The jurisdiction under section 34 is not appellate in nature and an award passed by an Arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the court to interfere with the

award merely because in the opinion of the court, another view is possible. The duty of the court in these circumstances is to see whether the view taken by the Arbitrator is a plausible view on the facts, pleadings and evidence before the Arbitrator. Even if on the assessment of material, the court while considering the objections under section 34 is of the view that there are two views possible and the Arbitral Tribunal has taken one of the possible views which could have been taken on the material before it, the court would be reluctant to interfere. The court is not to substitute its view with the view of the Arbitrator if the view taken by the Arbitrator is reasonable and plausible Jhang Cooperative Group Housing Society v. P.T Munshi Ram & Associates Private limited: MANU/DE/1282/2013 : 202(2013) DLT 218.

The extent of judicial scrutiny under section 34 of the Act is limited and scope of interference is narrow. Under section 37, the extent of judicial scrutiny and scope of interference is further narrower. An appeal under section 37 is like a second appeal, the first appeal being to the court by way of objections under section 34. Where there are concurrent findings of facts and law, first by the Arbitral Tribunal which are then confirmed by the court while dealing with objections under section 34, in an appeal under section 37, the Appellate Court would be very cautious and reluctant to interfere in the findings returned in the award by the Arbitral Tribunal and confirmed by the court under section 34.”

22. The abovementioned view was further upheld by the division bench in **Mahanagar Telephone Nigam Ltd. vs Finolex Cables Limited** **FAO(OS) 227/2017** reported at 2017(166)DRJ1, stated as follows:-

“It is apparent, therefore, that, while interference by court, with arbitral awards, is limited and circumscribed, an award which is patently illegal, on account of it being injudicious, contrary to the law settled by the Supreme

Court, or vitiated by an apparently untenable interpretation of the terms of the contract, requires to be eviscerated. In view thereof, the decision of the ld. Single Judge that reasoning of the arbitral award in this regard was based on no material and was contrary to the contract, cannot be said to be deserving of any interference at our hands under Section 37 of the Act. In a pronouncement reported at MANU/DE/0459/2015, MTNL v. Fujitsu India Pvt. Ltd. (FAO(OS) No. 63/2015), the Division Bench of this court has held that "an appeal under Section 37 is like a second appeal, the first appeal being to the court by way of objections under Section 34". Being in the nature of a second appeal, this court would be hesitant to interfere, with the decision of the learned Single Judge, unless it is shown to be palpably erroneous on facts or in law, or manifestly perverse."

23. Having regard to the law laid down by this Court as well as the Apex Court in number of decisions rendered and applying the law laid down to the facts of the present case, we do not find any merit in the appeal. Hence, no grounds are made out to interfere in the impugned order passed by learned Single Judge under Section 34(2) of the Arbitration and Conciliation Act, 1996. Resultantly, the appeal is dismissed.

G.S.SISTANI, J.

SANGITA DHINGRA SEHGAL, J.

MARCH 19, 2018

//-