IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.1077 OF 2014
WITH
NOTICE OF MOTION NO.1743 OF 2017
IN
ARBITRATION PETITION NO.1077 OF 2014

M/s. Unimex ....Petitioner
vs
M/s. Savers Impex ...Respondent
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Mr. Kevic Setalvad, Senior Advocate, a/w. Mr. Awais Ahmedji, i/b. Ms. Krupali Rajani, for the Petitioner.

Mr. Atul Damle, Senior Advocate, i/b. Mr. Rupesh Lanjekar, for the Respondent.
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CORAM : S.C. GUPTE, J.

DATED: 24 JANUARY, 2019

ORAL JUDGEMENT:

. This petition challenges an award passed by a sole arbitrator. The disputes between the parties arise out of High Seas Sales Agreements. Both parties had earlier filed their respective suits. The Respondent, who was the vendor, had filed a summary suit for recovery of amounts due to it on dishonoured cheques, whilst the Petitioner, who was the purchaser, had filed a suit for recovery of dues on account of defective goods. At the hearing of the summons for judgment in the Respondent's summary suit, the parties agreed to take their disputes before an arbitrator. The Respondent's summary suit was treated as a statement of claim, whilst the Petitioner's affidavit-in-reply to the summons for judgment and plaint in its own recovery suit were, respectively, treated as a written statement and counter-claim. Learned arbitrator, by his impugned award, allowed the Respondent's claims, whilst rejecting the Petitioner's counter-claims.

2. The Respondent had imported several raw materials/pharmaceutical drugs under a world bank project. The Petitioner herein, by its e-mail dated 16 August 2007, agreed to buy some of these materials on high seas sale basis. The materials included Riboflavin and Folic Acid along with some other materials. Various documents, such as high seas sale agreements and warehouse sale agreements, were executed by the parties. There were in all seven sales. The Respondent claims to have issued invoices towards these sales. Two sets of invoices appear to have been issued in this behalf. One set of invoices formed part of Exhibit R-5 collectively before the arbitrator (referred to hereinafter as 'R-Series invoices'), whilst the other set was invoices in Exhibits C-2 to C-8 (hereinafter referred to as 'C-Series invoices'). Whilst values of goods reflected in these two sets were the same in case of four invoices, in case of three (two for Riboflavin and one for Folic Acid), values reflected in the two sets were different. The aggregate invoice value of R-Series invoices was Rs.86,19,570/-, whereas that of C-Series was Rs.1,93,19,829/-. It appears that the Petitioner had handed over to the Respondent several cheques aggregating to about Rs.1.93 crores, out of which, cheques of an aggregate value of Rs.33,64,000/- were cleared, whilst 17 cheques of an aggregate value of Rs.1,59,00,400/- were dishonoured. It was the Respondent's case that

these cheques were issued towards the purchase price of the goods in accordance with C-Series invoices. The Respondent had sued the Petitioner for the value of dishonoured cheques. The Petitioner *inter alia* pleaded the bar of limitation to oppose the claim. On merits, the Petitioner denied having agreed to purchase the material (namely, Riboflavin and Folic Acid) at the rates mentioned in C-Series invoices. According to it, the correct invoices were the R-Series invoices, which were received along with covering letters of the Respondent. Based on the Respondent's statement that R-Series invoices were issued at the instance of the Petitioner so as to understate the value of the imported goods for the purposes of customs duty, it was alternatively submitted by the Petitioner that having been party to deception of the revenue by means of issuance of R-Series invoices so as to understate the import value for customs duty, the Respondent ought not to be permitted to assert any right or claim arising out of such transaction, since such transaction was based upon an illegal and fraudulent act. The Petitioner, in other words, set up a plea of *ex turpi causa non oritur actio/in pari delicto portior est conditio possidentis*, based on which it prayed for rejection of the Respondent's claim. In his impugned award, the arbitrator held that the Petitioner could not evade its liability under the principle of *ex turpi causa non oritur actio*. The arbitrator held that the analysis of the plaint and the case pleaded and proved before him showed that the Respondent's claim was based on dishonoured cheques, and not on documents, including the R-Series invoices, which were said to be fraudulent. The arbitrator held that the price recorded in R-Series invoices for Riboflavin and Folic Acid did not reflect the true price agreed between the parties; the true price was reflected in the C-Series invoices and the Petitioner was liable to make payment accordingly. The arbitrator held the Respondent's claim to be within limitation, since the accrual of cause of action had occurred on the date of dishonour of cheques; save and except one cheque for Rs.10 lakhs, which anyway did not form part of the Respondent's claim in the arbitration reference, the claims on all other dishonoured cheques were within time. The arbitrator also considered the Petitioner's case under Sections 91 and 92 of the Indian Evidence Act as also on estoppel and held against the Petitioner on both issues. The arbitrator, in the premises, awarded a principal amount of Rs.1,38,38,878/- along with interest at the rate of 18% p.a., respectively, from the dates of dishonour of cheques till the date of the award and further interest at the same rate from the date of the award and till payment or realisation.

3. It is submitted by Mr. Setalvad, learned Senior Counsel appearing for the Petitioner, that the impugned award is in breach of public policy of India and also vitiated by a patent illegality appearing on the face of the award, since it grants a claim despite the claimant being party to a fraud on his own admission. Learned Counsel submits that the award is against binding judgments of Courts including the Supreme Court. Learned Counsel submits that these judgments mandate that no court should help a plaintiff on a fraudulent claim. Learned Counsel submits that this would be so even though in proving the fraudulent nature of the plaintiff's claim it is necessary for the defendant to rely on his own guilt in such fraud. Learned Counsel relies on the judgment of the Supreme Court in the case of **Waman Shriniwas Kini vs. Ratilal**

Bhagwandas and Co.[1], a Full Bench decision of our Court in the case of **Guddappa Chikkappa Kurbar vs. Balaji Ramji Dange**[2] and a decision of Full Bench of Lahore High Court in **Qadir Bukhsh vs. Hakam**[3], in this behalf. Learned Counsel, secondly, submits that the high seas sale agreements/warehouse sale agreements are written contracts and the price recorded in those contracts can alone be said to be the agreed price. As a second limb to this submission, learned Counsel, relying on Sections 91 and 92 of the Evidence Act, submits that no evidence for contradicting or varying the terms of these written contracts is admissible. Learned Counsel submits that the arbitrator's view on both these aspects discloses a clear error of law rendering the award to be contrary to public policy of India and vitiated by a patent illegality.

4. The principle of *ex turpi causa non oritur actio/in pari delicto portior est conditio possidentis* is based on a sound policy of law. The equitable principle underlying this maxim is that where each party is equally in fault, the law favours him who is actually in possession, thereby not assisting either party to the fraud. That is on the footing that no court will allow a fraud being practiced on it by either party. The *raison d'etre* of this rule was described by Broom in his "Legal Maxims" (Edn. 9), Page 466, in the following words:

> "The maxim, *in pari delicto portior est conditio possidentis* is as thoroughly settled as any proposition of law can be. It is a maxim of law, established, not for the benefit of plaintiffs or defendants, but is founded on the principles of public policy, which will not assist a plaintiff who had paid over money, or

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1 AIR 1959 Supreme Court 689 (V 46 C 92)

2 (28) A.I.R. 1941 Bombay 274

3 A.I.R. 1932 Lahore 503

> handed over property, in pursuance of an illegal or immoral contract, to recover it back; for the Courts will not assist an illegal transaction in any respect."

The result of this maxim in practice is, as is famously said, the estate must lie where it falls.

5. Based on this maxim, it is contended by learned Counsel for the Petitioner that on the Respondent's own showing the agreements of high seas/warehouse sales and R-Series invoices based thereon were acts of fraud, designed to mislead the exchequer and evade tax. Learned Counsel submits that no claim founded on a fraud can be countenanced by a court of law or an arbitral tribunal. There is a fundamental fallacy in the Petitioner's submission. The case of fraud or execution of fraudulent documents is not being set up by the Respondent (Claimant) in support of its case. The Respondent's case is based on dishonoured cheques. Section 118 of Negotiable Instruments Act, which contains rules of evidence concerning negotiable instruments including cheques, presumes that until the contrary is proved, every negotiable instrument was made or drawn for consideration and, when accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred, as the case may be, for consideration In other words, when a plaintiff comes to a court with a claim on a negotiable instrument, there is a statutory presumption in his favour that the instrument was for a lawful consideration. It is, of course, rebuttable. The defendant may well show the contrary; he may prove that the particular negotiable instrument sued on is not in fact supported by any lawful consideration; its consideration is unlawful. In the present case, it is the defendant,

who is seeking to displace or rebut the presumption and that he is seeking to do by pleading a case of fraud. The principle of *ex turpi causa non oritur actio/in pari delicto portior est conditio possidentis*, if at all, will apply to, and undermine, the defendant's defence rather than the plaintiff's claim in the present case. It was indeed so applied by the learned arbitrator relying upon decided cases including the decision of the Supreme Court in the case of **B.O.I. Finance Ltd. vs. Custodian**[4].

6. Learned Counsel for the Petitioner submits that the arbitrator has wrongly relied on the decision in **B.O.I. Finance Ltd.** Learned Counsel submits that that was a case of a ready-forward contract. The ready leg of the contract, which was for sale of securities on spot delivery basis was legal. Only the forward leg, which envisaged sale of securities at a future date for a fixed price, being prohibited under Section 16 of Securities Contract Regulation Act ('SCRA'), was disallowed, whilst affirming the transaction contained in the ready leg. Learned Counsel submits that the ratio of the Supreme Court decision in **B.O.I. Finance Ltd.**, rendered in its own peculiar facts, does not apply to the facts of our case. I am afraid, that is not quite correct. The relevant contract in the case of **B.O.I. Finance Ltd.** was what was regarded in the market as a ready-forward contract, partly a contract for spot delivery upon sale of securities and partly for sale of securities on a future date at a fixed price. The ready leg of the contract had been fully accomplished. Before the forward leg could be completed, an ordinance known as 'Special Court (Trial of offences relating to transactions in securities) Ordinance, 1992' was promulgated. It was followed and replaced by the

4 MANU/SC/1570/1997

Special Courts Act, 1992. The custodian appointed under this Ordinance and Act, who had the authority to cancel contracts relating to properties of notified persons and deal with them, applied to the Special Court to take charge of the securities dealt with under the subject ready-forward contract by a notified party, on the ground that the transaction was void under Section 16 of SCRA for both the ready and the forward parts. The Supreme Court held that the two parts of the contract were severable; sale of securities by spot delivery, which, in that case, was represented by the ready leg, being permissible and only the sale at a future date for a fixed price, which was the forward leg of the contract, being impermissible under Section 16 of SCRA, such illegal part of the agreement could not affect the transfer of title, which had already taken place under the ready leg at the time of its execution. That being so, the securities, which had been purchased by the appellants from the notified persons, could not be attached. There learned Counsel is right; this was truly the distinguishing feature of the case of **B.O.I. Finance Ltd.** But then this was one of the reasons why the Court did not interfere with the sale of securities on spot delivery forming part of the contract. The Court, at the same time, considered the position in law even if the transactions were to be treated as inseverable. The discussion on this point, which begins with an assumption that the agreements were not severable but were composite, concludes that even in such a case the ready leg could well be performed. The question considered by the Court in this context was, whether illegality of the agreement, in respect of the composite forward leg of the contract, would affect the transfer, which had already taken place. It is in that connection that the Supreme Court referred to the principle of *ex turpi causa non oritur actio,* or its attendant maxim, which provides that the estate may lie where it falls when both parties are equally in fault.

7. The Supreme Court, in this context, referred to the decision of the House of Lords in the case of **Tinsley vs. Milligan**[5]. The parties, Tinsley and Milligan, who were living together, had jointly purchased a house, which was registered in the name of Tinsley as the sole legal owner. Though both accepted that the house was jointly owned, the registration was taken in the sole name of Tinsley so as to enable Milligan, with knowledge and assent of Tinsley, to make false claims to the Department of Social Security for benefits. The money obtained thereby from the Department was shared between the two. Subsequently, the parties fell apart and Tinsley moved out of the house, which continued to be in occupation of Milligan. Tinsley then brought an action claiming possession of the house asserting her ownership. Milligan counter-claimed for an order for sale and a declaration that the house was held by Tinsley on trust for the parties in equal shares. Relying on the maxim *ex turpi causa non oritur actio,* Tinsley contended that Milligan was barred from denying Tinsley's ownership because the purpose of the arrangement, whereby the house had been registered in the sole name of Tinsley, was to facilitate a fraud on the Department of Social Security and, thus, Milligan's claim to joint ownership was tainted by illegality. It was contended that Milligan came to the Court on an equitable principle and he who claimed equity had to come with clean hands; else the court ought to leave the estate to lie where it fell. Tinsley's claim was dismissed and counter-claim of Milligan was upheld by trial judge. The appeal by Tinsley was dismissed by the court of

5 (1993) 3 All ER 65

appeal, and the House of Lords upheld the court of appeal. In his speech, Lord Jauncey made it clear at the outset that it was important to distinguish between enforcement of executory provisions arising under an illegal contract or other transaction on the one hand and enforcement of rights already acquired under completed provisions of such contract or transaction. One of the three propositions of law enunciated in this behalf by Lord Jauncey was said to be the following:

> "It is well established that a party is not entitled to rely on his own fraud or illegality in order to assist a claim or rebut a presumption. Thus when money or property has been transferred by a man to his wife or children for the purpose of defrauding creditors and the transferee resists his claim for recovery he cannot be heard to rely on his illegal purpose in order to rebut the presumption of advancement (see Gascoigne v. Gascoine (1981) 1 KB 223. Chettiar v. Chettiar (1962) 1 All ER 494 (1962) AC 294 and Tinker v. Tinker (1970) 1 All ER 540, (1970) p. 136 per Salmon U)."

8. What was considered by the House of Lords in that case was whether the respondent, in claiming existence of a resultant trust in his favour, was seeking to enforce unperformed provisions of an unlawful transaction or he was simply relying on an equitable proprietary interest that he had already acquired under the transaction. The court said that the transaction, under which the trust was claimed, was an agreement between the parties that although funds were to be provided by both of them, nevertheless the title to the house was to be in the sole name of the appellant for the unlawful purpose of defrauding the Department of Social Security. So long as that agreement remained unperformed neither party could have enforced it against the other. However, as soon as the agreement was implemented by sale in the name of the appellant

alone, she became a trustee for the respondent who could then rely upon the equitable proprietary interest presumed to have been created in his favour; there was no need for him to rely on the illegal transaction which led to its creation. In other words, it was not a case where the respondent Milligan wanted the appellant Tinsley to perform an executory contract under which the parties had proposed to buy property in the sole name of Tinsley to defraud the Department; what he wanted was that the court should recognize the equitable estate already created in his favour by the tainted transaction. As Lord Browne Wilkinson observed in that matter, "*at law (as opposed to in equity) property in goods or land can pass under, or pursuant to, such contract*". If so, the rights already acquired could be enforced in court. The court's assistance was sought for recognition and enforcement of existing rights, and not for creation of rights under a yet unperformed agreement. That is how the property was allowed to lie where it fell, no matter such property was acquired as a result of title passing under an illegal contract; and appellant Tinsley's defence to respondent Milligan's counter-claim that the property acquired under a tainted contract ought not to be recognized, was rejected by the House of Lords.

9. The decision of the Supreme Court in **B.O.I. Finance Ltd.**, and in particular, the reference therein to the House of Lord's decision in **Tinsley vs. Milligan**, is very apposite in the context of our case. The principle of *ex turpi causa non oritur actio/in pari delicto portior est conditio possidentis* does not imply that it is merely a restriction for the plaintiff, who applies to the court for a relief based on a tainted transaction, as claimed by learned Counsel for the Petitioner, it equally applies to a

defence based on a tainted contract or transaction. The principle implies that a party is not entitled to rely on his own fraud or illegality not only in order to assist his claim, but even to rebut a presumption in favour of the counter-party. The Petitioner in the present case had issued cheques for purchasing goods from the Respondent. The goods were purchased and the cheques were handed over in payment of price. After that, the liability owed to the vendor was under the cheques and not under the underlying sale agreement. The cheques were presented for payment and dishonoured. The Respondent sued on the dishonoured cheques. The Respondent relied on a presumption in law that the cheques were supported by consideration. It is the Petitioner, who wants to rebut that presumption and for rebutting it, he relies on a fraud or illegality, to which he was admittedly a party. That obviously cannot be permitted. The law cannot assist a party in setting up a case of fraud to which he himself was a party. That is the meaning of the principle of *ex turpi causa non oritur actio/in pari delicto portior est conditio possidentis*. As we have noted above, the learned arbitrator has correctly applied this principle and rejected the defence based on it.

10. In any event, even if it is possible to hold that the arbitrator's conclusion in this behalf is not correct, it is certainly a reasonable and possible conclusion and not a conclusion, which no fair or judiciously minded person might have arrived at, or which would shock the conscience of the Court. In that case, there is no reason for this Court to interfere with it under the provisions of Section 34 of the Act. There is, thus, no infirmity in the impugned award.

11. Learned Counsel for the Petitioner, alternatively, submits that the price shown in the high seas sale agreements/warehouse sale agreements correctly reflects the agreed price. In support of his contention, learned Counsel contends that Section 14 of the Customs Act enjoins upon the parties to a transaction of import of goods to state the correct price actually paid or payable for the goods imported, which must be an arms length price, in their import documents. Learned Counsel submits that the parties having submitted documents of contract to the customs authorities evidencing the import sales, including R-Series invoices in support of the contract price, the price reflected in these documents must be treated as the correct price. The submission has no substance whatsoever. Firstly, it starts with a major premise which has no justification. The conclusion suggested by learned Counsel would be right only in a case, where all contracts submitted by the parties to the customs are invariably correct and actual contracts. Far from such being the case, here it is the specific case of the parties, or, at any rate, of one of them, that the contract submitted to the customs authorities for assessment of customs duty was deliberately shown at an undervalue. If that is so, merely because the contract reflected a particular price, that price could not be said to be correct because it was so reflected. That would be a circular argument.

12. Alternatively, learned Counsel submits that what the Respondent seeks to do in the present case is setting up a case for contradicting or varying the terms of a written contract, namely, the high seas sale agreements/warehouse sale agreements, and that is prohibited under Sections 91 and 92 of the Evidence Act; no evidence for

contradicting or varying terms of the high seas sale agreements/warehouse sale agreements is admissible. That is not quite correct for more than one reasons. Sections 91 and 92 of the Evidence Act, in the first place, do not exclude documentary evidence for the purpose of contradicting, varying, adding to or subtracting from, the terms of a written contract. Section 91 provides that when terms of a contract have been reduced to the form of a document, no evidence in proof of the terms of such contract may be given except the document itself or the secondary evidence of its contents in cases where such evidence is admissible. Section 92, on the other hand, excludes evidence of a contemporaneous oral agreement for the purpose of varying, adding to or subtracting from, the terms of a written contract. Even here, the existence of any fact, which would invalidate any document or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law, can always be pleaded and proved. In the present case, evidence sought to be produced to contradict the terms of written contracts or documents was of another set of documents, namely, C-Series invoices. These latter invoices suggest illegality or falseness of the other set of invoices and documents forming part of Exhibit R-5. As rightly observed by the arbitrator, there is no bar under Sections 91 and 92 to lead such documentary evidence. The arbitrator also considered the decision of the Supreme Court in the case of **Ishwar Dass Jain (Dead) through LRS vs. Sohan Lal (dead) by LRS.**[6] in this behalf. In **Ishwar Dass Jain**'s case, the Supreme Court held that it was permissible to lead oral evidence to

6 (2000) 1 SCC 434

contend that the agreement was not intended to be acted upon or that it was a sham document. That is precisely what the case set up and evidence produced in the present case attempt to do. Thus, there is no infirmity in the impugned award even on this score.

13. Learned Counsel next attempts to take me through the oral evidence including the cross-examination of the Respondent's witness in support of his case on true contract price. Assessment of oral and documentary evidence is strictly within the province of the arbitrator. It is for the arbitrator to decide the question of sufficiency of evidence. As the Supreme Court has held in **Associate Builders vs. Delhi Development Authority**[7], the only mandate of the challenge court under Section 34 of the Arbitration and Conciliation Act, 1996, is to see if the arbitrator's conclusion is a possible conclusion, that is to say, a conclusion, which is supported by some evidence, and not a conclusion based on no evidence or a conclusion which no fair or judiciously minded person would have arrived at or a conclusion that would shock the conscience of the court. The arbitrator's conclusion that the correct documents evidencing the particular high seas sales were the C-Series invoices and the price reflected in those invoices alone was the correct price, is based on some evidence. It is not a conclusion based on no evidence. It is a conclusion, which a fair or judiciously minded person may well have arrived at, and there is nothing in it to shock the conscience of the Court. In other words, it brooks no interference under Section 34 of the Act.

7 2015 (3) SCC 49

14. In the premises, there is no merit in the petition. The petition is dismissed. The Petitioner shall pay costs of the arbitration petition quantified at Rs.1 lakh.

15. In view of the dismissal of the petition, the notice of motion (Notice of Motion No.1743 of 2017) does not survive and the same is also dismissed.

16. Learned Counsel for the Petitioner seeks stay of this order. The Petitioner has lost before the arbitral tribunal. Its petition, in challenge of the award, having now been comprehensively heard and decided against it, there is no question of any stay. It is, however, ordered that the Respondent shall not seek execution of the order of costs for a period of four weeks from today.

(S.C. GUPTE, J.)