

\$~20

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **FAO(OS) (COMM) 320/2019, C.M. Nos. 48702-703/2019**
M/S KALPATARU EMPORIUM Appellant

Through: Mr. Sandeep Sharma, Mr. Aman Dhyani
and Ms. Kanchan, Advocates.

versus

M/S REEBOK INDIA COMPANY Respondents

Through: Mr. Ashok Kumar Singh, Sr. Advocate
with Mr. Niraj Singh, Mr. Ashutosh Ranjan, Ms.
Aishwarya Singh and Mr. Deepak Jaiswal,
Advocates.

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MS. JUSTICE ASHA MENON

ORDER

% **13.11.2019**

1. The present appeal filed under Section 37 of the Arbitration & Conciliation Act, 1996 (in short '**the Act**') arises from an order dated 23.7.2019, passed by the learned Single Judge, dismissing OMP (Comm.) 275 of 2019 filed by the appellant/petitioner under Section 34 of the Act, challenging an Arbitral Award dated 02.2.2019, passed by the learned Sole Arbitrator, who was called upon to adjudicate the disputes and differences that had arisen between the parties in respect of an Agreement dated 27.8.2003 whereunder, the appellant/petitioner was appointed as a franchisee of the respondent's products and for establishing and operating a retail outlet at its premises. By the impugned order, the learned Single Judge has dismissed the petition filed by the appellant/petitioner on two counts, firstly, on the ground that there was no reason to condone the delay in re-filing the petition and secondly, on merits.

2. For the purpose of examining the aspect of delay, we may note that the Arbitral Award was passed on 02.2.2019. The period of 90 days for filing the Section 34 petition available under the Statute, if reckoned from 02.2.2019, would have expired on 01.5.2019. Initially, the appellant/petitioner had filed a Section 34 petition on 30.4.2019. The said petition comprised of only 22 pages. The impugned order notes that the original filing was without any book marking and pagination and nor was the petition originally filed, accompanied by affidavits in support. The Statement of Truth required to be mandatorily filed and the *vakalatnama* of the Advocate were also missing. Surprisingly, the appellant/petitioner had even failed to file a copy of the impugned Award with the petition. As a result, the said petition was returned with objections by the Registry and it was re-filed after over a month i.e., on 31.5.2019. This time, the petition comprised of 248 pages. Observing that the originally filed petition on 30.4.2019, cannot be treated as a valid filing in the eyes of law and it was a mere paper formality being completed by the appellant/petitioner only to save the period of limitation, the learned Single Judge opined that the period of limitation cannot be permitted to be calculated by taking in to consideration the said date i.e., 30.4.2019 and if the date of re-filing of the petition i.e., 31.5.2019 is taken as the first date of filing, then the said petition would have to be treated as filed beyond the period of limitation prescribed under Section 34 (3) of the Act. It was also observed that in the application for seeking condonation of delay in re-filing the petition, the only explanation offered by the appellant/petitioner was that he was a senior citizen and was not available to furnish the required record to his Advocate for curing the defects pointed out by the Registry. Not impressed by the said

explanation, the learned Single Judge expressed his disinclination to condone the delay in re-filing the Section 34 petition.

3. To serve the underlying object of speedy and prompt disposal of petitions filed under Section 34 of the Act, strict adherence to the timelines spelt out in the said Statute, is a must. Section 34(3) of the Act prescribes a period of three months for filing a petition challenging an Arbitral award. In the present case, the Arbitral Award was made on 02.2.2019. The appellant/petitioner had time upto 01.5.2019 to file the Section 34 petition. It is not in dispute that the said petition was originally filed on 30.4.2019, but the same was a skeletal set of documents bereft of a copy of the impugned award, an affidavit in support of the averments made in the petition, the Statement of Truth and a *Vakalatnama* of the Advocate. Not surprisingly, the said bunch of documents described as a Section 34 petition, was returned by the Registry under objections. The second time, the 22 page paper book initially filed by the appellant/petitioner had swelled to 248 pages and the missing documents mentioned above, including the impugned Award were enclosed with the said petition. On objections being cured, the said petition was re-filed by the appellant only on 31.5.2019.

4. The proviso to Section 34 (3) of the Act states in clear terms that only if the Court is satisfied that the applicant was prevented by sufficient cause from filing the Section 34 petition within a period of three months, it may entertain the said petition within a further period of thirty days, but not thereafter. The additional period of 30 days reckoned from 01.5.2019, the date on which, the period of three months would have lapsed, would take us to 31.5.2019, the date on which the appellant/petitioner had re-filed the petition. But unfortunately, no worthwhile explanation as to what had

prevented the appellant from filing the petition within three months was offered in the application for condonation of delay except for a bald statement that he was a senior citizen and was not available to furnish the required record to his Advocate to enable him to cure the defects pointed out by the Registry. We are inclined to concur with the opinion of the learned Single Judge that this can hardly be treated as a just and sufficient cause for condoning of the delay and extending the period of limitation by 30 days.

5. As for the merits of the case, learned counsel for the appellant/petitioner has assailed the impugned order on the ground that the learned Single Judge failed to consider the submission that the Agreement dated 27.8.2003, has not been interpreted by the learned Sole Arbitrator, who has completely overlooked Clause 10.1; that the learned Single Judge erred in ignoring the fact that the respondent had failed to produce any document in support of its counter claim and nor had it led any substantive evidence to show that its counter claims were maintainable and further, that the calculation sheets submitted by the appellant were ignored by the learned Single Judge. Lastly, it is contended that the learned Single Judge had overlooked the order dated 24.3.2006 passed by the MRTPC.

6. At the outset, we may delineate the scope of interference in a Section 37 petition, as discussed by us in a recent judgment dated 21.10.2019 in **FAO (OS) (COMM) 296/2019, Ministry of Youth Affairs & Sports vs. Swiss Timing Ltd.**, reported as **2019 SCC Online Del. 10934** the relevant paras whereof are reproduced herein below:-

“19. We are also mindful of the law on interference by the courts in respect of findings of facts based on appreciation of evidence, returned by the Arbitral Tribunal. In Sutlej Construction Limited Vs. Union Territory of Chandigarh reported as (2018) 1 SCC 718

the Supreme Court has held as follows: -

*“11. It has been opined by this Court that when it comes to setting aside of an award under the public policy ground, it would mean that the award should shock the conscience of the Court and would not include what the Court thinks is unjust on the facts of the case seeking to substitute its view for that of the arbitrator to do what it considers to be “justice”. **Associate Builders v. DDA, (2015) 3 SCC 49.***

*12. The approach adopted by the learned Additional District Judge, Chandigarh was, thus, correct in not getting into the act of reappreciating the evidence as the first appellate court from a trial court decree. An arbitrator is a chosen Judge by the parties and it is on limited parameters can the award be interfered with. **(Sudarsan Trading Co. v. State of Kerala [Sudarsan Trading Co. v. State of Kerala, (1989) 2 SCC 38; Harish Chandra & Co. v. State of U.P., (2016) 9 SCC 478 and Swan Gold Mining Ltd. v. Hindustan Copper Ltd., (2015) 5 SCC 739.***

13. The learned Single Judge ought to have restrained himself from getting into the meanderings of evidence appreciation and acting like a second appellate court. In fact, even in second appeals, only questions of law are to be determined while the first appellate court is the final court on facts. In the present case, the learned Single Judge has, thus, acted in the first appeal against objections dismissed as if it was the first appellate court against a decree passed by the trial court.”

*20. In Ssangyong Engineering Construction Co. Ltd. vs. National Highways Authority of India reported as **2019 SCCOnline SC 677**, the Supreme Court has reiterated the aforesaid view in the following words: -*

35. What is clear, therefore, is that the expression “public policy of India”, whether contained in Section 34 or in Section 48, would now mean the “fundamental

policy of Indian law” as explained in paragraphs 18 and 27 of Associate Builders (supra), i.e., the fundamental policy of Indian law would be relegated to the “Renusagar” understanding of this expression. This would necessarily mean that the Western Geco (supra) expansion has been done away with. In short, Western Geco (supra), as explained in paragraphs 28 and 29 of Associate Builders (supra), would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of Associate Builders (supra).

36. It is important to notice that the ground for interference insofar as it concerns “interest of India” has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. This again would be in line with paragraphs 36 to 39 of Associate Builders (supra), as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

37. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of Associate Builders (supra), or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of Associate Builders (supra). Explanation 2 to Section 34(2)(b)(ii)

*and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that **Western Geco (supra)**, as understood in **Associate Builders (supra)**, and paragraphs 28 and 29 in particular, is now done away with.*

38. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.”

*21. Reliance is also placed on a recent judgment dated 18.10.2019 passed by the Supreme Court in **SLP No.13117/2019, The State of Jharkhand and Ors. vs. M/s HSS Integrated SDN and Anr.**, wherein it has been emphasised that the Award passed by an Arbitral Tribunal can be interfered with in proceedings under Sections 34 and 37 of the A&C Act only in a case where the finding is perverse and/or contrary to the evidence and/or the same is against public policy. In the instant case, none of the above circumstances exist for interference.”*

7. Keeping in mind the aforesaid parameters of interference in a Section 37 petition, it is clear that this Court cannot re-appreciate the evidence led before the learned Sole Arbitrator, who is the most competent person to evaluate the same and adjudicate on the above aspect. Mis-appreciation of the evidence or an erroneous conclusion arrived at on the basis of the evidence led can also not be rectified in a Section 37 petition, as the court is not expected to examine the Award as if it is an Appellate Court. The Court

must exercise its power of judicial review within the confines of the law laid down by the Supreme Court in the captioned cases.

8. All the same, we have taken note of the submission made by the learned counsel for the appellant to the effect that the learned Arbitrator had ignored the fact that the appellant had suffered losses and injury for the reason that on the termination of the Agreement, the respondent had refused to take back the goods supplied to the appellant though he had not made payment for the said goods. The learned Single Judge has rightly rejected the said plea on the ground that learned Sole Arbitrator had examined this aspect in detail before arriving at a conclusion that Clause 5.1 (s) of the Agreement contemplates that *“the title of the goods would pass on to the appellant as soon as the said goods were purchased by it and the respondent was under no obligation to take them back even when they remained unpaid by the appellant”*. For arriving at the said conclusion, the learned Sole Arbitrator had also placed reliance on Clause 6 (a) of the Agreement.

9. For purposes of ready reference, we may reproduce herein below the Clause 5.1 (s) of the Agreement: -

“5. Obligations of Franchisee

5.1 Franchisee hereby agrees:

XXX

XXX

XXX

(s) Not to return goods purchased by the Franchisee under any circumstances.”

10. Clause 6 (a) of the Agreement stipulates that *“the title of goods will be transferred to the franchisee immediately on invoicing by RIC”*.

11. This is what the learned Sole Arbitrator had to say on the effect of Clause 5.1 of the Agreement:-

“36. Clause 5.1 (c) had categorically stated that the Claimant was required to obtain stocks directly from the Respondent and not from any other party. Therefore the plea of the Claimant that it was obtaining stocks from the distributors of the Respondent after the expiry of the Agreement runs counter to this condition. Clause 5.1 (j) had provided that the Claimant was to follow special or reduced price schemes in respect of slow moving products as implemented by the Respondent on such margins as may be determined by the Respondent. Therefore the Claimant was bound to participate in the ‘Sales’ organized by the Respondent on such margins as may be determined by the Respondent.

37. It is also important to notice that Clause 5.1 (1) had provided that the price of the goods ordered by the Claimant was to be paid by the Claimant to the Respondent before the despatch of the goods by the Respondent and the Authorized Representatives of the Respondent were empowered to inspect the stocks kept at the Retail outlet of the claimant. Even inventories were to be made available by the Claimant to the Respondent regarding the stocks and sales etc., on periodical basis.

38. The most important Clause of the Agreement was Clause 5.1(s) which provided the Claimant could not return the goods purchased by it to the Respondent under any circumstances. It shows that unsold or dead stocks were the responsibility of the Claimant only and it could not ask the Respondent to take back the same. Clause 6(a) of the Agreement Exhibit C-1 had further clarified that the title of the goods would stand transferred to the Franchisee immediately on invoicing by the Respondent. It also conveys that the goods once purchased by the Claimant from the Respondent stood owned by it and the Respondent had no title or interest therein except taking back the defective goods. Clause 7 had provided that the Respondent would offer a gross commission of 28% of MRP to the Claimant.

XXX

XXX

XXX

50. *The plea of the Claimant that the Respondent did not take back the dead stocks files directly in the face of Clause 5.1 (s) of the Agreement between the parties which stipulated that the Claimant was not to return the goods purchased by it under any circumstances. The reason behind this stipulation was that the Claimant was a Franchisee of the Respondent who was purchasing products from the Respondent at a lesser price for selling the same at a higher price through its Retail Outlet. The title and the proprietary rights in the products passed to the Claimant as soon as the goods were purchased and thereafter whether those could be sold or not by the Claimant was not a concern of the Respondent. In case, the Claimant had been a Selling Agent only of the Respondent and the goods were stored in its outlet by the Respondent for sale without receiving the price, it could be said that the products remained the property of the Respondent and it was liable to take back the unsold stocks from the Claimant. However, in this case, the Respondent had sold its products to the Claimant for onwards sales at the Retail Outlet of the Claimant and once the property in the goods got transferred to the Claimant the Respondent remained under no obligation whatsoever to take back the unsold stocks and refund the value thereof to the Claimant. There was no such stipulation in the Agreement. Clause 6(a) of the Agreement clearly stated that the title in the goods will be transferred to the Franchisee immediately on invoicing by the Respondent.*

(emphasis supplied)

12. As for the claim of the appellant/petitioner that Clause 10.1 of the Agreement has been overlooked by the learned Sole Arbitrator, the same is not borne out on a perusal of the Arbitral Award particularly paras 39, 40, and 50, that record as follows:-

“39. Clause 10 of the Agreement stipulated that upon expiration or termination of the Agreement the Franchisee shall immediately cease holding itself out as a Retail Outlet. However in the present

case, even after the expiry of the Agreement the Claimant continued to hold itself as the Franchisee of the Respondent and continued with the sale of the Respondent's products by purchasing the same from the distributors of the Respondent as if it was still a Franchisee of Respondent.

40. Clause 10.1 (e) had provided that the Respondent shall arrange to lift the stocks owned by it from the Retail Outlet within 14 days. These stocks were those regarding which the payment had not been made by the Claimant and as such those were owned by the Respondent.

XXXX

XXXX

XXXX

50. The contention that in terms of Clause 10.1 (e) the Respondent was enjoined to lift the stocks owned by it from the retail outlet of the Claimant within 14 days is also not sustainable as this Clause pertained to only those stocks which were owned by the Respondent and was not regarding those stocks payment of which had been made by the Claimant and title therein had already passed on to the Claimant. Therefore, the goods already purchased and paid for by the Claimant were not to be lifted by the Respondent within 14 days in terms of Clause 10. 1(e) of the Agreement."

13. Coming to the order dated 24.3.2006 passed by the MRTP Commission, in para 50 of the Award the learned Sole Arbitrator has observed that the said order would not be of any assistance to the appellant for the reason that the Agreement that was being examined before the Commission, was a Commission Agreement, which had not been placed on record by either side. In fact, the MRTP Commission made a specific observation in para 6 of the order dated 24.3.2006, that neither side has filed a copy of the Agreement and therefore, it did not have the benefit of examining the terms and conditions thereof. The learned Sole Arbitrator has specifically observed that the Agreement between the parties herein had different stipulations that provided that the title in the product would pass on

the appellant immediately upon the issuance of the invoice by the respondents. We are also in complete agreement with the observations made in the impugned order that the appellant was obliged to pay for the goods at the time of taking delivery and the parties had agreed for a credit period for the said purpose, but non-payment in respect of the goods in question would not have any effect on the title of the goods passing on to the appellant.

14. In view of the above discussion, we are of the opinion that the impugned order does not warrant any interference and is accordingly upheld. The appeal is dismissed in *limine* as meritless along with the pending applications.

HIMA KOHLI, J.

ASHA MENON, J.

NOVEMBER 13, 2019
ap/neelam