



WEB COPY

C.M.A.No.1797 of 2



THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 18.03.2024	Delivered on 17.04.2024
----------------------------------	-----------------------------------

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR.JUSTICE R.SAKTHIVEL

C.M.A.No.1797 of 2020

M/s.NLC India Limited,
(Formerly M/s. Neyveli Lignite Corporation Limited),
Rep. by its General Manager / Card & Disposal,
Present Registered Office at First Floor, No.8,
Mayor Sathyamurthy Road, FSD,
Egmore Complex of Food Corporation of India,
Chetpet, Chennai - 600 031.

...Appellant

Vs.

1.M/s.Metro Machinery Traders,
No.42, 2nd Floor, Nishant Kunj,
Pitampura, Delhi - 110 034.

2.Mr.Justice R.C.Lahoti(Retd.,) (Sole Arbitrator)
Former Chief Judge of India,
B-56, Sector 14, P.O.Noida,
Uttar Pradesh 201 301.

...Respondents

Prayer: Civil Miscellaneous Appeal filed under Section 37 of Arbitration and Conciliation Act, 1996, against the order and decretal order dated 07.02.2020 passed in Arb.O.P.No.29 of 2017 on the file of the Principal District Judge, Cuddalore, Cuddalore District.



For Appellant : Mr.AR.L.Sundaresan, Senior Advocate
for Mr.N.Nithianandan

For Respondents : Mr.A.L.Somayaji, Senior Advocate
for Mr.Yogesh Kannadasan for R1

J U D G M E N T

(Judgment of the Court was made by R.SUBRAMANIAN, J.)

This appeal under Section 37 of the Arbitration and Conciliation Act is at the instance of the Neyveli Lignite Corporation now known as NLC India Ltd, which had suffered an award to the tune of Rs.1,25,49,96,511/- with interest at 12% per annum from 01.09.2006 till the date of award and 18% per annum from the date of award till date of payment.

2.The facts that led to the reference to arbitration are as follows:-

The NLC India Ltd, which is a wholly owned Government of India undertaking had put up its fertilizer plant and machinery, which consisted of two parts, the Urea manufacturing plant and Ammonia manufacturing plant, for sale of scrap. A tender was issued on 15.02.2005 for sale of those plants as metal scrap through M/s.Metal Scrap Trading Corporation namely,



MSTC. The respondent, a trader participated in the tender and was the highest bidder at Rs.132.01 crores. On being declared as a highest bidder, a sale order was issued in favour of the respondent on 01.04.2005 which was followed by a delivery order dated 18.05.2005. A total period of 370 days upto 23.05.2006 was allowed for the respondent to remove the material. As per the sale order dated 01.04.2005, the respondent was directed to deposit 10% of the said amount equivalent to Rs.13,20,00,000/- as security deposit and the total value of the sale was to be paid by 30.04.2005 without penalty and upto 21.05.2005 with 1% penalty. On 18.05.2005, the NLC India Ltd issued the permission to dismantle and take delivery of the materials subject to certain conditions. The work for dismantling began on 18.05.2005 and it was carried on for almost 369 days till 22.05.2006.

3.It appears that the respondent had entered into a memorandum of understanding with the State Trading Corporation which had agreed to finance the dismantling operations of the fertilizer plants. Complaining that the respondent did not comply with the conditions regarding payment of the sale proceeds of the dismantled plant and machinery, the State Trading Corporation moved the Delhi High Court under Section 9 of the Arbitration



and Conciliation Act in OMP.No.232 of 2006 and the Delhi High Court granted an order of injunction on 22-05-2006 restraining the respondent herein from transferring or alienating rights in the immovable properties and the list of assets of the partners of the respondent apart from restraining the NLC India Ltd, which figured as 9th respondent from repaying any EMD or security deposit or any other amount lying in deposit with them to the respondents 1 to 6 until the next date of hearing. The injunction also restrained the respondents from selling the plant and machinery and scrap lying at the fertilizer plant of the NLC India Ltd. By the same order, one Mr.Surindar Adlakha, an Advocate was appointed as a Commissioner to take an inventory of remaining plant and machinery at the fertilizer plant of the NLC India Ltd and to file a report.

4.It is not disputed that pursuant to the said order, the Commissioner visited the NLC India Ltd and took an inventory and filed a report before the Delhi High Court on 20.07.2006. After receipt of the report, on 07.08.2006, the Delhi High Court passed an order appointing the State Trading Corporation itself as a receiver of the goods in question and respondent herein was permitted to effect sale of the dismantled goods



under the supervision of the receiver and sale proceeds that were to be realized will be paid over to the State Trading Corporation. This was in effect an agreed order made at the instance of the parties. Thereafter, the respondent wrote to the NLC India Ltd on 22.08.2006, disclosing its intention to remove the plant and machinery.

5.In the interregnum, another dispute appears to have crept in the form of an intervention by the Directorate of Revenue Intelligence. It came to light that the NLC India Ltd had undertaken the exercise of revamping the fertilizer plant in the year 2000 and had imported certain machineries at a concessional duty during the exercise of revamping and the duty concession was granted subject to the condition that the machineries are used for the purpose of manufacture of the fertilizers namely, Urea and Ammonia. The Directorate of Revenue Intelligence, Chennai addressed a letter to NLC India Ltd. on 12.06.2006, required it to produce documents relating to duty exemptions granted for importing the machineries and also the agreement between NLC India Ltd and M/s.Project and Development India Limited (PDIL), the Contractor appointed by the NLC India Ltd for carryout the revamp work.



6. After certain correspondence, the Director of Revenue Intelligence by its order dated 20.06.2006 directed that the goods which are imported under concessional duty and used in revamping of the fertilizer plant should not be disposed or removed till investigation by the Directorate is complete. Subsequently, the NLC India Ltd requested the Directorate of Revenue Intelligence to provisionally release the goods, citing the orders of the Delhi High Court and eventually, the Directorate of Revenue Intelligence passed an order on 17.11.2006, provisionally releasing the goods subject to certain conditions. It is not in dispute that the conditions were complied with by 29.11.2006. The NLC India Ltd by its letter dated 08.12.2006 addressed to the Branch Manager of the State Trading Corporation of India, the receiver appointed by the Delhi High Court informing it of the order of the Directorate of Revenue Intelligence permitting provisional release of the machineries and extending the period for dismantling by 60 days from 08.12.2006 for dismantling and removing the remaining goods. It was also made clear that the NLC India Ltd reserves its rights to proceed further under law, if the dismantling is not completed by 05.02.2007. It was made clear that the said letter is subject to the rights of the NLC India Ltd in the



pending proceedings before the Delhi High Court. On the same day, Metro Machinery Traders were informed of the action of the DRI and requesting it to complete the removal of the remaining plant and machinery on 05.02.2007.

7.In the interregnum, the respondent namely, M/s.Metro Machinery Traders had filed a Writ Petition in W.P.No.43497 of 2006 in this Court seeking a writ of certiorarified mandamus to call for the records relating to the sale order dated 01.04.2005, quash the same and direct the Neyveli Lignite Corporation to return the sum of Rs.1,63,49,96,511/- after deducting the amounts already received with interest at 18% per annum from 30.04.2005. The Writ Petition came to be dismissed by this Court on the conclusion that the parties will have to work out their rights before the Delhi High Court where the arbitration proceedings are pending. This order of the learned single Judge dated 26.10.2007 made in the said Writ Petition was challenged by all the parties namely, the appellant before us, the respondent as well as the State Trading Corporation in W.A.Nos.1488, 1502 & 1562 of 2007. The said appeals were dismissed by a common order dated 01.04.2008 mainly on the ground that disputed questions of fact cannot be



gone into in the Writ Petition and it is for the parties to invoke the arbitration as per the clause provided under the contract. The order of the Division Bench was challenged by the 1st respondent herein before the Hon'ble Supreme Court and before the Hon'ble Supreme Court, an agreement was reached between the parties to have the dispute referred to arbitration. Accordingly, a retired Chief Justice of India was appointed as the sole arbitrator with the consent of the parties.

8.The Arbitrator entered upon the reference and a statement of claim was made before the Arbitrator by the respondent seeking payment of a sum of Rs.1,25,78,96,511/-. The claim comprised of the following amounts:-

- i) Caution money deposit made on 24.02.2005 - Rs.50,00,000/-
- ii) Earnest money deposited on 02.03.2005 - Rs.13,20,00,000/-.
- iii) Balance consideration paid through State Trading Corporation on 30.04.2005 - Rs.1,49,79,96,511/-.
- iv) Totalling to RS.1,63,49,96,511/-.

After deducting the value of the goods cleared prior to investigation by the DRI namely, Rs.37,71,00,000/-, the balance amount of Rs.1,25,78,96,591/- was claimed to be the amount payable by NLC India Ltd to the claimant as



refund of the monies paid by it.

9.The claimant would submit that the benefit of customs duty was availed of by NLC India Ltd was within its knowledge and it did not disclose the said defect in the tender, which it is bound to under Section 55 of the Transfer of Property Act and thus, committed breach of trust. It was also claimed that once the goods were confiscated by the Customs Department,, under Section 111 of the Customs Act, the importer namely, NLC India Ltd losses its title to the goods and therefore, the entire sale is invalid and hence, the whole contract has become incapable of performance entailing the respondent to refund of the entire monies that it has paid. The respondent also claimed that it has deducted a sum of Rs.37,71,00,000/-, being the value of the goods that were paid over to State Trading Corporation as admitted by State Trading Corporation before the Delhi High Court and therefore, the balance amount that was paid by it in the hands of NLC India Ltd is Rs.1,25,78,96,511/-.

10.The claim was resisted by the NLC India Ltd contending that the claim itself is completely fanciful. According to NLC India Ltd, the goods were never confiscated under Section 111 of the Customs Act, 1962. The



order made was only an order of Seizure under Section 110 of the Customs Act, 1962. Even assuming that there was a confiscation order and it would amount to deprivation of title to the goods, it would only apply for the goods that were imported in the year 2000 and not for the entire plant. Pointing out that the assessable value of the goods that were imported was only about Rs.34.08 crores and even assuming that the Corporation has sold the goods, the result would be only that the Corporation would be liable to pay the differential customs duty and it would not lose its title to the goods. Therefore, it was very well open to the respondent to have removed the material after the order of confiscation was lifted by the Directorate of Revenue Intelligence on 17.11.2006. Without doing the same, the respondent has chosen to rush to this Court with a Writ Petition, which was eventually dismissed. It was also pointed out that the sale order was issued on 01.04.2005 and the dismantling commenced on 18.05.2005. It was carried on for almost 369 days out of 370 days. Therefore, it is very hard to believe the contention of the respondent that it had removed the goods worth only about Rs.37,00,00,000/- for the entire period of the contract, minus a day.



11. Reliance was also placed on the report of the Advocate Commissioner who was appointed by the Delhi High Court and the valuation report submitted by the Engineer engaged by the respondent before the contract to show that a major portion of the plant and machinery except a negligible portion of about 1189 tonnes had been removed even before the grant of the prohibitory order of injunction by the Delhi High Court. Therefore, the claim of the respondent that it had removed goods worth only Rs.37,00,00,000/- is false to the knowledge of the respondent.

12. The Hon'ble Arbitrator passed an award on 16.12.2016 concluding that the claim of the respondent has the support in law and it has to be allowed. On the said conclusion, the Hon'ble Arbitrator granted an award for recovery of Rs.1,25,49,96,511/- with interest at 12% per annum from 01.09.2006 till the date of the award and 18% per annum from the date of the award till date of payment, apart from awarding a cost of Rs.10,00,000/-. This award was subject matter of challenge under Section 34 before the learned Principal District Judge, Cuddalore. The learned Principal District Judge, Cuddalore had upheld the award on the conclusion that the scope of the provisions under Section 34 of the Arbitration and Conciliation Act does



not permit the Court to go into the questions of fact and re-appreciate the evidence available before it. The learned Principal District Judge felt bound by the contours of Section 34 to sustain the award. Hence, this appeal.

13.We have heard Mr.AR.L.Sundaresan, learned Senior Counsel instructed by Mr.N.Nithianandam for the appellant and Mr.A.L.Somaiyaji, learned Senior Counsel for Mr.Yogesh Kannadasan, learned counsel for the respondent.

14.Mr.AR.L.Sundaresan, learned Senior Counsel appearing for the appellant would vehemently contend that the award of the Arbitrator overlooks vital documentary evidence that should have been considered by him. He would draw our attention to the valuation report filed by the Engineer appointed by the respondent which was also placed before the Arbitrator which would demonstrate that the total weight of the plant and machinery that was available at site was nearly about 95,000 Metric Tonnes. This document which was produced as Annexure 'D' before the Arbitrator gives the valuation of the plant and machinery available as on 13.04.2005 that is before the work of dismantling commenced. The document also



contains the weight of each and every piece of plant and machinery and the weight alone totals to at least 95000 Metric Tonnes. It is not in dispute that the respondent had carried on the work of dismantling from 18.05.2005 till 22.05.2006 when the Delhi High Court granted an injunction restraining the respondent from removing the plant and machinery.

15.Mr.AR.L.Sundaresan, learned Additional Solicitor General would draw our attention to the report of the Advocate Commissioner appointed by the Delhi High Court who had inspected the site during the 1st Week of June, 2006 and point out that the total weight of the plant and machinery that was available at site in both the plants was only about 1200 Tonnes. The learned Additional Solicitor General would also point out that it was not the case of any of the parties that NLC India Ltd has removed certain plant and machinery during the interregnum. The learned Additional Solicitor General would also point out that the Delhi High Court granted an order of injunction on 22.05.2006 and the same was lifted on 07.08.2006 and removal of plant and machinery was permitted.

16.In the interregnum, the Directorate of Revenue Intelligence which



has passed a seizure order on 20.06.2006 had lifted it on 07.11.2006.

Therefore, there was a prohibition between 22.05.2006 and 07.11.2006 namely, for a period of five months. Immediately thereafter, the NLC India Ltd had extended the time for completion of the contract till February, 2007. The learned Additional Solicitor General would also point out that even during the pendency of the Writ Petition, the respondent had sought for permission to remove the remaining goods on 01.04.2010 and 16.07.2010 which was responded to by NLC granting 60 days time through its counsel's notice dated 16.04.2010 and another 20 days by its letter dated 06.08.2010.

17.The 1st respondent namely, M/s.Metro Machinery Traders did not chose to avail of the benefits of such extension though those extensions were granted at its request. The essential grievance of the learned Additional Solicitor General is that the learned Arbitrator has gone by the submissions of the respondents without even advertng to those documents that were placed before him. The conclusion of the Arbitral Tribunal that there was a breach of Section 55 of the Transfer of Property Act and its assumption that there was a defect in the title of the Corporation for non-payment of the Customs Duty is erroneous.



18.While not disputing the fact that the powers of the Court, sitting under Section 34 are very very limited. The learned Additional Solicitor General would point out that if the Arbitrator fails to take into consideration that vital available documentary evidence then, the award would suffer a wise of being patently illegal and such illegality appears on the face of the award. The learned Senior Counsel would draw our attention to the provisions of the Customs Act, particularly, Sections 110,110A, 111(O), 112, 113 and the power vested in the Customs Department to order provisional release of the siezed goods to contend that an order of confiscation does not deprive the title of the Corporation to the confiscated goods and the only consequence is Corporation would be liable to pay the Customs duty only. The learned counsel would also point out that the Corporation has also submitted a bond for a sum of Rs.23,00,000/- to the Customs Department, which would meet the liability for differential customs duty.

19.The learned Additional Solicitor General would also acknowledge the fact that the confiscation proceedings have not become final and the



NLC India Ltd is disputing its liability to pay the duty and the proceedings are pending before the Hon'ble Supreme Court regarding the payment of the differential duty on the ground that there is a variation on the condition imposed while granting permission to import the goods at a concessional duty. Therefore, according to the learned Senior Counsel, non-performance of the contract by the respondent is sought to be taken advantage of and the Arbitrator has omitted to look into the documents that were placed before him, particularly, the valuation report dated 13.04.2005 and the report of the Advocate Commissioner appointed by the Delhi High Court dated 20.06.2006.

20.Mr.AR.L.Sundaresan would also draw our attention to the award of the Hon'ble Arbitrator to point out that the Arbitrator had overlooked the fact that it was the contention of the State Trading Corporation before the Delhi High Court that all the amounts released by sale of these machineries was not paid over to it, apart from sum of Rs.38,00,00,000/-. He would also point out that the Arbitrator had held that NLC India Ltd was not guilty of committing fraud. He would also fault the Arbitrator for advertizing to Section 29 of the Contract Act, which deals with contracts with unlawful



objects. He would point out that the contract is for sale of the goods that belonged to the Corporation and it cannot be said that there was any unlawful object or unlawful consideration involved in the contract. Our attention is also drawn to the observations of the learned Arbitrator at paragraph 46 of the award where, the learned Arbitrator culls out the scope of enquiry by the Customs Department and concludes that the Customs Department was only interested in collecting the deficit Customs Duty, if any, that would be payable by the NLC India Ltd.

21.The learned Senior Counsel would also place reliance on the judgments of the Hon'ble Supreme Court in ***Reliance Infrastructure Limited Vs. State of Goa*** reported in (2024) 1 SCC 479, apart from relying upon the judgment of the Hon'ble Supreme Court in ***Associate Builders Vs. Delhi Development Authority*** reported in (2015) 3 SCC 49 and the judgment in ***Oil and Natural Gas Corporation Limited Vs. Western GECO International Limited*** reported in (2014) 9 SCC 263. Reliance is also placed on the judgment in ***Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd.*** reported in (2003) 5 SCC 705 to contend that the award is in contravention of the substantive law namely, the Contract Act and the



provisions of the 31(3) of the Arbitration and Conciliation Act apart from being patently illegal.

WEB COPY

22.Contending contra, Mr.A.L.Somaiyaji, learned Senior Counsel for the respondent would submit that the Arbitrator was justified in his conclusion that the respondent had removed only the goods of a value of Rs.38,00,00,000/- and the remaining goods were always available with the appellant Corporation. He would also point out that the State Trading Corporation had claimed that it was paid only a sum of Rs.38,00,00,000/- by the respondent and therefore, the balance amount is due to the loss caused to the respondent. Reliance in this regard is placed on the claim and the attempts made by the respondent itself before the Delhi High Court.

23.Mr.A.L.Somaiyaji, learned Senior Counsel would also contend that the appellant is guilty of suppression of fact pointing out that the dispute regarding the payment of concessional duty and the investigation regarding payment of concessional duty comes as early as on 24.05.2004, even before the action notice was issued. He would also point out that the very decision to dismantle the plants was taken on 24.05.2004 when the



Superintendent of Central Exercise wanted particulars regarding the concessional duty filed by NLC India Ltd. Therefore, according to the learned counsel for the respondent, the Neyveli Lignite Corporation is guilty of suppression of material facts and therefore, as a result of the confiscation order, it would lose its right to the entire plant and machinery. We have heard the rival submissions.

24.The only question that would loom large before us in this appeal is as to whether the award of the sole Arbitrator is liable to be set aside and as to whether the appellant / NLC India Ltd has made out a case within the pigeon holes adumbrated under Section 34 of Arbitration and Conciliation Act, 1996 to set aside the award. As a corollary, we will have to necessarily decided as to whether the learned Principal District Judge who dealt with the Section 34 application was right in dismissing the same on the conclusion that no ground has been made out under Section 34.

25.Before proceeding to consider the facts on hand, it will be advantageous to refer to the relevant provision namely, Section 34 of the Arbitration and Conciliation Act and its scope. Section 34 of the Arbitration



and Conciliation Act reads as follows:-

Section 34: *Application for setting aside arbitral awards.*

(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 only 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.]

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section(1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with



the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section(5) is served upon the other party.

Be it noted that Section 2(A) was inserted by amending Act 3 of 2016 with effect from 23.10.2015 and it provides for a new ground to set aside the award namely, patent illegality. Even before its introduction, the said ground of patent illegality was covered under the other ground namely, opposed to public policy, which was available sans the amendment under Section 34(2)(b)(ii).

26. Now let us consider the leading decisions under Section 34 relating to the scope and power of the Court to set aside the awards. The earliest is the judgment of the Hon'ble Supreme Court in ***Oil and Natural Gas Corporation Ltd. vs. Saw Pipes Ltd.*** reported in ***(2003) 5 SCC 705***. Being a judgment rendered prior to the 2016 amendment of the Arbitration Act, the Hon'ble Supreme Court had explained the meaning of the term public policy, since the ground urged was that the award is in conflict with public policy of India. In concluding whether the term public policy should be susceptible to a narrow or a wider meaning depending upon the context,



in which it is used, the Hon'ble Supreme Court observed as under:-

"22....Therefore, in a case where the validity of award is challenged, there is no necessity of giving a narrower meaning to the term 'public policy of India'. On the contrary, wider meaning is required to be given so that the 'patently illegal award' passed by the Arbitral Tribunal could be set aside. If narrow meaning as contended by the learned Senior Counsel Mr.Dave is given, some of the provisions of the Arbitration Act would become nugatory...."

Again at Para 31, the Hon'ble Supreme Court observed as follows:-

"31.Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar's case [1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal.



The result would be the award could be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or*
- (b) the interest of India; or*
- (c) justice or morality, or*
- (d) in addition, if it is patently illegal.*

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."

Therefore, according to the Hon'ble Supreme Court, an award can be set aside, if it is contrary to:-

- a) fundamental policy of Indian law.
- b) the Interest of India
- c) justice or morality
- d) if it is patently illegal.

The Hon'ble Supreme Court also added that the illegality must go to the root of the matter and it cannot be a trivial illegality. An award could be set aside, if it is so unfair and unreasonable that it shocks the conscience of the Court. The Hon'ble Supreme Court goes to the extent of concluding that

24/47



such award which is unfair and unreasonable is required to be adjudged void.

WEB COPY

27.In ***Oil and Natural Gas Corporation Limited Vs. Western GECO International Limited*** reported in (2014) 9 SCC 263, which is also a judgment rendered prior to the amendment introducing Section 34(2A), the Hon'ble Supreme Court examined the scope of the term fundamental policy of India. The Hon'ble Supreme Court held that expression fundamental policy of India includes of such fundamental principles that provided basis for administration of justice and enforcement of law in India. Elaborating on the expression fundamental policy of India, after referring to ***ONGC Ltd. Vs. Saw Pipes Ltd.***, referred supra, the Hon'ble Supreme Court had observed as follows:-

"35.What then would constitute the “fundamental policy of Indian law” is the question. The decision in ONGC Ltd.v. Saw Pipes Ltd., (2003) 5 SCC 705] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression “fundamental policy of Indian law”,



we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a “judicial approach” in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.”

28.In Associate Builders Vs. Delhi Development Authority reported



in (2015) 3 SCC 49, the position was explained further and the Hon'ble Supreme Court introduced four Sub-heads under the main heading namely, "Public Policy of India". They are:-

I) Fundamental Policy of India Law, which was again sub-divided into four parts namely,

- i) compliance with statutes and judicial precedents.
- ii) need for judicial approach.
- iii) natural justice compliance.
- iv) Wednesbury reasonableness

II) Interest of India

III) Justice or Morality

IV) Patent illegality, which was again sub-divided into three parts namely,

- i) contravention of substantive law of India.
- ii) contravention of provisions of Arbitration and Conciliation Act, 1996.
- iii) contravention of the terms of the contract.

It was also observed that the interference is permissible only when the findings of the Arbitrator are arbitrary, capricious or perverse, or when the



conscience of the Court is shocked, or when illegality is not trivial but goes to the root of the matter.

WEB COPY

29. In doing so, the Hon'ble Supreme Court made a detailed analysis of the provisions and the sub-headings that were introduced. In fact, it will not be out of place to mention that, it is this judgment, which led to the addition of Section 34(2A) in the statute. The Hon'ble Supreme Court finally concluded that a decision which is perverse or is irrational cannot be sustained by a Court of law. It was also pointed out that perversity or irrationality of decisions has to be decided on the Wednesbury principle of reasonableness. The Hon'ble Supreme Court had also made it clear that it would not be proper to make an exhaustive enumeration of what would be against fundamental policy of Indian law and it is also not possible to place in a straight jacket of the definition which would depend on the each and every case.

30. Then came, the judgment is ***SSANGYONG Engineering and Construction Company Limited Vs. National Highways Authority of India (NHAI)*** reported in ***(2019) 15 SCC 131***, which was after the introduction of



the ground of patent illegality under Section 34(2)(a). The Hon'ble Supreme Court clarified the two aspects namely, the patent illegality and the most basic notions of justice. The Hon'ble Supreme Court has also held that a decision which is perverse as understood in Paragraphs 31 & 32 of ***Associate Builders*** supra may not be a ground for challenge on the ground that it is not opposed public policy but it would certainly amount to patent illegality bringing it under Section 34(2A) of the Act as a ground to set aside the award. The Hon'ble Supreme Court has also pointed out that a finding based on documents taken behind the back of the parties and the decision based on no evidence will have to be characterised as perverse. While doing so, the Hon'ble Supreme Court had in ***SSANGYONG Engineering and Construction Company Limited*** observed as follows:-

"35.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 paras 36 to 39 of Associate Builders[Associate Builders v. DDA], (2015) 3 SCC 49 as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.



WEB COPY



36. 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 paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49], or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . 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 [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as understood in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , and paras 28 and 29 in particular, is now done away with.

37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), 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.



WEB COPY



38. *Secondly, it is also made clear that re-appreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.*

39. *To elucidate, para 42.1 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.*

40. *The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).*



41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.

42. Given the fact that the amended Act will now apply, and that the “patent illegality” ground for setting aside arbitral awards in international commercial arbitrations will not apply, it is necessary to advert to the grounds contained in Sections 34(2)(a)(iii) and (iv) as applicable to the facts of the present case."

31. Now let us advert to the facts on the case on hand, in the light of pronouncements extracted supra. The contract was for removal of the plant and machinery, a delivery order was granted on 18.05.2005 a period of



performance for 370 days up to 23.05.2006 was fixed. The respondent had entered into an understanding that the State Trading Corporation for financing the entire removal. The State Trading Corporation initiated proceedings before the Delhi High Court and obtained an order of injunction on 22.05.2006 under Section 9 of the Arbitration and Conciliation Act.

32. We must, at this juncture point out that the order of injunction was obtained on the 369th day i.e., just a day before the entire period fixed for removal came to an end. It should also be noted that it is not the case of the respondent that there was any obstacle in removing the machineries till 22.05.2006 from 18.05.2005 i.e., for 369 days. Therefore, from the above facts, it is clear that the respondent has started removal on 18.05.2005 and had continued it till 22.05.2006 for 369 days. Even on 22.05.2006, the Delhi High Court appointed an Advocate Commissioner to take an inventory of the goods namely, the plant and machinery that are lying at the site. The Commissioner visits the site during the 1st and 2nd Week of June, takes an inventory of the material that is available and submits a report to the Delhi High Court on 20.07.2006.



33. In the interregnum, on 20.06.2006, the Directorate of Revenue Intelligence passes an order of seizure of some of the goods which have been imported at a concessional rate of duty. Those goods were separated and entrusted with the respondent itself by the Directorate of Revenue Intelligence. It should also be point out here, that the material that was seized was only material worth about Rs.23,00,00,000/- which was imported availing a concessional duty. However, subsequently, the Directorate of Revenue Intelligence had passed a provisional order of release on certain conditions being complied with by the appellant and it is not in dispute that those conditions have been complied with.

34. It is at this stage, the respondent attempted to claim that the contract is terminated and move this Court by way of a Writ Petition seeking refund of the money. We have also dealt with the orders passed in the Writ Petition and the Writ Appeal which led to the filing of a Special Leave Petition before the Hon'ble Supreme Court where the Arbitrator was appointed. The Arbitrator has concluded that the appellant is guilty of suppression of material facts and it owed a statutory duty to disclose the defects in its title. This conclusion of the Arbitrator is essentially based on



certain correspondence between NLC and the customs authorities that had taken place in the year 2004. The correspondence related to import of certain machinery which was used in revamping the fertilizer plants at a concessional duty.

35. Section 14 of the Sale of Goods Act imposes an obligation on the part of the seller to disclose any defect title to the goods which are sought to be sold. This principle supposes that the defect must have existed on the date when the sale was made. If a defect is discovered after the sale, it may not amount to violation of Section 14. None of the correspondence which has been set out by the Arbitral Tribunal at paragraph 45 of the award could be termed as an order of confiscation passed under 111 of the Customs Act. Even though, it is claimed that order of confiscation that came to be passed by the Directorate of Revenue Intelligence on 19.06.2006, a perusal of the said order would show that it is not a confiscation order but it is a seizure order which is made under Section 110 of the Customs Act. This is followed an order provisional release of the goods that were seized under the order dated 19.06.2006 on 17.11.2006. It is not in dispute that the requirements set out in the provisional release order dated 17.11.2006 were



complied with by the NLC India Ltd / the appellant herein on the very next day.

WEB COPY

36.To our specific query as to how the title of the appellant could be said to be affected, Mr.A.L.Somayaji, learned Senior Counsel appearing for the respondents would submit that upon confiscation of the goods, which are improperly imported in contravention of the conditions under Section 111 of the Customs Act would vest in the Government of India. This submission of the learned counsel is based on Section 126 of the Customs Act. We have no quarrel with the effect of Section 126 but, in the absence of an order of confiscation under Section 111, Section 126 would not come into operation. We have already seen that the order dated 20.06.2006 by the Directorate of Revenue Intelligence is an order of seizure and not confiscation and that seizure was also lifted provisionally on 17.11.2006. Therefore, at no point of time, did the NLC India Ltd, the appellant lost its title to the goods.

37.In fact, Arbitrator had held that the NLC India Limited cannot be held to be guilty of having committed fraud and it it a mere non-disclosure.



The learned Arbitrator has however, proceeded to rely upon Section 24 of the Indian Contract Act, 1872 which deals with agreements consideration or objects of which is unlawful. In order to apply the said provision it should be shown that the consideration or object of the contract was unlawful at its inception that is on the date of which it is entered into. It is nobodies case before the Arbitrator that this contract for sale of the plant and machinery entered into sometime in 2005 was for unlawful consideration or for an unlawful object.

38.The Arbitrator had introduced the Section 24 of the Indian Contract Act, 1872 without any basis of pleading and such introduction appears to be totally out of context. The contract entered into on 18.05.2005 was a perfectly valid contract. The respondent has admittedly worked on the contract and removed the material for almost the entire period of contract, short of a day. Therefore, to conclude that this contract would be a void contract under Section 24 of the Indian Contract Act, 1872 is clearly unconscionable and it is against the fundamental policy of Indian law. While proceeding to assess the value of the goods that has been removed by the claimant, the learned Arbitrator has again gone by the



admission of the claimant while stating it is not bound by the rule of evidence. The Tribunal has gone to rely upon the award passed in a proceedings between the respondent and the State Trading Corporation where the State Trading Corporation has admitted receipt of Rs.37.71 Crores from the respondent as the value of the scrap that has been sold by the respondent.

39.For a moment, the Arbitrator has lost sight of the fact that it is the contention of the State Trading Corporation before the Delhi High Court was that the respondent herein namely, the purchaser of the scrap had not paid the value of all the scrap sold by it and hence, the proceeding under Section 9 were initiated before the Delhi High Court. Therefore, the action of the Arbitrator in going by the certain admission in the another legal proceeding between one of the parties excluding the evidence that was already on record in this proceeding would amount to patent illegality as well as lead to the award suffering the vice of perversity.

40.Having said that, we shall now examined evidence that is available on record in these proceedings. There is a report of the valuer engaged by



the respondent, which is prior to contract of sale i.e., on 13.04.2005. It is not in dispute that the valuation report was placed before the Hon'ble Arbitrator. As per the said valuation report, the total value of the plant and machinery that was available at the site was Rs.3,52,24,52,000/-. The valuer has given the quantity of the material available in Metric Tonnes also. The total quantity in metric tonnes that was available was nearly 95000 Metric Tonnes.

41.As per the memorandum of understanding between the State Trading Corporation and the respondent herein, the State Trading Corporation had made a payment of Rs.1,49,79,96,511/- to NLC India Limited and the State Trading Corporation will sell the dismantled machinery to the parties selected by the respondent and at the price approved by the respondent herein. It is the complaint of the State Trading Corporation in the proceedings before the Delhi High Court that this procedure was violated and the respondent herein had sold the materials removed without the knowledge of the State Trading Corporation. The local Commissioner was appointed by the Delhi High Court in the proceedings under Section 9 on 22.05.2006. The Commissioner had inspected the area



along with representatives of both the parties namely, the appellant as well as the respondent and had filed an inventory. It is not shown that the said inventory was objected to by the either of the parties.

42.A compromise was entered into between State Trading Corporation and the respondent before the Delhi High Court wherein, permission to sell was granted subject to certain conditions. It is not the case of the respondent before the Arbitrator that some of the goods were removed at the interregnum and as per the report of the Commissioner, the goods that were available weighed only about 1400 tonnes. This leads us to following irressitible conclusion. What was available before the sale contract was about 95000 metric tonnes and what was available at site after the respondent has worked on the contract for 369 days between 18.05.2005 and 22.05.2006 is 1400 metric tonnes.

43.The essential sequitur is that 90350 tonnes of scrap had been removed between 18.05.2005 to 22.05.2006. The Hon'ble Arbitrator has completely overlooked these documents that were available and the Section 34 Court also unfortunately, omitted to notice these very important evidence



that was available before the Arbitrator and it is non-consideration by the Arbitrator. If only the Arbitrator has adverted to that evidence and concluded that such evidence is not enough or that de hors that evidence the value of the goods that have been removed is only around Rs.38 crores we would not have interfered. A thorough reading of the award shows that this particular factor in evidence has been completely overlooked which leads to the award being perverse. Apart from being perverse it shocks our conscience in as much as the Hon'ble Arbitrator has gone only by the proceedings of the Directorate of Revenue Intelligence and the fact that there was an order prohibiting removal of goods for about five months between 22.05.2006 and 17.11.2006.

44. We must also point out that the Hon'ble Arbitrator had completely overlooked the fact that the respondent had applied for extension even during the pendency of the Writ Petition in its bid to remove the left over material. For the shake of clarity, we summarize what has been ignored by the Arbitrator by way of bullet points.

1) The fact that the respondent worked on the contract and removed materials for 369 days before the prohibitory order was made by the Delhi



High Court on 22.05.2006.

ii) There was no order of confiscation passed by the Directorate of Revenue Intelligence under Section 111(O) of the Customs Act.

iii) The seizure order that was made under Section 110 of the Customs Act was lifted under Section 110-A of the Customs Act on 17.11.2006.

iv) The report of the valuer engaged by the respondent prior to the contract of sale demonstrated that 95000 tonnes of scrap material was available at the site in the form of the two fertilizer plants.

v) The report of the Advocate Commissioner appointed by the Delhi High Court shows that what was left over after 369 days is only about 1400 tonnes.

vi) There was no defect in title of the appellant on the date when the sale contract was entered into, since there was no order on confiscation that Section 126 of Customs Act, 1962 would not come into play.

45. Therefore, the conclusion of the Arbitrator that NLC India Limited had lost its title because of the confiscation is in the derogation of the provisions of the Customs Act, which renders the findings of the



Arbitrator patently illegal. We must point out that at this juncture the judgment of the Hon'ble Supreme Court in *Vijay Karia and Others Vs.*

Prysmian Cavi Sistemi SRL and others reported in (2020) 11 SCC 1 wherein, the Hon'ble Supreme Court had held that there is no finding on a material that is available in the award, the award could be set aside by the Court under Section 34(2) or under explanation to 1(iii) to Section 34 (2)(b)(ii).

46. In doing so, the Hon'ble Supreme Court though having dealt with provisions of Section 48 of the Arbitration and Conciliation Act which deals with international arbitration concluded that if the award is against the fundamental policy of Indian law it may be set aside. The Court also considered the provisions of Section 34(2)(b)(ii) and concluded that as follows:-

"43. It will be noticed that in the context of challenge to domestic awards, Section 34 of the Arbitration Act differentiates between international commercial arbitrations held in India and other arbitrations held in India. So far as "the public policy of India" ground is concerned, both Sections 34 and 48 are now identical, so that in an international commercial arbitration conducted in India, the



WEB COPY



ground of challenge relating to “public policy of India” would be the same as the ground of resisting enforcement of a foreign award in India.”

47.From the above discussion, it is clear that if the Arbitral Tribunal had omitted to consider vital evidence and has gone on to pass an award, the award renders it self liable to set aside as a patently illegal award and an award which is opposed to public policy also. Unfortunately, the Section 34 Court has not adverted to these material that were available before it also and has gone on to confirm the award on the ground that gives the reasons for the conclusions of the Arbitrator and the Section 34 Court cannot go into sufficiency of those reasons. Sufficiency of reasons is one thing and non-consideration of relevant material is another thing. Once it is found that sole Arbitrator has proceeded in ignorance of very vital evidence that was available before him, it will be open to the Section 34 Court to set aside the award. Here, the Section 34 Court has not adverted to these materials and has gone by the award on the face of it. Hence, we are unable to affirm the conclusions of the Section 34 Court.

48.We conclude that the failure on the part of the Arbitrator to have ignored the evidence in the form the report of the valuer engaged by the respondent itself prior to the sale and the report of the commissioner, which



C.M.A.No.1797 of 2

was filed in the proceedings under Section 9 before the Delhi High Court and made part of the record before the Arbitrator, which would demonstrate that the large quantity of the scrap that was sold was removed even prior to the order of injunction granted by the Delhi High Court on 22.05.2006, vitiates the entire award and makes it patently illegal. Hence, we have no other option but to set aside the award on the ground of patent illegality and perversity.

49.The Civil Miscellaneous Appeal stands **allowed**. The order of Section 34 Court is set aside and the award of the Arbitrator will stand set aside. The appellant will be entitled to cost of Rs.10,00,000/-, being the cost of the arbitration proceedings, the petition under Section 34 as well as this appeal. Consequently, connected miscellaneous petitions, if any, are closed.

(R.S.M., J.) (R.S.V., J.)
17.04.2024

kkn

Internet:Yes

Index:Yes

Speaking

Nuetral Citation :Yes

45/47



C.M.A.No.1797 of 2

To:-
WEB COPY

The Principal District Judge,
Cuddalore.



WEB COPY



C.M.A.No.1797 of 2

R.SUBRAMANIAN, J.
and
R.SAKTHIVEL, J.

KKN

C.M.A.No.1797 of 2020

17.04.2024