

IN THE HIGH COURT AT CALCUTTA

Ordinary Original Civil Jurisdiction

ORIGINAL SIDE

Present:-

THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA

A.P. 147 of 2016

MARMAGOA STEELS LTD.

vs.

MSTC LTD.

For the petitioner : Mr. Anirban Ray, Adv.
Mr. Varun Kothari, Adv.

For the respondent : Ms. Noelle Banerjee, Adv.

Last Heard on : 11.03.2021

Delivered on : 19.03.2021

Moushumi Bhattacharya, J.

1. The challenge in the present case relates to an Award dated 27th November, 2015, passed by a Learned sole Arbitrator by which the respondent (petitioner before this Court) was directed to pay Rs. 23,84,59,434/- to the claimant (the respondent before this Court). The

respondent was also directed to pay interest at 9% for the relevant period till the date of the Award.

2. For convenience, the petitioner before this Court, who is the Award-debtor and seeks to have the impugned Award set aside under Section 34 of the Arbitration and Conciliation Act, 1996(the Act) will be referred to as the “*petitioner*” in the remaining part of this judgment.

3. To understand the background of the impugned Award, the facts are stated in brief. The respondent Award-holder is a Government of India undertaking engaged in the procurement of goods from third parties for its customer upon making payment for such goods on behalf of its customer. The petitioner approached the respondent in April 2004 for procurement of LAM Coke. An agreement was thereafter entered into between the parties on 7th April, 2009 containing an arbitration clause which was subsequently modified in May 2010, April 2011 and April 2012. The parties proceeded on the basis of the arbitration clause in its final form. The respondent invoked the arbitration clause after the petitioner failed to repay the money paid by the respondent to the third party vendors for procurement of goods for the petitioner. The subject matter of the dispute before the learned Arbitrator were ten transactions between 2011 and 2012 under which the respondent caused payment to be made to third parties but the petitioner failed to make repayment of such amount to the respondent. A sum of Rs. 23,84,59,434/-

thus became due and payable by the petitioner to the respondent. The Statement of Claim of the respondent was filed for an Award of Rs. 23,84,59,434/- together with interim interest and interest *pendente lite* at 14% p. a and for other reliefs.

4. Mr. Varun Kothari, learned counsel appearing for petitioner, raises two grounds of challenge to the Award. First, the impugned Award could not be passed in view of Section 22(1) of the Sick Industrial Companies Act, 1985 (SICA). According to counsel, under the said provision when a sanctioned scheme is under implementation there can be no suit for recovery of money or for enforcement of any security against the company except on the consent of the Board under the provisions of SICA. Counsel submits that the arbitration in this case could not have proceeded since the petitioner was declared a sick company and no consent was sought from the Board under the provisions of SICA. The second objection is that the Arbitrator failed to finally adjudicate the disputes between the parties and that the Award should therefore be set aside since it is contrary to the public policy of India. Counsel further submits that the Award is patently illegal as it is in contravention of Section 35 of the 1996 Act and shocks the conscience of the Court.

5. Ms. Noelle Banerjee, learned counsel appearing for the respondent argues that the challenge to the Award is speculative since the petitioner has

not specified the issues and disputes which remained to be adjudicated and that too after the Award was passed on a clear admission by the petitioner to the claim of the respondent. Counsel explains the scope of Section 22 (1) of SICA as relating to coercive measures in the execution proceedings and hence not falling within the jurisdiction of the Arbitrator. According to counsel, proceeding with arbitration would not come within the bar of Section 22(1) of SICA. Counsel submits that for an Award to be set aside on the ground of being contrary to the public policy of India, the Award must be patently illegal on the face of the Award and such patent illegality should go to the root of the matter. It is submitted that an Award without reasons would be in contravention of Section 31(3) of the Act and further that a Section 34 Court cannot sit in appeal over the findings of the Arbitrator unless the findings are such that no reasonable man could have arrived at the findings. It is further submitted that since the arbitrator is not the executing Court, a probable consequence at the stage of measure taken of the Award cannot be used for setting aside the award on the plea that the award is inconclusive.

6. Since the challenge to the Award is based on two grounds, each of the grounds is being separately answered.

7. With regard to the contention that the Arbitrator could not have proceeded with the arbitration in view of the bar of Section 22(1) of SICA,

from the Award it appears that the Arbitrator has clearly stated the reasons as to why pendency of proceedings before the BIFR would not disentitle the respondent from claiming relief against a sick unit. The Arbitrator has relied on the decision of the Supreme Court in *San-A Tradubg Company Limited vs I.C. Textiles Limited*; (2012) 7 SCC 192. In that case, the Supreme Court considered the wording of Section 22(1) of SICA and opined that the proceedings covered under Section 22 would be proceedings of a coercive nature and would not prohibit arbitration proceedings. The Supreme Court has in fact mentioned the proceedings which would fall within the ambit of Section 22(1) of SICA being proceedings for winding up of the industrial company or proceedings for execution and distress against any of the properties of the industrial company or even for the appointment of a receiver in respect of the properties of the industrial company. The Supreme Court further held that proceeding in arbitration is neither a suit under Section 22(1) of SICA nor proceedings under there and would therefore not constitute a prohibition under Section 22. Since the dictum in *San-A Tradubg Company*, relied on by the Arbitrator is clear in respect of there not being any bar under Section 22(1) of SICA in respect of arbitration proceedings, this Court is of view that the ground for challenge pertaining to the perceived bar in Section 22(1) of SICA is without merit and is accordingly rejected.

8. With regard to the issue that the Award contravenes Section 35 of the 1996 Act (*Finality of Arbitral Awards*) in not being final and conclusive, the

specific line in the Award which has been relied on by the petitioner is required to be set out:

“Therefore, I also find that there is no bar in disposal of the proceedings and passing an Award, though at the time of Execution other contentions may be considered”.

9. The Arbitrator has made this observation in relation to the scope of Section 22(1) of the SICA in the context of the Supreme Court decision in *San-A Tradubg Company Limited*. Since the scope of Section 22(1) of SICA has already been discussed above, this Court finds no infirmity in the above finding of the Arbitrator to accept that the Award can be held to be inconclusive under Section 35 of the 1996 Act. In any event, a sentence cannot be taken out of the context in which it has been used and construed devoid of the context. More importantly, on perusing the grounds of challenge it is found that the petitioner has not taken any ground with regard to the Award being inconclusive and not final. Hence, this challenge is also rejected for the above reasons.

10. The decisions with regard to the finality of Awards relied upon by counsel for the petitioner namely, *Gobardhan Das vs Lachhmi Ram*; AIR 1954 SC 689 is under the Arbitration Act of 1940 while *Hooghly River Bridge Commissioners vs Bhagirathi Bridge Construction Co. Ltd.*; AIR 1995 Cal 274 was concerned with the Arbitrators not deciding the disputes raised by the parties in terms of the Memo of Reference which would have enabled the

respondent No. 1 in that case to execute the awarded amount. *Ssangyong Engineering & Construction Co. Ltd. vs National Highways Authority of India (NHAI)*; 2019(15) SCC 131 has been cited for the proposition that an award must be in conformity with the public policy of India and cannot be in conflict with the most basic notions of morality or justice under the Explanation to Section 34(1)(b) of the Act.

11. A perusal of the relevant paragraph of *Ssangyong Engineering & Construction* shows that contravention of the most basic notions of justice would concern a breach of a fundamental principle of justice and which would shock the conscience of the Court. No case has been made out by the petitioner in this application that the impugned Award has breached any fundamental principle of justice or is of a nature which would shock the conscience of this Court. Although *Associate Builders vs. Delhi Development Authority*; (2015) 3 SCC 49 has been cited for the proposition that a contravention of the Arbitration Act would be regarded as a patent illegality, the decision goes on to explain that patent illegality may arise if an Arbitrator does not give reasons for an Award as required in Section 31 (3) of the Act. This Court is of the view that the impugned Award in this case is replete with reasons and certainly cannot come under the scope of Section 31(3) of the Act which mandates that “*the arbitral Award shall state the reasons upon which it is based...*”. *Associate Builders vs. Delhi Development Authority* also cautions that a Court cannot act as a Court of appeal and correct errors of

fact and that a possible view by the Arbitrator on facts has necessarily to pass muster as the Arbitrator is the ultimate master of the quantity and quality of evidence. The decision reiterates that once it is found that the Arbitrator's approach is not arbitrary and capricious, the Arbitrator must be taken as the last word on facts. (Ref: *Gujarat Water Supply and Sewerage Board vs. Unique Erectors*; (1989) 1 SCC 532).

12. After perusing the Award it is seen that the Award has been passed on an unequivocal admission of the petitioner contained in documents which were before the Arbitrator. In fact the Arbitrator has also taken note of the additional written statement filed on behalf of the petitioner which admitted the amount claimed by the respondent herein. The Arbitrator, however, held that despite there being a clear admission on behalf of the petitioner, if relief is refused to the respondent/claimant in the arbitration, the respondent will be left without a remedy. The decisions relied upon in this context by the respondent Award-holder namely *Charanjit Lal Mehra vs. Kamal Sarof Mahajan (Smt)*; (2005)11 SCC 279 and *Uttam Singh Duggal Co. Ltd. vs United Bank of India*; (2000)7 SCC 120 on the principle under Order 12 Rule 6 of The Civil Procedure Code (Judgment on Admissions) cannot be called into question. *Deccan Chronicle Holdings Limited. vs Tata Capital Financial Services Ltd.*; 2016 SCC Online Bom 5319 applied Order 12 Rule 6 of the CPC in respect of an interim Award.

13. In view of the above reasons, this Court does not find any merit in the challenge to the Award dated 27th November, 2015 on any of the grounds available under Section 34 of the 1996 Act.

14. A.P No. 147 of 2016 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.)