

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

Present:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

A.P.227 of 2013

Mitesh Mehta also Known as Mitesh Kishore Mehta

Vs.

Saregama India Limited

For the Petitioner : Mr. Jit Ray, Adv.
Md. Jalaluddin, Adv.

For the Respondent : Mr. Anirban Ray, Adv.
Mr. Shaunak Mitra, Adv.
Mr. Rishav Dutta, Adv.

Last Heard on : 18.02.2021.

Delivered on : 02.03.2021.

Moushumi Bhattacharya, J.

1. The instant application under Section 34 of The Arbitration and Conciliation Act, 1996 (the Act) has been filed for setting aside an Award dated 28th November, 2012 passed by a learned Sole Arbitrator. By the said Award, the respondent herein (who was the claimant in the arbitration) was found to be entitled to a substantial part of the claims made in the

Statement of Claim together with costs and expenses incurred by the respondent in a pending proceeding between the parties before this court. The amount of Rs.1,93,96,735/- was awarded on account of shortage of stocks as per an inventory made, rental charges, power and fuel expenses, labour and monthly general expense, including loss of business, which were computed by the claimant (respondent herein) in paragraph 24 of the Statement of Claim.

2. The dispute arose out of an agreement dated 16th May, 2007 between Greenfield Logistics, a firm of which the petitioner herein is the proprietor and Saregama India Limited by which Greenfield Logistics was appointed as logistic service provider to provide services of storing and handling with respect to Saregama's goods, comprising of audio cassettes, CDs, DVDs, in a warehouse located at Turbhe, Navi Mumbai. Saregama terminated the agreement by a letter dated 10th September, 2008 and informed the petitioner that the security deposit together with the interest thereon would be refunded to the petitioner after receiving the goods and documents lying at the warehouse of the petitioner. The petitioner responded to the termination letter by its letters dated 13th September, 2008 and 30th September, 2008, enclosing final bills including refund of security deposit and interest. The respondent/claimant's case before the learned Arbitrator is that the respondent was constrained to terminate the agreement as there was a necessity to appoint a third party who would operate as a complete logistics solution provider throughout India by reason of which the respondent issued the letter of termination dated 10th September, 2008.

According to the respondent, the petitioner accepted the termination of the agreement dated 16th May, 2007 in its replies. However, since the letter of 10th September, 2008 had not referred to the contractual period of notice of 30 days, the respondent issued a second letter dated 7th October, 2008. The petitioner replied to the second letter by a letter dated 10th October, 2008 claiming outstanding amounts but accepted the termination which would be evident from a letter dated 11th October, 2008 written by the respondent's lawyer.

3. The stand of the petitioner in the arbitration was primarily concerned with the outstanding claims which were disclosed through various letters, enclosing bills for the services rendered by the petitioner for the concerned warehouse including towards labour and security deposit.

4. Learned counsel, however, in the present proceeding for setting aside the impugned Award has primarily placed emphasis on Clause 30 of the agreement dated 16th May, 2007, which provides that either party may at any time terminate the agreement by giving a 30 days' advance written notice to the other party of its intention to do so and terminate the agreement upon expiry of the period of such notice. According to counsel, the letter of termination dated 10th September, 2008 did not comply with the requirement of Clause 30 since the respondent sought to terminate the agreement before expiration of the 30 days' period. It is contended that the second letter of termination issued on 7th October, 2008 could not cure the defect of the earlier termination letter as the agreement had already been

terminated on 14th September, 2008. Counsel submits that the Arbitrator failed to construe the intention of the parties as expressed in Clause 30 of the agreement and did not decide the said point in the Award. It is submitted that the Arbitrator therefore also failed to take into account the terms of the agreement as mandated under Section 28(3) of the Act. Counsel relies on *ONGC Limited vs. Saw Pipes Ltd.*; (2003) 5 SCC 705 in which it was held that an Arbitrator must follow the procedure prescribed under the 1996 Act. *State of Jharkhand Vs. HSS Integrated SDN*; (2019) 9 SCC 798 has been relied on for the proposition that an Award can be interfered with if the findings are contrary to the evidence and against the public policy of India. *State Bank of India vs. Mula Sahakari Sakhar Karkhana Ltd.*; (2006) 6 SCC 293 and *Nabha Power Limited (NPL) Vs. Punjab State Power Corporation Limited (PSPCL)*; (2018) 11 SCC 508 has been shown for the principle that a court cannot substitute its own view of the presumed understanding of commercial terms by the parties if the terms are clear since the terms would be the final indication with regard to the intention of the parties. *Delhi Development Authority vs. R.S. Sharma and Company, New Delhi*; (2008) 13 SCC 80 has been relied on for enumerating the principles on which a court would interfere if the Award is found to be patently illegal or against the public policy of India. *Associate Builders vs. Delhi Development Authority*; (2015) 3 SCC 49 has also been cited for the proposition that patent illegality would include a contravention of Section 28(3) of the Act.

5. Learned counsel appearing for the respondent/claimant seeks to sustain the impugned Award by contending that the Award is not only a reasoned Award but in accordance with the substantive laws which are presently in force. Counsel submits that the Arbitrator is the final word on the construction of the contract executed between the parties and the findings of the Arbitrator after appreciation of evidence cannot be interfered with unless found to be perverse. Counsel relies on *Associate Builders Vs. Delhi Development Authority*; (2015) 3 SCC 49 and *State of Jharkhand Vs. HSS Integrated SDN*; (2019) 9 SCC 798 for this purpose. Counsel relies on *Jahuri Sah vs. Dwarika Prasad Jhunjunwala*; AIR 1967 SC 109 for the proposition that in the absence of a specific denial by the petitioner, the claims of the respondent would be deemed to be admitted. *A.E.G. Carapiet vs. A.Y. Derderian*; AIR 1961 CAL 359 has been shown in support of the contention that since the petitioner did not make out his essential and material case in the cross-examination, the case put forward by the respondent/claimant would be deemed as undisputed.

6. I have considered the case put forward by counsel appearing for the petitioner and the respondent. The argument made before this court in the application for setting aside of the Award centres around the mandate of Section 28(3) of the Act under which, *inter alia*, the Arbitral Tribunal shall take into account the terms of the contract. The emphasis placed on the aforesaid section is by reason of the petitioner contending that the respondent failed to comply with the requirement of Clause 30 of the agreement dated 16th May, 2007, in giving 30 days' advance written notice of

the respondent's intention to terminate the agreement. According to counsel for the petitioner, the Arbitrator failed to construe the effect of this clause and came to a decision in respect of the legality of the termination.

7. Upon reading the Award, it is found that the Arbitrator has considered the effect of Clause 30 at length and came to a specific decision that although the initial termination letter dated 10th September, 2008 did not refer to the 30 days notice period as contemplated in Clause 30 of the agreement, the second letter dated 7th October, 2008 was issued by way of abundant caution and presumably to cure the defect. The Arbitrator was also of the view that both the letters of termination, namely, 10th September, 2008 and 7th October, 2008 have not been denied by the petitioner, which amounted to a crucial consideration for deciding in favour of the respondent/claimant. The Arbitrator has referred to several documents to come to the aforesaid finding, including letter of the petitioner of 15th October, 2008 and orders passed by this court in May 2009 in an application under Section 9 of the Act by which the keys of the go-down were handed over to the respondent and the Special Officer appointed in the proceedings was discharged. The Arbitrator appears to have proceeded on essentially two considerations, namely, that there was no denial on the part of the petitioner of the two notices of termination and that the petitioner failed to appear in the arbitration proceedings after 11th January, 2001 in spite of several notices being sent to the petitioner. It has been specifically stated in the Award that the petitioner was not present for cross-examination by the respondent by reason of which the Arbitrator thought it

fit to discount the evidence filed on behalf of the petitioner in the arbitral proceedings. The documents filed in the present proceedings corroborate the views of the Arbitrator with regard to the petitioner's correspondence of the letters of termination. The view of the Arbitrator that the second letter of termination cured the defect of the first letter of termination is reinforced by the fact that the respondent did not take steps to give effect to the termination before expiration of the 30 days notice period which would be evident from its second letter dated 7th October, 2008.

8. With regard to allowing the claim of Rs.1,93,96,735/-, the Arbitrator relied on the particulars set out in paragraph 24 of the statement of claim enumerating the expenses incurred by the respondent under the Heads mentioned in the said paragraph including operating and other expenses, rental charges, shortages of stocks, etc. The Arbitrator was of the specific view that the denial in the counter-statement made by the petitioner with regard to these claims was evasive and further that while the claimant's witness was cross-examined, the petitioner's witness did not present himself for cross-examination. The Arbitrator also found that the claims enumerated in paragraph 24 of the statement of claim, were supported by the documents E-22 to E-27 of the affidavit of evidence of the respondent. With regard to the other set of claims including the claim on account of further loss of opportunity and loss of future business as well as loss of goodwill and reputation were disallowed for lack of evidence in respect of the said claims. The Arbitrator, however, awarded Rs.3,54,520/- on account of costs and expenses incurred by the respondent in litigation between the parties. The

respondent was also directed to adjust a sum of Rs.7 lakhs together with the accrued interest on account of the security deposit, which was lying with the respondent.

9. The Award impugned does not disclose any basis for holding that the Award is either perverse or patently illegal or opposed to public policy. For an Award to be seen as perverse, the law laid down in *Associate Builder* may profitably be referred to; namely that perversity or irrationality would arise when no reasonable person would have arrived at such finding; findings which are not based on evidence; or the arbitral tribunal takes into account the irrelevant considerations or ignores vital evidence in arriving at its decision. There is no finding in the Award which can satisfy either of the three criteria laid down in *Associate Builders*. In the same decision, patent illegality has been held to include a contravention of Section 28(3) of the Act, which mandates that the arbitral tribunal shall decide in accordance with the terms of the contract. Paragraph 42.3 of *Associate Builders*, however, goes on to explain that if an Arbitrator construes a term of the contract in a reasonable manner, it will not mean that the Award can be set aside on this ground and further that construction of the terms of a contract is primarily for an Arbitrator to decide. The Award shows that the Arbitrator took into account the implication of Clause 30 of the agreement and weighed the same against the correspondence exchanged between the parties subsequent to the letters of termination. There is nothing in the Award to indicate that the construction given to the clause was such that no reasonable person would arrive at.

10. Considering these aspects, it cannot also be said that the Award is opposed to the public policy of India. The ground taken in the application that the petitioner was not given proper notice and the arbitral proceeding is not corroborated by the materials on record is in any event contrary to the specific finding of the Arbitrator that the petitioner refused to participate in the arbitration after 11th January, 2011 despite several notices given to him.

11. The cases cited on behalf of the petitioner proceed on the basis that an Award can only be interfered with if it is found to be perverse by being contrary to evidence or against public policy, as enumerated in *Delhi Development Authority and Associate Builders*. What has to be seen is whether these principles can be applied to the facts of a particular case. The proposition laid down in *State Bank of India vs. Mula Sahakari Sakhar Karkhana Ltd.*; (2006) 6 SCC 293 must be construed on the basis of the terms and conditions in the particular facts and does not apply to the facts of this case. *Nabha Power Limited* reiterates the aforesaid proposition in that the explicit terms of a contract are always the final word with regard to the intention of the parties and would have been relevant to the present case if the Arbitrator had disregarded Clause 30 of the agreement in the context of the correspondence exchanged between the parties. On the other hand, *A.E.G. Carapiet* and *Jahuri Sah* shown on behalf of the respondent are relevant in the present facts since the Arbitrator has come to a specific finding that the petitioner did not present himself for the cross-examination and did not participate in the arbitration proceedings after 11th January, 2011 despite several notices being issued to the petitioner. Order VIII Rule 5

of The Code of Civil Procedure – “Specific Denial” - provides that every question of fact in the plaint not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability. *A.E.G. Carapiet* is an authority on the principle that wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. *Associate Builders* has clarified the juristic principle of perversity by way of three instances where the Tribunal errs in coming to a finding with regard to the available evidence. None of the three points in paragraph 31 of *Associate Builders* applies to the present case since the Arbitrator based his findings on the documents before him and did not take any irrelevant considerations to buttress his reasons. It should also be clarified that the law laid down in *R.S. Sharma*, essentially that an Award can also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court must be seen in the light of the later pronouncement of the law in *Associate Builders*. The petitioner having accepted the termination and acting upon it is a crucial consideration as also the second letter issued by the respondent curing the defect of the first letter of termination which did not refer to the period of notice for termination. The finding that the petitioner accepted and acted upon the termination cannot be seen as perverse since the said finding was based on contemporaneous letters exchanged between the parties which were considered by the Arbitrator.

12. Section 31 (4) of the 1996 Act mandates that the arbitral award shall state the date and the place of arbitration in accordance with Section 20 of the Act and the Award shall be deemed to have been made at that place. Although, the impugned Award does not state the place of arbitration, the submissions made on behalf of the parties that the award was made in Kolkata is taken into account. The parties to the Arbitration have also been described as Plaintiff and Respondent in the Cause Title (Section 23 of the 1996 Act mentions 'Claimant'), which is understood to mean Claimant and Respondent, respectively, as stated in the body of the Award. However, considering that the impugned award contains reasons as mandated under Section 31 (3) of the Act and has taken the salient terms of the agreement dated 16th May, 2007, including Clause 30 into account, the objection taken on behalf of the petitioner that the Arbitrator has not given a proper construction to the said Clause cannot be accepted. This is by reason of the stated position of the law that construction of the terms of a contract is within the exclusive domain of the Arbitrator and the construction given to such terms can only be interfered with if found that no reasonable man would have arrived at such a construction. In any event, the award makes it clear that the keys to the warehouse were ultimately handed over to the respondent in May, 2009, which means that the termination was given effect to much later than contemplated in the letter dated 10th September, 2008. Further, the second letter issued by the respondent on 7th October, 2008 clearly mentions the 30 days notice and accordingly made the termination effective from 11th October, 2008, which was taken into consideration by the Learned Arbitrator.

13. In view of the above reasons, the impugned Award dated 28th November, 2012 does not call for interference under any of the grounds available under Section 34 of the Act.

14. A.P. No.227 of 2013 is, accordingly, dismissed without any order as to costs.

Urgent Photostat certified copy of this Judgment, if applied for, be supplied to the parties upon compliance of all requisite formalities.

(MOUSHUMI BHATTACHARYA, J.)