

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

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Date of decision: 01.05.2020

+ **FAO(OS) (COMM) 23/2020, C.M.Appl.4192/2020**

M/S INTER ADS EXHIBITION PVT LTD Appellant

Through: Mr. Siddharth Yadav, Ms. Vijeta
Mukherjee and Mr. Wasim Ashraf,
Advocates

Versus

BUSWORLD INTERNATIONAL COOPERATIEVE
VENNOOTSCHAP MET BEPERKTE ANASPRAKELIJKHEID

..... Respondent

Through: Ms. Malvika Trivedi, Mr. Vasanth
Rajasekaran, Mr. Saurabh Babulkar,
Ms. Reshma Ravipati, Ms. Shivani
Garg, Advocates

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MS. JUSTICE ASHA MENON

ASHA MENON, J.

1. This appeal has been preferred by the appellant being aggrieved by a judgment dated 13.01.2020, passed by the learned Single Judge dismissing O.M.P.(I) (COMM.) 273/2019, filed by it under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act').

2. It is not disputed that the appellant/*M/s. Inter Ads Exhibition Pvt. Ltd.* and the respondent/*Busworld International Cooperatieve Vennootschap Met Beperkte Anasprakelijkheid* had entered into a Joint Venture Agreement dated 16.10.2003 (for short, 'JVA-I'), for organizing in India, exhibitions

and conferences known as “Busworld India”. A Supplementary Agreement dated 24.07.2009, was also entered into between the parties. Pursuant to these agreements, three editions of such events were organized in the years 2005, 2007 and 2009. After executing another Joint Venture Agreement (**for short, ‘JVA-II’**) on 25.10.2011, events were organized in the years 2011, 2013, 2015, 2016 and 2018. According to the appellant, all these editions were organized successfully on account of their hard-work and dedication. Importantly, the respondent had made no investment even by way of working capital for the organisation of these events. However, for the ‘2018 Event’ organized at Bengaluru, the respondent had, for the first time, agreed to pay Euro 67,000 towards the working capital of the event in terms of Article 5.2(b) of JVA-II. A Memorandum of Understanding was also executed between the parties on 21.10.2017, whereby the respondent agreed to set off its dues, which it was to claim from the appellant for the earlier editions, against the said contribution to the working capital for the 2018 event.

3. As per the appellant, admittedly, it had to reimburse Euro 55,949.28 towards expenses on marketing, research, advertisement, etc., borne by the respondent for the earlier editions. The appellant further undertook to pay to the respondent, Euro 67,000 a week before August, 2018, i.e. between 29.08.2019 and 31.08.2019, but it informed the respondent vide email dated 20.08.2018, that it would pay the said amount in three instalments, one each in the months of September, October and November, 2018, respectively. Two instalments were duly paid by the appellant, but it was unable to pay the third one due to certain constraints and offered to compensate the

respondent by paying interest @12% *per annum*, on the delayed payment, which was agreed to by the respondent.

4. The dispute apparently arose between the parties when on successful completion of the ‘2018 Event’, the ‘2020 edition’ was announced by the respondent on 04.09.2018, but it failed to respond to the e-mails dated 12.10.2018 and 17.10.2018 sent by the appellant for venue booking, etc.. Subsequently, the appellant received a communication/notice dated 15.03.2019 from the respondent stating *inter alia* that the JVA-II stood terminated and also making a claim for payment of Euro 118,486,34. This according to the appellant, was despite the fact that 10 days prior thereto, vide e-mail dated 05.03.2019, the respondent had agreed to receive the last instalment with interest. The appellant protested and pointed out that after so many years of valued partnership, JVA-II ought not to be terminated on account of a minor default.

5. In the light of the disputes arising between the parties out of JVA-II and since it contained an arbitration clause, the appellant filed a petition under Section 9 of the Act, seeking the following reliefs: -

- “a) *the termination notice dated 15.03.2019 issued against the terms of JVA-II, be quashed and set-aside;*
- b) *pass ex-parte ad interim order(s) restraining the Respondent to give effect to the termination notice dated 15.03.2019...*”

6. After hearing both sides, the learned Single Judge concluded that in the light of Article 7.3 of JVA-I, the contract between the parties was determinable in nature as it enabled either of the parties to terminate the agreement if the other party was in default or in breach of a material obligation under the JVA and the defaulting party failed to correct this default within 30 business days of the receipt of the notice. It was observed that since the contract was determinable, it could not be revived or restored by the court and no specific performance of the contract could be directed. It was further observed that at best, if the termination was found to be bad in law for some reason, the remedy to seek compensation for wrongful termination was still available to the appellant and in any case, the said question was to be considered only by the Arbitrator. Further, the learned Single Judge observed that in view of the provisions of Section 41(e) of the Specific Relief Act, no injunction could be granted to prevent breach of a contract which could not be specifically enforced. Thus, the first relief claimed by the appellant was declined by the learned Single Judge.

7. With regard to the second relief, it was observed by the learned Single Judge that since it would involve imposing a blanket restraint order on the respondent, restraining it from carrying on any business in India, it would in effect amount to granting the first relief indirectly, despite the court having no power to grant the first relief of injunction. Further, the court observed that in view of the fact that the appellant had chosen to wait from March, 2019, till the end of August, 2019 for filing the Section 9 petition, there was no justification for restraining the respondent from going ahead with the events as scheduled in the year 2020. Thus, the petition filed by the

appellant under Section 9 of the Act was dismissed.

8. Mr. Siddharth Yadav, learned counsel appearing for the appellant submitted before this court that the contract was not for four years and therefore, was not determinable, unless the conditions prescribed under Article 7 of the JVA-II had been met. He contended that the contract was an ongoing contract and could be determined only if there was any material breach and a specific Notice issued under Article 7.3(b) of the JVA-II giving 30 days' time to the defaulting party to rectify the default. He stated that in the present instance, only 10 days prior to the so-called termination, the respondent had accepted the offer of the appellant to pay the outstanding dues with 12% interest. Hence notice as required under the above Article, had not been issued by the respondent and the contract could not have been terminated. It was argued that the 2020 Edition having been announced the termination of the JVA was illegal and the appellant was entitled to an injunction in view of the Article 7.4(f), whereunder there was a bar on the respondent from organising any event having the same or substantially the same theme and profile as that of 'Busworld India' for a period of four years.

9. On the other hand, Ms. Malvika Trivedi, learned counsel appearing for the respondent submitted that the contract was for four editions and stood terminated upon conclusion of these four editions. Furthermore, the e-mail dated 15.02.2019 sent by the respondent, was in effect a notice for payment as a sum of Euro 27361.34 which was outstanding, and which had not been paid within 30 days and on that score too, the termination notice dated 15.03.2019, was valid and legal. Thus, it was urged that once the

contract had been terminated, there was no question of its specific performance and the learned Single Judge had rightly declined any relief to the appellant.

10. We have heard the submissions of learned counsel for the parties and perused the record. Before proceeding further, we may note that the scope of an appeal under Section 37 of the Act is fairly limited, as was discussed by us in a recent judgment in Ministry of Youth Affairs & Sports vs. Swiss Timing Ltd., reported as **2019 SCC Online Del. 10934**, 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 SCC Online 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.”

11. Turning to the case at hand, we may note that the reliefs that the appellant had sought under Section 9 of the Act were for quashing and setting aside of the termination notice dated 15.03.2019 and to injunct the respondent from giving effect to the termination notice and continuing with its business in India. The first contention of the appellant was that the **JVA-II** was not for four editions. The **JVA-II** executed on 25.10.2011, records as below: -

*“Whereas, the parties desire to renew the said Joint Venture Agreement dated 16.10.2003 for **four more editions**, in pursuance of the terms and conditions as mentioned hereto in this Agreement;”*

12. Thus, on a plain reading of the agreement dated 25.10.2011, **i.e. JVA-II**, it is apparent that it was intended only for four editions. With the conduct of the exhibitions in the years 2013, 2015, 2016 & 2018, the four events stood concluded. No doubt, under Article 7.1, the following is provided: -

“7.1 Term of Agreement

The term of this Agreement commences on execution of

this Agreement as mentioned in Article 2.1 and continues until terminated under the provisions of this Article 7. In order for the termination to be valid, the termination must be served in accordance with Article 12.4 of this Agreement.”

13. Whether the termination notice dated 15.03.2019, met the requirements of Article 12.4 or not and thus, whether the termination was a valid termination or not, would be questions that have to be examined and adjudicated upon by the learned Arbitrator, to be appointed by the parties to resolve their disputes. It would also be for the learned Arbitrator to reconcile Article 7.1 with the recitals in the JVA-II dated 25.10.2011, as reproduced hereinabove, limiting the agreement to four editions. Under Article 7, termination can be either mutually agreed to under Article 7.2 or at the option of either party, on the occurrence of certain events, as listed under Article 7.3, which contemplates a termination with penalty. Again, the question whether the respondent had given 30 days' time to the appellant to make good the default, duly specified in reasonable detail in the communications exchanged between the parties, is not for this court to inquire into. Suffice it is to state that in either event, the agreement was terminable and therefore, the conclusion arrived at by the learned Single Judge that specific performance of the contract could not be granted and nor could any injunction be issued restraining the respondent from giving effect to the notice dated 15.03.2019, as that would in effect amount to enforcement of the contract beyond the said date i.e. 15.03.2019, cannot be faulted.

14. The learned Single Judge has rightly relied on a decision of this court

in MIC Electronics Ltd. and Ors. vs. Municipal Corporation of Delhi and Ors., **2011 II AD (DEL) 625**, to hold that legality of the termination and the justification of the appellant of not paying the balance due to the respondent, would have to be examined by the learned Arbitrator. Reliance was rightly placed on the following observations made in the captioned case:-

“12..... Therefore, the licence stood terminated, as correctly observed by the learned Single Judge, in the impugned order, and the legality or illegality of termination would be a matter to be determined in arbitration. Further, the justification given by the Appellant for not paying the licence fee will be examined in the arbitral proceedings. The case of the Appellant that, owing to the failure of the Respondent to perform obligations under the agreement, and the latter's refusal to decrease the number of 20 of LED screens in terms of clause 6 of-the-agreement, would also be considered by the Arbitral Tribunal. In this behalf, we, therefore, find considerable merit in the submission made on behalf of the Respondent that if the cancellation of the contract by the Respondent constitutes a breach of contract on their part, the Appellant would be entitled to damages. In other words, the questions whether the termination is wrongful or not or whether the Respondent was not justified in terminating the agreement, are yet to be decided. However, from the facts of the case there is no manner of doubt that the contract was by its very nature terminable, in terms of the contract between the parties themselves.”

(emphasis added)

15. Since the contract in the present case was terminable and as the issue

of the legality of the action of termination has yet to be determined and further, since wrongful termination can be restituted by awarding of damages, in the event the appellant is able to establish that the said termination was illegal and invalid, the learned Single Judge has rightly declined the reliefs prayed for by the appellant in the Section 9 petition. We do not find any reason to interfere with the view taken in the impugned judgment.

16. The present appeal lacks merit and is accordingly dismissed alongwith the pending application.

(ASHA MENON)
JUDGE

(HIMA KOHLI)
JUDGE

MAY 01, 2020

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