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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

IN ITS COMMERCIAL APPELLATE DIVISION

COMMERCIAL APPEAL NO. 435 OF 2019
IN
COMMERCIAL ARBITRATION PETITION NO. 71 OF 2017
WITH
COMMERCIAL NOTICE OF MOTION NO. 932 OF 2019
IN
COMMERCIAL APPEAL NO. 435 OF 2019

National Insurance Co Ltd …Appellant
Versus
Maa Ashish Textile Industries Pvt Ltd …Respondent

Mr Yashesh Kamdar, *with Ankita Mishra, i/b Tuli & Co, for the Appellant.*
Mr Ragesh S Mehta , *with Mallika Mehta, Aaushi Doshi & Chinmay Thatte, i/b India Law, for the Respondent.*

CORAM G.S. Patel &
Gauri Godse, JJ.
DATED: 20th July 2022

PC:-

1. The appeal is under section 37 of Arbitration and Conciliation Act, 1996. It assails an order of 3rd June 2019 by the learned single Judge, KR Shriram J. That was a common order made on two Section 34 Petitions, one filed by the original claimant in arbitration Maa Ashish Textile Industries Pvt Ltd **("Maa Ashish")** and the other by the National Insurance Company Ltd ("**National Insurance**"), the respondent in the arbitration. The award was dated 20th October 2016 and was passed by a sole arbitrator, who dismissed Maa Ashish's claim for Rs. 1,95,08,797/- but allowed a claim for interest on delayed payment. Maa Ashish challenged the award to the extent it disallowed its claim. National Insurance challenged the award for interest on delayed payment. By the impugned order, KR Shriram J set aside the award to the extent that it dismissed the claim for Rs.1,95,08,797/-. National Insurance is in appeal. He also dismissed National Insurance's challenge. Thus, he allowed Maa Ashish's claim in full.

2. Before us the National Insurance challenges this portion of the impugned order, i.e. the portion in paragraph 35 that allows Maa Ashish's claim for Rs. 1,95,08,797/- (and sets aside the Award to the extent that it dismissed it).

3. In *Ssangyong Engineering & Construction Co Ltd v National Highways Authority of India*[1] the Supreme Court enunciated the principles that restrict judicial intervention in arbitration awards after the 2015 amendment to the statute. These principles were marshalled in *Union of India v Recon*[2], a judgment by one of us (GS Patel J) sitting singly. One of the proscriptions is that a Section 34 may not re-appreciate the evidence before the arbitrator; the arbitrator is the sole judge of the evidence.

1 (2019) 15 SCC 131.

2 2020 SCC OnLine Bom 2278.

4. Mr Kamdar for National Insurance urges before us that the learned Single Judge was in error because he impermissibly reappreciated the evidence before the Arbitrator. The learned Single Judge could not have engaged in any such exercise. That is clearly prohibited by both the statute and by the weight of decided authority. The relevant portion of Section 34 of the Arbitration Act says:

> 34. Application for setting aside arbitral award.—
>
> (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).
>
> (2) **An arbitral award may be set aside by the Court <u>only</u> if**—
>
> > (a) the party making the application establishes on the basis of the record of the arbitral tribunal that —
> >
> > > (i) a party was under some incapacity, or
> > >
> > > (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
> > >
> > > (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
> > >
> > > (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on

matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) **the arbitral award is in conflict with the public policy of India**.

Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—**For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute**.

(2A) **An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award**:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

(*Emphasis added*)

5. This requires us to assess what it was that the learned Single Judge actually did. Maa Ashish made two claims. The first was for a sum of Rs. 1,95,08,797/-, part of the insurance claim that was disallowed by the Insurance Company. The second was for interest of the delayed payment of part of the claim amount. The Arbitrator rejected the claim for Rs. 1,95,08,797/-. National Insurance challenge the Award allowing interest on delayed payment.

6. National Insurance issued a Standard Fire and Special Insurance policy to Maa Ashish on 26th May 2010 covering a period between 24th May 2010 and 23rd May 2011. The insurance cover was for Rs. 20,78,56,204/-. The risk covered Maa Ashish's building, plant, machinery, stocks, etc. On 21st March 2011, there was a fire in Maa Ashish's factory. Maa Ashish made a claim under the policy. National Insurance appointed surveyors. These surveyors submitted a preliminary survey report on 22nd March 2011. Then National Insurance appointed another entity as a joint surveyor. Together the two surveyors submitted a final survey report on 3rd August 2011 and quantified the loss as Rs. 17,63,78,222/-. Maa Ashish accepted this assessment. Then, allegedly on the basis of another so-called final survey report of 29th October 2011 and an addendum report dated 31st July 2012, National Insurance reduced the admissible claim to Rs. 15,81,22,177/-. An amount of Rs. 15,68,69,425/- was paid out to Maa Ashish. National Insurance said this was a full and final discharge. Maa Ashish said that it was forced to sign vouchers because otherwise it would not have received even this amount. It had therefore made a claim for the remaining amount of Rs. 1,95,08,797/-.

7. The Arbitrator made an Award on 20th October 2016. Both sides came to the Court under Section 34. The learned Single Judge noted that there were now four survey reports. One was by the first sole surveyor, called a preliminary survey report of 22nd March 2011. It was issued within one day of the loss. Then there was a final survey report of 3rd August 2011 assessing the loss to be Rs. 17,63,78,222/-which Maa Ashish accepted. Then there was third final survey report of 29th October 2011, seven months after the fire. Finally, there was a fourth report called an addendum of 31st July 2012 issued one year and four months after the fire. It is, the learned single Judge noted, the addendum that lies at the heart of this dispute.

8. The learned single Judge considered the provisions of the Insurance Regulatory & Development Authority (Protection of Policyholder's Interests) Regulations, 2002 for an assessment as to when an insurer can ask for an addendum or additional report. The learned single Judge found, and we believe correctly, that this can only be done if the insurer finds that the report is incomplete, that is to say, not that it is inconvenient or not to the insurer's liking.

9. The Regulations also provide for stringent timelines. Shriram J found that only the first two of these four reports, i.e. the preliminary survey report of 22nd March 2011 and the first final report of 3rd August 2011 fell within the timelines prescribed by the Regulations. The so-called second final survey report of 29th October 2011 and the addendum of much later, 27th October 2012, were outside those timelines and therefore not according to the Regulations. Shriram J found that the arbitrator relied on the addendum to negative Maa Ashish's claim for the deduction or reduction of Rs.1,97,08,797/-. Maa Ashish contended that the arbitrator came to this conclusion by ignoring vital evidence, relying on irrelevant evidence not germane to the issue or on the basis of no evidence at all. In paragraph 13 of the impugned order, Shriram J noted that the scope for interference was indeed narrow. He found that the Arbitrator's views were perverse and the Arbitrator took into account irrelevant material and ignored vital evidence.

10. Shriram J looked at the material laid before the Arbitrator and set this against the arbitral findings in the Award. This is what Mr Kamdar assails when he says that the learned single Judge could have done no such thing. He could not even have looked at the evidence.

11. The proscription against '*reappreciating*' evidence does not mean that a Section 34 Court is required to ignore evidentiary material. When a submission is that evidentiary material that was available has been overlooked, surely a Section 34 Court must apply its mind to what that evidence is in order to assess whether it was reasonably taken into account and whether a finding was returned on it. Similarly, if the charge is that the arbitral Award takes into account irrelevant material, this too must be seen. The assessment is not of the quality of the evidence. A Section 34 court will not be permitted to say that the arbitrator *ought* to have appreciated the evidence in a certain way. But a section 34 Court can certainly say that the arbitral award does not reflect a consideration *at all of evidence shown to be material* or *that it takes into account material shown to be irrelevant*. Conceptually, examining the record to see what was considered and what was left out and re-appreciating the evidence are two entirely different things. It is a mistake to believe that a Section 34 Court must shut its eyes totally to the evidentiary material. No law says that a Section 34 court is prohibited *from even looking at the evidence*. What the law tells us is that a Section 34 court cannot say that the available evidence should have been read or understood in a manner different from what the arbitrator did.

12. In this case, Shriram J found that the arbitrator had completely overlooked some of the germane, material and vital evidence on record. A court order made in Section 11 proceedings shows that, in its affidavit in reply, National Insurance had provided a copy of the addendum report but not the second so-called final survey report of 29th October 2011. Maa Ashish's witness said that he received the addendum for the first time in those Section 11 proceedings, and that he had never received the addendum at any time before. In cross-examination, this assertion in his evidence affidavit was never put him. What Shriram J found was that the date when the addendum report came to the knowledge of Maa Ashish was totally irrelevant to the question of proof of the correctness of the addendum report's contents (what he called 'establishing its validity'). In other words, merely saying that Maa Ashish had received the addendum at some prior point in time could not and did not in law establish the correctness of the contents of the addendum. This is a well-settled principle. Merely because the addendum report was annexed to an Affidavit in Reply did not mean that it was proved or that Maa Ashish had accepted it. The arbitrator could not have used the date of receipt of the addendum by Maa Ashish — completely immaterial — to hold that the contents of the addendum were proved. This was not even a possible view. It was a perversity and a patent illegality.

13. The arbitrator had also held that the addendum report was proved because the evidence of one witness for the Insurance company was said to be 'unchallenged'. KR Shriram J dealt with this in paragraph 25, where he pointed out that there was wholesale overlooking by the arbitrator of the evidence on record during the cross-examination of the National Insurance's witness and the dispute raised by Maa Ashish about that testimony. It could hardly be said that this witness's testimony was 'unchallenged'. That was also perverse.

14. Shriram J found that the addendum report seemed to have been triggered by, and only, by some e-mails received from the head office and head office instructions. Maa Ashish's witness said so, and this had gone untested. This is what led to Shriram J's observations in paragraphs 26 and 27 of the impugned order that the addendum report prima facie was not credible and was engineered by National Insurance. Shriram J also found that National Insurance had no legal right — i.e. under the Regulations — to ask for such further reports unless an earlier report was found to be incomplete. There was nothing to indicate that the earlier first final survey report was incomplete in any way. As we have noted there were two final survey reports dated 3rd August 2011 and 23rd October 2011. In its letter of 7th March 2012 and e-mails of 5th July 2012, 19th July 2012 and 27th July 2012, National Insurance raised queries about the assessment in the second final survey report of 29th October 2011 and asked for the loss to be reduced. Shriram J found that this evidence was entirely ignored by the arbitrator.

15. There were also inherent inconsistencies and contradictions sufficient to justify a finding returned by Shriram J of perversity and patent illegality and a demonstration of non-application of mind. For, on the one hand, the arbitrator accepted the validity and the correctness of the addendum report, but, on the other, also found that the addendum report was contrary to the timelines and other conditions in Regulation 9 of the IRDA Regulations. Both findings could not possibly coexist. That was not even a possible view.

16. The arbitrator had also found that queries not permissible under the Regulations triggered the addendum report thus resulting in violation of IRDA norms and Regulations.

17. Further, while on the one hand the arbitrator held that National Insurance should have paid Rs. 17,63,78,222/- within seven days on 9th August 2011, there was also simultaneously a contrary finding that Maa Ashish agreed to accept a much lower amount of Rs. 15,81,22,177/-. This is what resulted in an award for delayed payment at the rate of 12%. Again, this was even ex facie not a possible view. The finding further contradicted the result, i.e., the rejection of Maa Ashish's claim for the amount of Rs. 1,95,08,797/-.

18. If the scope for interference under Section 34 is limited, the scope for an Appellate Court in a Section 37 to interfere with Section 34 Court's order is even more restricted. We do not think that there is any infirmity in the order of the learned Single Judge. To interfere with the order would mean upholding the award, one that is, in our view also perverse and patently illegal.

19. There is no merit in the Appeal. It is dismissed.

20. In the facts and circumstances of the case, and although this is a Commercial Appeal, we refrain to making an order of costs.

21. Consequently, the Notice of Motion does not survive and is disposed of as infructuous.

(Gauri Godse, J) **(G. S. Patel, J)**

IRESH SIDDHARAM MASHAL

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