

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.02.2019

CORAM

THE HONOURABLE MR.JUSTICE M.SUNDAR

O.P. No. 79 of 2014

M/s. Lemminkainen Construction (India)

Private Limited,

Formerly known as

Lemcon Construction Private Limited,

Chennai City Centre, Level-6,

NO.10/11, Dr. Radhakrishnan Salai,

Chennai - 600 004.

rep.by its Power of Attorney

Mr.R. Ravichandran

..Petitioner

Vs.

1. M/s. Kirby Building Systems India Limited,
rep. by its General Manager - Sales,
Plot No.8 to 15, IDA, 
Phase III, Pashamylaram - 502 307,
Medak District - 502 307
Andhra Pradesh, India.

2. Nokia India Private Limited
Nokia Telecom SEZ, SIPCOT Industrial Park,
Phase III, A-1, National Highway NO.4 (NH-4)
Sriperumbudur - 602 105
Tamil Nadu.

3. Mr.P. Murari
Learned Sole Arbitrator,
Indian Council of Arbitration,
Federation House,
Tansen Marg,
New Delhi - 110 001.

..Respondents

Prayer: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 01.09.2012 passed by the 3rd respondent in Arbitration Case No. ICA/1206/AC/1801 of 2012.

For Petitioner :: Mr.J.P. Jayanth of
M/s. Kochhar & Co.

For Respondents :: Mr. V.Kuberan of
M/s. Rank Associates for R1
Mr.P.V. Balasubramanian
of M/s. BFS Legal Services for R2

ORDER

There is one petitioner and there are three respondents in this instant 'original petition' (hereinafter referred to as 'OP' for brevity) i.e, OP No. 79 of 2014.

2. Before I proceed further, it is made clear that under 'The Arbitration and Conciliation Act, 1996' (hereinafter referred to as 'A & C' Act for brevity), proceedings pertaining to recourse against arbitral awards as contained in Section 34 of A & C Act, more particularly, under Chapter VII of the said Act refers to such proceedings in the nature of recourse against arbitral awards as 'application'. However, such proceedings are given the nomenclature 'original petition' in this registry and therefore, I am referring to

instant petition as 'OP' though it is a challenge to an arbitral award under Section 34 of A & C Act.

3. Reverting to the array of parties, as mentioned supra, there is one petitioner and there are three respondents.

4. The 3rd respondent is the sole arbitrator who constituted the Arbitral Tribunal. An arbitral award dated 01.09.2012 made by the Arbitral Tribunal has been assailed in the instant OP by the 1st respondent before the Arbitral Tribunal. Claimant before the Arbitral Tribunal is the 1st respondent herein and 2nd respondent before the Arbitral Tribunal is the 2nd respondent in the instant OP also. As already mentioned supra, 3rd respondent in the instant OP is the sole arbitrator who made the aforesaid arbitral award dated 01.09.2012 which shall hereinafter be referred to as 'impugned arbitral award' for the sake of convenience and clarity.

5. Undisputed facts as they unfurl from the case file placed before me and the submissions made by the learned counsel before me shall be set out infra (sans unnecessary particulars/details) under the caption 'FACTUAL MATRIX IN A NUT-SHELL'.

6. 'FACTUAL MATRIX IN A NUT-SHELL':

(a) Nucleus of the entire dispute is a 'tripartite agreement' dated 06.02.2007 which shall hereinafter be referred to as 'said tripartite agreement' for the sake of convenience and clarity. Petitioner before me i.e, 'Lemminkainen Construction (India) Private Limited' (hereinafter referred to as 'Lemmin' for the sake of brevity), 1st respondent before me i.e, 'Kirby Building Systems India Limited' (hereinafter referred to as 'Kirby' for the sake of brevity) and 2nd respondent i.e, 'Nokia India Private Limited' (hereinafter referred to as 'Nokia') are signatories to the said tripartite agreement. A perusal of said tripartite agreement (a copy of which has been placed before me as part of the case file) reveals that the said tripartite agreement in itself is a sequel to another agreement dated 14.12.2006 between Lemmin and Nokia. To be noted, in the copy of said tripartite agreement placed before me, date of this agreement has been wrongly mentioned as 14th December, 2007. All the three counsel before me accept that this agreement between Lemmin and Nokia is dated 14.12.2006.

(b) A perusal of said tripartite agreement reveals that the crux of said tripartite agreement between the aforesaid three parties is construction of a superstructure which is referred to as 'Nokia Logistics Centre' in SIPCOT Industrial Park in Sriperumbudur, Tamil Nadu. It is not in dispute that the site

where the said Nokia Logistics Centre was proposed to be built is classified as Special Economic Zone ('SEZ' for the sake of brevity), established for promoting export and therefore there are certain benefits qua fiscal laws. Therefore, said tripartite agreement may have to be read in conjunction with the aforesaid agreement dated 14.12.2006 between Lemmin and Nokia.

(c) Be that as it may, pursuant to said tripartite agreement, Lemmin entrusted the work of supply of pre-fabricated steel buildings to Kirby. No formal agreement was entered into between Lemmin and Kirby for this purpose, but the same is evidenced by a series of purchase orders is the common submission made in unison by all the three counsel before me.

(d) It is not in dispute that construction of aforesaid centre was completed and bills were raised for the construction made. To be noted, bills were raised by Kirby for the limited purpose of pre-fabricated steel building parts of the construction which was entrusted to them by Lemmin pursuant to said tripartite agreement.

(e) It also emerges clearly from said tripartite agreement that there is an arbitration agreement between the three parties namely, Nokia, Lemmin and Kirby. In other words, all three parties/entities qualify as a 'party' within

the meaning of Section 2(1)(h) of A & C Act. This arbitration agreement being an agreement within the meaning of Section 7 of A & C Act is in the form of a clause in the said tripartite agreement and the same reads as follows:

'Settlement of Disputes

All disputes arising out of the contract on which the parties cannot mutually reach agreement shall be settled by arbitrators, whose award shall be final. The arbitration shall be conducted in the English language in India in accordance with the Rules of Arbitration of the Indian Council of Arbitration (ICA) that are deemed to have been incorporated herein, and the Arbitration and Conciliation Act, 1996 of India.

All proceedings and hearings by Arbitration shall be held in Chennai, India unless otherwise mutually agreed.

Law of India shall prevail.'

(f) Post aforesaid work, Kirby raised an arbitral dispute saying that monies are due on account of works carried out. In other words, Kirby raised an arbitral dispute inter alia on the ground that bills raised for workdone qua aforesaid work remain unpaid. This is one head of claim. There was another head of claim by Kirby qua the arbitral dispute. This head is payment of Central Sales Tax ('CST' for brevity) and according to Kirby, they had paid CST

@ 12.5% on the value of invoices raised and they are entitled to refund of the same as the construction has been made in a site situate in a SEZ. It is their specific statement that if Nokia gives them the requisite forms under CST Act, they will be able to get refund of the same. In other words, Kirby made a claim under two heads and for both heads, Kirby claimed interest. The claim made by Kirby as can be culled out from the claim statement is as follows:

- '50. As such the following sums are due to the claimant:
- a) Money due on account of works carried out: Rs.3,75,93,778/-
 - b) Interest at the rate of 18% from 17.11.2007 to 31.3.2011 calculation sheet filed : Rs.2,28,03,459/-
 - c) Central Sales Tax paid @ 12.5% in the absence of Form I : Rs.1,34,72,779/-
 - d) Interest on the tax payment due at 18% as per the calculation sheet filed : Rs. 20,66,318/-
- Total : Rs.7,59,36,334/-

(g) All the three learned counsel submit that the arbitral clause in the said tripartite agreement (extracted and reproduced supra) was invoked. The 3rd respondent (sole arbitrator) constituted the Arbitral Tribunal, he entered upon reference, issued notice to the parties and arbitral proceedings commenced. On 07.11.2011, pending proceedings before Arbitral Tribunal, Kirby and Lemmin entered into an arrangement which is captioned 'financial closure'. Vide said financial closure deed dated 07.11.2011, Kirby was paid a

total sum of Rs.3.5 crores by Lemmin in full quit of its claim as far as the first head of claim before the Arbitral Tribunal is concerned, i.e, claim towards unpaid bills for workdone. Therefore, when the impugned arbitral award was ultimately delivered by the Arbitral Tribunal, only the second head of claim pertaining to CST survived. This obviously led to the Arbitral Tribunal passing an award pertaining to the second head of claim touching upon CST. The operative portion of the impugned arbitral award reads as follows:

'In sum my awards, in my capacity as sole arbitrator are as follows:

1. Because of their acts of omission and commission in not providing on time Form -1 to claim refund of Central Sales Tax which is available to companies located in the Special Economic Zones and which finally led to the incidence of this CST at 12.5% along with interest and penalty on the claimant, R-2, namely, Nokia is solely responsible for this incident and, therefore, R-2 under contractual obligations and principles of law and natural justice is bound to reimburse the same to the claimant. Therefore, I direct that R-2, namely, Nokia, would reimburse the claimant for the sales tax paid which was not their responsibility but due to the non provision of CST Form-1 by R-2, in the sum of Rs.1,34,72,779/- with interest of Rs.20,66,318/-. Since R-2 was not represented inspite of summons during the hearings this Award against

R-2 is passed ex parte.

2. *In terms of the tripartite contract which is binding on all parties R-1 was to have, at the instance of claimant, informed R-2 in turn to produce Form-1 for CST exemption, but failed to do so which led to an imposition of CST @ 12.5% + interest and penalty on the claimant. In view of this I direct, as part of the Award, that R-1 should raise this bill in the sum of Rs.1,55,39,097/- against R-2 and ensure that R-2 transmits this amount via R-1 to be handed over to the claimant since it form part of their legitimate dues within a reasonable time of one month. If not, R-1 would directly reimburse this amount to the claimant and then take such legal and other actions as they deem fit to secure this amount from R-2 to compensate for the amount which R-1 paid to the claimant.*

3. *There will be no order as to costs, damages or penalties. Each party would bear their own costs.'*

7. Having set out the factual matrix in a nut-shell, I now proceed to examine the grounds on which the impugned arbitral award is assailed before me. Discussion on the same and my dispositive reasoning qua such grounds that were raised before me are set out under the caption 'DISCUSSION AND DISPOSITIVE REASONING' infra.

8. DISCUSSION AND DISPOSITIVE REASONING:

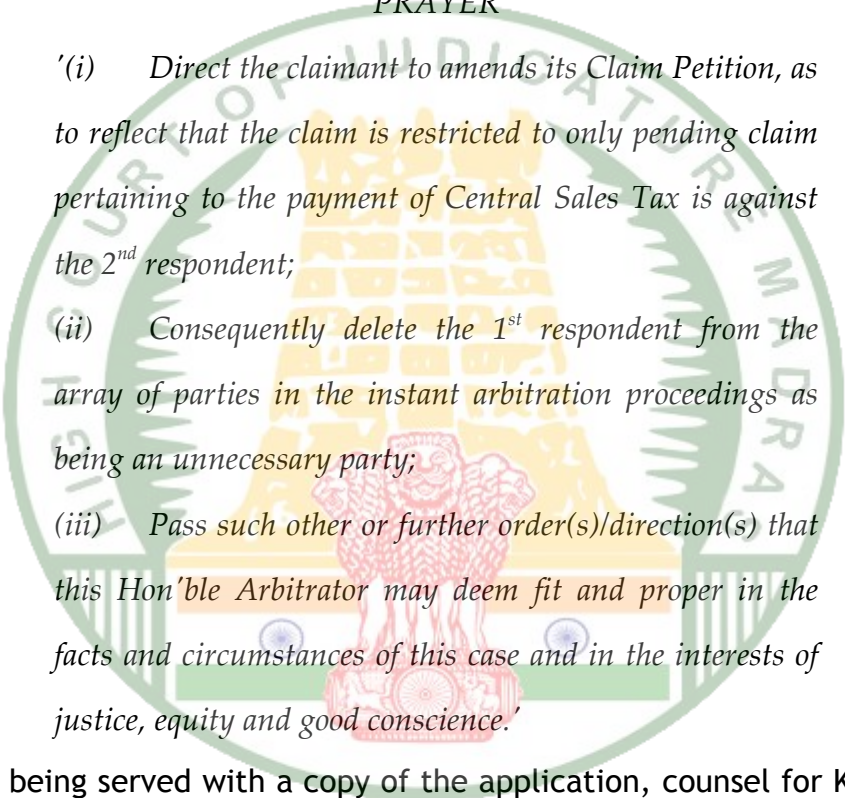
(a) Mr. J.R. Jayanth, learned counsel of M/s. Kochar and Co. (Law Firm) on behalf of the petitioner 'Lemmin', Mr.V. Kuberan, learned counsel of M/s. Rank Associates (Law Firm) on behalf of Kirby and Mr.P.V. Balasubramanian, learned counsel of M/s. BFS Legal (Law Firm) on behalf of Nokia were before me. As already mentioned, 3rd respondent is the sole arbitrator who constituted the Arbitral Tribunal which made the impugned arbitral award.

(b) The protagonist of the instant OP under Section 34 of A & C Act namely Lemmin submitted that the specific ground on which the impugned arbitral award is assailed would neatly fit into Section 34 (2) (a)(iii) and 34 (2)(b)(ii) read with clauses (ii) and (iii) of Explanation 1 to A& C Act. It is on this basis that I shall now proceed to examine the grounds on which the impugned arbitral award is assailed.

(c) Learned counsel for petitioner submitted that on receiving notice from the Arbitral Tribunal, petitioner (1st respondent before the Arbitral Tribunal) filed an application in April, 2012. This, according to the learned counsel, is an interlocutory application and the prayer in the interlocutory

application was, in sum and substance, to delete Lemmin from the array of parties before the Arbitral Tribunal. Though this is the crux and gravamen of the interlocutory application before the Arbitral Tribunal, I deem it appropriate to extract the prayer in its entirety and the same reads as follows:

PRAYER

- 
- '(i) Direct the claimant to amend its Claim Petition, as to reflect that the claim is restricted to only pending claim pertaining to the payment of Central Sales Tax is against the 2nd respondent;
- (ii) Consequently delete the 1st respondent from the array of parties in the instant arbitration proceedings as being an unnecessary party;
- (iii) Pass such other or further order(s)/direction(s) that this Hon'ble Arbitrator may deem fit and proper in the facts and circumstances of this case and in the interests of justice, equity and good conscience.'

On being served with a copy of the application, counsel for Kirby sent a communication dated 27.04.2012 to counsel for Lemmin seeking clarification as to whether the interlocutory application can be treated as a defence statement.

(d) Learned counsel for Lemmin who had taken out the interlocutory application responded vide letter dated 09.05.2012 making it clear that it has

to be treated only as an interlocutory application and more particularly, it was articulated with abundant clarity that Lemmin makes it clear that it reserves its right to file a detailed counter statement if deemed necessary. Obviously, the language in which it is couched shows that Lemmin reserved its right to file a written statement/statement of defence subject to the outcome of the interlocutory application which sought deletion of Lemmin from the array of parties before the Arbitral Tribunal. In the light of importance of these communications exchanged between the counsel, I deem it appropriate to extract the same. They read as follows:

Communication from counsel for 1st respondent:

'April 27, 2012

RPAD

Mr. Adeesh Anto
Senior Associate – Litigation,
Kochar & Co., Advocates,
Suite 305, Delta Wing,
Raheja Towers, 177,
Anna Salai,
Chennai – 600 002.

Sir,

**SUB: Arbitration Proceedings between Kirby and
(i) Lemminkainen construction (India) Pvt.
Ltd.
(ii) Nokia India Private Limited.**

In the above proceedings, you had filed an Interlocutory Application, before the Hon'ble Tribunal, praying for a direction, to the Claimant, to amend the Claim Petition as

well as to delete the First Respondent from the array of parties.

A copy of the Application along with enclosures have been served on us. Kindly let us know as to whether the contents of the above Application, can be treated and Written Statement, being filed, defending the Claim Statement as well, or whether you would be filing a separate Defense Statement.

Upon receipt of your response, we will finalize the Counter for the Interlocutory Application and circulate the same.

Yours truly

Sd/-

V. KUBERAN,
COUNSEL FOR CLAIMANT

Copy to:

Mr.P. Murari IAS (Retd.)
Adviser to FICCI President &
Former Secretary to
President of India,
No.5, Vivekananda Road,
Off Spur Tank Road,
Chetpet, CHENNAI- 600 031.'

Communication from Counsel for Petitioner:

'BY SPEED POST WITH ACK. DUE

9th MAY 2012

Mr.V. Kuberan,
Partner – Rank Associates,
Advocates & Notary Public,
25, Bazullah Road, T. Nagar,
Chennai 600 017.

Dear Mr.Kuberan,

ARBITRATION PROCEEDINGS

Between

..M/s. Kirby

Vs.

Lemcon and another

Before the Hon'ble Sole Arbitrator Mr.P. Murari

We confirm receipt of your letter dated 27th April 2012 to which our client has instructed us to inform you that the said Application filed by our Client seeking to delete itself from the array of parties be treated as an Interim Application. Our client further wishes to reserves its rights to file detailed counter statement if deemed necessary.

Thanking You,

Yours Sincerely,

Sd/-

Adeesh Anto

For KOCCHAR & CO.

Copy to: Hon'ble Sole Arbitraor Mr.P. Murari,

No.5, Vivekananda Road, Off.Spur Tank Road,
Chetpet, Chennai 600 031.'

(e) One more important aspect of the communications which have been extracted and reproduced supra is that both learned counsel have marked copies of the aforesaid communications, i.e, communications dated 27.04.2012 and 09.05.2012 to the 3rd respondent i.e, sole arbitrator who constituted the Arbitral Tribunal.

(f) Notwithstanding the aforesaid scenario, the Arbitral Tribunal proceeded without returning a finding with regard to the interlocutory application and by embarking upon the exercise of examining the claim on merits.

(g) I was taken through the impugned arbitral award and a perusal of the same in its entirety makes it clear that the arbitral award has proceeded on the basis that the interlocutory application taken out by the 1st respondent before it will be treated as stated position of the 1st respondent i.e, Lemmin without returning a finding on the same or calling upon Lemmin to file statement of defence and documents in support of the same. It was well open to the Arbitral Tribunal to say that the interlocutory application will be decided later or along with final proceedings and it was equally open to the Arbitral Tribunal to call upon the 1st respondent to file its statement of defence/written statement without waiting for a finding being returned on the interlocutory application. To be noted, the Arbitral Tribunal is a private tribunal which is a creature of the contract. A procedure can no doubt be evolved by the Arbitral Tribunal and nothing prevented the Arbitral Tribunal from taking this course. Specific reference was drawn to a paragraph (internal page No.23) in the impugned arbitral award, which reads as follows:

'Similarly, in Para 9 of the Application, R-1 themselves have clarified as to how the purchasing dealer must issue a declaration in the prescribed manner, on the prescribed form in order to avail of tax exemption. As submitted earlier, the consignee in each one of the invoices (Annexure 4 to Application) is only R-1 to whom the goods have been consigned in the account of the R-2. As such even though the Form-1 has to be provided by R-2, in the event of failure to do so, the obligation to make good the loss suffered by the claimant, rests on both the respondents. Therefore, R-1 cannot point out to the provision of the CST Act and pass on the liability solely to R-2.'

(h) Adverting to the aforesaid paragraph, learned counsel for petitioner submitted with substantial force that the Arbitral Tribunal has simply proceeded as if the defence statement and documents of Lemmin (1st respondent before the Arbitral Tribunal) were before it. Elaborating on the same, learned counsel also submitted that serious prejudice has been caused to Lemmin (1st respondent before the Arbitral Tribunal) as the said tripartite agreement is a cryptic tripartite agreement, which refers to an earlier agreement dated 14.12.2006. Besides this, there are a series of documents which would have been pressed into service by Lemmin if it had been given an opportunity to file defence statement and this could have completely tilted

the outcome is the learned counsel's say. It may not be necessary to delve in greater detail into these aspects as the instant petition is under Section 34 of A & C Act.

(i) Honourable Supreme Court, in *Fiza Developers & Inter Trade Private Limited V. AMCI (I) Private Limited and Another* reported in **2009 (17) SCC 796** has held that OPs under Section 34 of A & C Act are one issue summary procedures. This Fiza Developer's principle was reiterated by Honourable Supreme Court subsequently in *Emkay Global Financial Services Limited V. Girdhar Sondhi* reported in **AIR 2018 SC 3894**. While reiterating Fiza Developer's principle that OPs under Section 34 of A & C Act are one issue summary procedures, Honourable Supreme Court also held that Fiza Developer's principle is a step in the right direction towards expeditious disposal of OPs under Section 34 of A & C Act.

(j) In this backdrop, I examined the plea of Lemmin that the instant petition is predicated specifically under Section 34 (2) (a)(iii) and 34 (2)(b)(ii) read with clauses (ii) and (iii) of Explanation 1 to A & C Act. This takes us to the question as to whether the impugned arbitral award is in conflict with public policy of India. In the present case, whether the impugned arbitral award is in conflict with public policy of India owing to it being in

contravention of fundamental policy of Indian law has to be examined. For this purpose, I straightaway refer to the celebrated judgment of Honourable Supreme Court in *Oil and Natural Gas Corporation Limited V. Western Geco International Limited* reported in **2014 9 SCC 263**. Western Geco International was reiterated by Honourable Supreme Court in another celebrated judgment namely, *Associate Builders V. Delhi Development Authority*. To be noted, *Associate Builders' case* has been reported in **2015 3 SCC Pg. 49**. It is also reported in **2014 13 Scale Pg. 226**. In the said judgment, starting from paragraph 27, the fundamental policy of Indian Law has been explained. While elucidatively explaining the fundamental policy of Indian Law, Honourable Supreme Court culled out three distinct and fundamental juristic principles. Those three distinct principles are (a) judicial approach (b) natural justice (c) perversity/irrationality. With regard to judicial approach, Honourable Supreme Court held that fidelity of judicial approach should emerge clearly from the award for an arbitral award is a matter for decision under Section 34 of A & C Act. More important is the second juristic principle, laid down in *J.G. Engineers (P) Limited V. Union of India* reported in **(2011) 5 SCC 758** reiterated in *Associate Builders' case* namely, natural justice. With regard to natural justice, it was held in *J.G. Engineers case* (reiterated in *Associate Builders' case*) that it has to be tested on the time-honoured principle of audi alteram partem. Considering the importance, I deem it

appropriate to extract entire paragraph No.28 of Associate Builders' case, which reads as follows:

'28. In a recent judgment ONGC Ltd. V. Western Geco International Ltd. this Court added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Court held: (SCC pp. 278-80, paras 35 & 38-40)

35. What then would constitute the 'fundamental policy of Indian law' is the question. The decision in ONGC does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression 'fundamental policy of Indian law', we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a 'judicial approach' in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affects the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach

ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

38. *Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated audi alteram partem rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.*

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 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.*

(emphasis in original)

(k) To be noted, the test as to whether the impugned award is in contravention with the fundamental policy of Indian law and therefore in conflict with public policy of India has been applied strictly within the contours and confines of Explanation 2 to Section 34(2)(b)(ii) of A & C Act. In other words, while testing the impugned award with regard to the ground that it is in contravention with fundamental policy of Indian law, the same has been done without embarking upon the exercise of review on merits of the lis/arbitrable dispute.

(l) The third juristic principle being perversity/irrationality has to be tested on the touchstone of Wednesbury principle of reasonableness and it may not be necessary to delve into that aspect of the matter considering the

limited scope of applications under Section 34 of A & C Act and the limited scope on which the impugned arbitral award has been assailed in instant OP before me.

(m) In the light of the narrative supra, it comes out clearly that the Arbitral Tribunal has not given an opportunity to the 1st respondent before it to file its statement of defence and documents, if any. I also see from the arbitration clause extracted and reproduced supra that the parties had not agreed amongst themselves that they will not let in oral evidence. Be that as it may, it is not necessary to delve further into this as it comes out very clearly that when an interlocutory application was filed by the 1st respondent before Arbitral Tribunal/petitioner before me, i.e., Lemmin, it was clearly stated that it is an interlocutory application and an interlocutory application only. It has also been elaborated by stating that the 1st respondent reserves its right to file the defence statement, subject ofcourse to the outcome of the interlocutory application. (To be noted, copies were marked to the Arbitral Tribunal). The Arbitral Tribunal ought to have given an opportunity to the 1st respondent to file its statement of defence. That is not the case in the instant factual matrix.

(n) As mentioned supra, it was also elaborated as to how prejudice has been caused to the 1st respondent owing to opportunity to file defence statement being denied. That the impugned arbitral award is hit by the vice of being in conflict with public policy of India as adumbrated under Section 34 (2)(b)(ii) read with clause (ii) of Explanation 1 to A & C Act comes out clearly. As a sequitur, this takes us to Section 34(2)(a)(iv) of A & C Act. Learned counsel for petitioner very fairly submitted that with regard to Section 34(2)(a)(iii), he will fall under the third limb of the circumstances envisaged under Section 34 (2)(a)(iii) of A & C Act. The third circumstance envisaged under Section 34 (2)(a)(iii) of A & C Act is a party being otherwise unable to be present in Court. It is very clear that the 1st respondent was unable to present his case.

(o) This takes us to the very last limb of this particular order. Honourable Supreme Court in the judgment in ***State of Bihar V. Bihar Rajya Bhumi Vikas Bank Samiti*** reported in **2018 9 SCC 472** reiterated the need to adhere to sub-section (6) of Section 34 of A & C Act and observed that endeavour should be made by Courts hearing applications under Section 34 of A & C Act in this regard. In the instant case, the impugned arbitral award is dated 01.09.2012 and it is more than half a decade and one year old now.

(p) More importantly, though this might strictly not fall within the purview of Section 34 of A & C Act, I have also noticed that the first head of claim made by the claimant before the Arbitral Tribunal (1st respondent before me) is without dispute or disagreement satisfied. The conduct of the petitioner Lemmin in that sense of the matter has been noticed. The fact that the claimant's first head of the claim remains satisfied has also been taken note of. What remains is the second head of the claim. With regard to the second head of the claim, I am to extract one paragraph of the impugned arbitral award (internal page No. 14), which reads as follows:

'Ignorance is not bliss or procrastination a virtue nor is selective amnesia an excuse for non-performance. By the act of omission and commission R-2 ensured that the claimant had to bear a totally unwanted burden of paying the Central Sales Tax (CST) with interest and penalty which the sales tax officer, Hyderabad rightfully imposed on the claimant in view of the absence of Form-1 which had to be issued by R-2 on time in order to claim the legitimate refund of CST available to companies located in the Special Economic Zones. Had the Form-1 been issued on time by R-2 then the claimant could have produced the same before the concerned sales tax officer and secured the requisite refund in as much as under the Act, failure to do so by any concern which executes the work on behalf of a client located

in the Special Economic Zone would be liable to pay the CST in full with all other penalties and duties in the absence of Form-1 issued by the client. Under these circumstances, it would be abundantly clear that, the principle of the perpetrator pays as enshrined in many case laws and past precedents would need to be enforced based on the tenets of Law and natural justice. Therefore, under these circumstances, it would be abundantly clear that it is R-2 who would have to reimburse this amount to the claimant in full.'

To be noted, aforesaid observations in the impugned arbitral award is qua the second respondent before me i.e, Nokia. I have also extracted the operative portion of the impugned arbitral award. The operative portion of the impugned arbitral award, which is by way of three subsections, makes it clear that the onus is on Nokia, who was the 2nd respondent before the Arbitral Tribunal. It is not in dispute that the 2nd respondent before the Arbitral Tribunal as well as before me i.e., Nokia in the instant OP did not choose to go before the Arbitral Tribunal and suffered an ex parte award. To top it all, my attention is drawn to this aspect of the matter, which has been recorded in the impugned arbitral award.

REMARK BEFORE PARTING WITH THE CASE:

(a) Kirby, before invoking the arbitration clause had filed a petition under Section 9 of A & C Act before this Court and this Court, by its order dated 08.02.2010 directed the 2nd respondent Nokia to withhold a sum of Rs.1.5 crores. It is also seen that this order of this Court was placed before the Arbitral Tribunal as document No.61. This aspect of the matter is articulated (internal page No.9) in the impugned arbitral award and the relevant portion reads as follows:

'...The Hon'ble High Court, by its order dated 8.2.2010, directed the R-2 to withhold a sum of Rs.1.5crores till the disposal of the Arbitration proceedings as evidence in the document No. 61 filed.'

It is not in dispute and there is no disagreement before me that aforesaid order made by this Court in an application under Section 9 of A & C Act before the commencement of the arbitral proceedings attained quietus and no party to the proceedings had carried it on appeal. Notwithstanding that this is an application i.e, OP under Section 34 of A & C Act testing the impugned arbitral award strictly by perambulating within the contours of Section 34 of A & C Act this Court has noticed that the second head of the claim qua the claimant before the Arbitral Tribunal (1st respondent before me)

has not been disputed by Nokia. However, this is not the basis on which this order is passed and this order is passed by testing the impugned arbitral award on the basis of the submissions made before me and the conclusion that it is hit by Section 34 (2)(b)(ii) particularly read with sub-clause (ii) of Explanation (1) has been arrived at independent of noticing these facts. This 'REMARK BEFORE PARTING WITH THE CASE' has been made only for the sake of completion of facts.

CONCLUSION:

In the light of narrative thus far, petitioner is entitled to succeed and the impugned arbitral award is set aside as being hit by the vice of being in conflict with the public policy of India under Section 34 (2)(b) (ii) read with clause (ii) of Explanation 1 of A & C Act i.e, being in contravention with fundamental policy of Indian Law as far as the petitioner is concerned. In other words, the impugned arbitral award is set aside as far as the 1st respondent before the Arbitral Tribunal i.e, Lemmin (petitioner before this Court) is concerned. It is open to the claimant i.e, Kirby to execute the impugned arbitral award against the 2nd respondent before the Arbitral Tribunal i.e., Nokia. To be noted, the ground on which the impugned arbitral award is assailed is peculiar to the petitioner (Lemmin) before me i.e. it was not given an opportunity to file statement of defence.

M. SUNDAR,J.

nv

DECISION:

O.P. is allowed setting aside the impugned arbitral award dated 01.09.2012 insofar as the petitioner is concerned leaving the parties to bear their respective costs.

27.02.2019

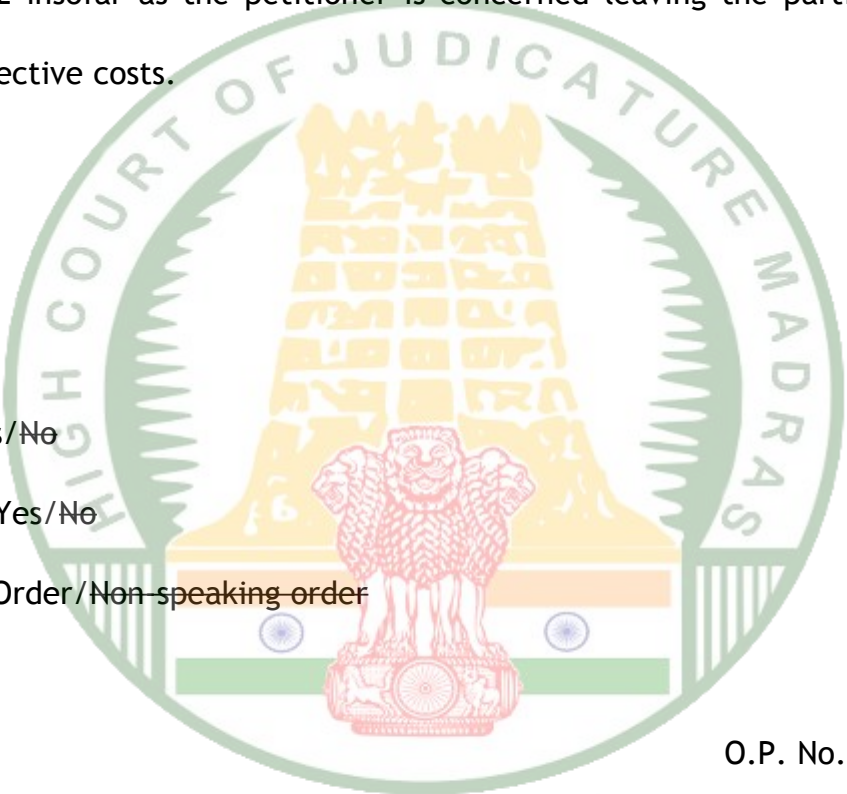
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Index: Yes/No

Internet: Yes/No

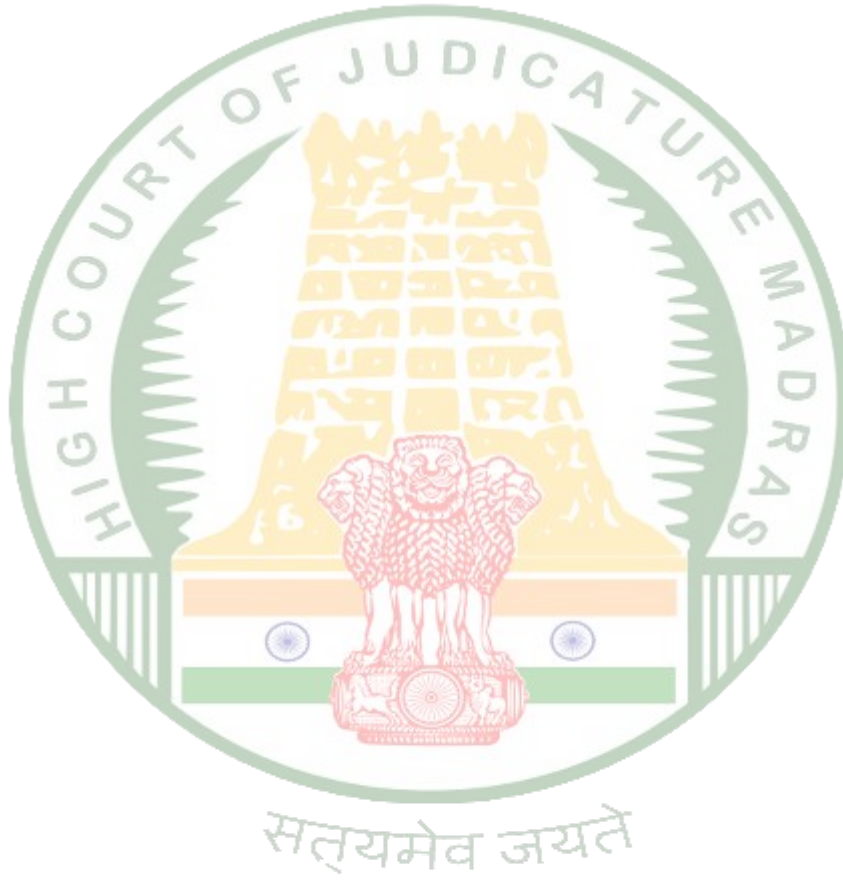
Speaking Order/Non-speaking order

O.P. No. 79 of 2014



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