



Arb.O.P.No.352 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 20.12.2023

PRONOUNCED ON : 10.04.2024

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.)No.352 of 2023
and A.No.4052 of 2023

Mrs.Trident Arts
Repr.by its Sole Proprietor,
R.Ravindran

.. Petitioner

vs.

Vishal Krishna

... Respondent

Prayer:- Original Petition is filed under Section 34(2)(3) of the Arbitration and Conciliation Act, 1996 praying to set aside the Arbitration Award passed dated 03.06.2023 passed by the Sole Arbitrator in the dispute between the petitioner and the respondent and grant of such further or other reliefs.

For Petitioner : Mr.Sathish Parasaran
Senior Counsel
for M/s.Vijayan Subramanian



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For Respondent : Mr.Aravindh Pandian
Senior Counsel
for Mr.A.Chidambaram

ORDER

The unsuccessful claimant is the petitioner before this Court and has challenged the impugned Award dated 03.06.2022.

2. By the impugned Award, the Arbitral Tribunal has rejected the claim of the petitioner.

3. The petitioner herein had claimed a sum of Rs.9,29,57,468/- and filed a claim statement before the Arbitral Tribunal on 18.06.2021 for the following relief :-

- a) Directing the respondent to pay the claimant, a sum of Rs.9,29,57,468/- (Rupees Nine Crores Twenty nine lakhs fifty seven thousand four hundred and sixty eight only) together with interest @ 17% per annum from 15.12.2019, till the realisation of the same.
- b) cost of the said proceedings
- c) and grant such further or other reliefs



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4. A dispute arose between the petitioner and the respondent under Ex.C2 Memorandum of Understanding (MOU) dated 07.06.2019 signed between them.

5. Relevant clause from Ex.C2 Memorandum of Understanding (MOD) reads as under:-

1. The second part* has assured to the First Part# that the excess of Cost of Production of Rs.4,00,00,000/- (Rupees Four Crores only) can be recovered by the first part from the theatrical exploitation of the said film since the movie will sure be a box-office hit and the first part shall recover minimum of Rs.20,00,00,000/- (Rupees Twenty Crores only) from the theatrical exploitation of Entire Tamilnadu and Andhra Pradesh/Telangana states.
2. In case, if the first part could not collect the assure amount of Rs.20,00,00,000/- (Rupees Twenty Crores) from the theatrical exploitation as stated above the shortage of the amount shall be paid by second part to the first part within 30 (thirty) days from the general release of the said film.
3. If the total realization exceed Rs.20,00,00,000/- (Rupees Twenty Crores)



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from Exploitation of theatrical share from territory of Entire Tamilnadu and Andhra Pradesh/Telegana states the excess amount (Net share) shall be paid by first part to the second part as additional remuneration.

4. The second part has not paid any consideration to the first part for the theatrical release of the said film in Entire Tamilnadu and Andhra Pradesh/Telengana states.
5. The second part has agreed with the first part that the entire business of theatrical exploitation of the said film for the territory of Entire Tamilnadu and Andhra Pradesh/Telengana states shall be done by first part and all the agreements with the distributors/buyers/assignees shall be executed by the first part.
6. The first part alone shall be entitled to receive any consideration for the assignment of theatrical exploitation of the said film to any person and the first part shall give statement of collection to the second part after 30 days of the date of first general theatrical release of the said film in India.
7. If any dispute arises between the parties on the terms and conditions of the MOU, the same shall be referred to the Arbitration and decision of the arbitrator shall be binding by the parties to this MOU.
8. The parties agree that the Courts at Chennai shall have the jurisdiction in all the matters arising out of this MOU.

* Respondent
petitioner



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6. The petitioner herein had produced a Tamil Film “Action”. The respondent herein requested the claimant to produce the film with the respondent to be the lead hero of the said film. The pre-production work of the Film “ Action” started on 08.08.2019. A sum of Rs.9,00,00,000/- said to have been paid by the petitioner to the respondent pursuant to Agreement for Engagement dated 29.08.2018. The aforesaid film was to be produced by the petitioner by spending an amount of Rs.40,00,00,000/-.

7. It appears that the petitioner handed up spending a little over Rs.40 crores, by over shooting, the budget of Rs.4,00,00,000/-. In this background, the Ex,C2 Memorandum of Understanding (MOU) dated 07.06.2019 was signed between the petitioner and the respondent.

8. In the last para of the preamble for the aforesaid Memorandum of Understanding (MOU) dated 07.06.2019, it has been stated as follows:-

“Whereas the second part* has undertaken the business of theatrical exploitation for the assured



and guaranteed return of Rs.20 crores for the territory of Entire Tamilnadu and Andhra Pradesh/Telangana states on the certain terms and conditions”.

* Respondent

9. The petitioner had signed Director Engagement Agreement dated 29.08.2018 with Mr.Anandan for producing a film Tamil purportedly in the name “ Chakra”. The petitioner had earlier engaged the respondent on 07.07.2018 to act as a lead actor in the film “ Action” which was directed by Mr.C.Sundar, total remuneration of Rs.9 Crores to the respondent. However, budget for producing the aforesaid film “ action” had exceeded by few crores and therefore, the petitioner and the respondent signed Memorandum of Understanding dated 07.06.2019, wherein the respondent had assured the petitioner that the film will become a Box Office hit, since the film had good content and was directed by Mr.Sundar.C. Under the aforesaid agreement, the petitioner had undertaken the business of theatrical exploitation for the film and assured and guaranteed return of Rs.20 crores from the territory of entire **Tamilnadu, Andhra Pradesh and Telengana** states on the certain terms and conditions. Relevant portion of the



Agreement reads as under:-

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1. The second part has assured to the First Part that the excess of Cost of Production of Rs.4,00,00,000/- (Rupees Four Crores only) can be recovered by the first part from the theatrical exploitation of the said film since the movie will sure be a box-office hit and the first part shall recover minimum of Rs.20,00,00,000/- (Rupees Twenty Crores only) frm the theatrical exploitation of entire Tamil nadu and Andhra Pradesh/Telangana states.
2. In case if the first part could not collect the assure amount of Rs20,00,00,000/- (Rupees Twenty Crores only) from the theatrical exploitation as stated above the shortage of the amount shall be paid by second part to the first part within 30 (thirty) days from the general release of the said film.
3. If the total realization exceed Rs.20,00,00,000/- (Rupees twenty crores) from Exploitation of theatrical share from territory of Entire Tamilnadu and Andhra Pradesh/Telangana states the excess amount (Net share) shall be paid by first part to the second part as additional remuneration.
4. The Second Part has not paid any consideration to the First Part for the theatrical release of the said film in Entire Tamilnadu and Andhra Pradesh/Telangana states.
5. The Second Part has agreed with the First Part that the entire business of theatrical exploitation of the said film for the territory of Entire Tamilnadu and Andhra Pradesh/Telangana states shall be done by first Part and all the agreements with the distributors/buyers/assignees shall be executed by the First Part.



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6. The First Part alone shall be entitled to receive any consideration for the assignment of theatrical exploitation of the said film to any person and the First Part shall give statement of collection to the second part after 30 days of the date of first general theatrical release of the said film in India.
7. If any dispute arises between the parties on the terms and conditions of the MOU, the same shall be referred to the Arbitration and decision of the arbitrator shall be binding by the parties to this MOU.
8. The parties agree that the Courts at Chennai shall have the jurisdiction in all the matters arising out of this MOU.

10. It also appears that such film was however produced independently without involvement of petitioner and since the collection from the theatre to release of the film “Action” covered by Memorandum of Understanding (MOU) dated 07.06.2019 between the petitioner and the respondent fell short of expectation i.e. below 20 crores in Telengana, Tamil nadu and Andhra Pradesh, the applicant wanted to recover the amount from the respondent. The applicant thus moved A.No.434 of 2020 before this Court for the following relief :-

- a) Grant an order of interim injunction restraining the 2nd respondent herein by themselves or by partners or successors of business, servants, agents,



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representatives, assignees and all other persons from releasing the film “Chakra” in any OTT platforms including Amazon Prime, Netflix, Zee5, Sun Nxt etc or through direct theatrical release or through any satellite TV, pending disposal of the Arbitration.

- b) Direct the 2nd respondent herein to furnish security for a sum of Rs.8,29,57,468/- (wrongly mentioned as Rs.8,29,57,468/- instead of Rs.9,29,57,468/-)

11. Earlier, *status-quo* order was granted on 24.09.2020 in the above application and later the said application was disposed of by the learned Single Judge vide order dated 15.10.2020.

12. By the aforesaid order, the respondent was directed to security for a sum of Rs.4,00,00,000/- crores within two weeks and a further sum of Rs.4,29,57,648/- from the date of release of the film “Chakra”. Applicant was also directed to invoke the arbitration clause. Relevant portion of the order passed on 15.10.2020 in O.A.No.434 of 2020 in A.No.2110 of 2020, reads as under : -

13. However, considering the fact that the agreement has been entered in to, in and by which the



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respondent had undertaken to offset any shortfall that the applicant would incur in the theatrical exploitations. This Court is of the view that the respondent is prima facie bound by this undertaking. As to whether, the amount becomes ultimately payable to the Applicant has to await the result of the Arbitral Award.

14. This Court, in seeking to balance the claims of both parties, is passing the following order :-

- (a) The respondent shall furnish security to the tune of Rs.4 Crores within a period of two weeks from the date of receipt of a copy of this order and only on furnishing such security the film Chakra shall be released. Within two weeks of the applicant releasing the said film, the balance sum of Rs.4, 29,57,648/- being security as claimed by the applicant shall be furnished.;
- (b) The applicant shall initiate the Arbitral Proceedings by appointing the Arbitrator on or before 23.12.2020 and failing such initiation, the security provided shall automatically be released;
- (c) The Arbitral Tribunal shall dispose of the dispute influenced by any observations of this Court.

15. The applications are disposed of on the above lines.

13. The aforesaid order passed by the learned Single Judge on 15.10.2020 was modified vide order dated 04.02.2021 in O.S.A.Nos.304 &



305 of 2020 filed by the respondent with the following observations : -

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5. Two aspects have always to be kept in mind before any order for furnishing security can be made: the unimpeachable character of the claim; and, the genuine apprehension, and resultant finding, that the defendant or respondent may not be in a position to pay the amount by the time the likely award ripens for implementation. Indeed, an order without taking into consideration both aspects of the matter and expressing an opinion thereon may not pass muster in law as one made under Section 9(1)(ii)(b) of the said Act.
 6. Even though, strictly speaking, the Code of Civil Procedure, 1908 may not govern every aspect of arbitration, but such code is the general law pertaining to all matters civil and the underlying principles recognized therein continue to remain as guiding factors. Though provisions in the Arbitration Act indicate that the Code of Civil Procedure and the Evidence Act, 1872 would not be binding, but such provisions do not indicate that such principal statutes should be disregarded altogether.
 7. Since, in fine, the resolution at this stage has been arrived at by consensus, nothing further need be said. It is only put on record that an order in the nature of attachment before judgment, which a direction for furnishing security amounts to, must meet very exacting tests and such a high order has to be regarded as an exception rather than the rule.
- O.S.A.Nos.304 and 305 of 2020 are disposed of by recording the consensus between the parties



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as above. This limited agreement for the purpose of the present appeals will be completely without prejudice to the rights and contentions of the parties in course of the arbitral reference. As a consequence, the judgment and order impugned are set aside. C.M.P.No.14577 of 2020 is also closed. There will be no order as to costs”.

14. It is in this background, the applicant filed the claim statement before the Arbitral Tribunal on 18.06.2021 which has now culminated in the impugned Award rejecting the claim of the petitioner before the Arbitral Tribunal. It was stand of the respondent that the arrangement in Ex.C2 Memorandum of Understanding (MOU) dated 07.06.2019 was that of a wagering contract and therefore is void non enforceable.

15. The Arbitral Tribunal has concluded that the arrangement in Memorandum of Understanding – Ex.C2 dated 07.06.2019 was not that of a wagering contract/Agreement under Section 30 of the Indian Contract Act, 1872. The Arbitral Tribunal was also concluded that the contract in Ex.C2 Memorandum of Understanding dated 07.06.2019 was not a contingent contract within the meaning of Section 37 of the Indian Contract Act, 1872.



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16. On the other hand, the Arbitral Tribunal has concluded that the petitioner being producer of the film in which, the respondent was engaged as a lead star cannot expect, the respondent to bear the loss arising out of shot fall in the collection. Relevant portion of the impugned Award reads as under:-

“

49. As already stated supra, the Claimant is the producer and the Respondent is the main actor in the said film “Action”. The claimant being the producer is bound to bear the entire production cost and face the profit or loss of such production, depending on the revenue collected by the release of the movie. The responding being the lead actor in the said film is paid his remuneration of Rs.9 crores for acting the film. Apart from that he does not have any connection either directly or indirectly with the production cost of the film. The producer viz., the Claimant is taking all risks to invest in the production of the film and thus none of the artists or technicians can be legally faulted, if the production of the film does not become a profitable one after its release. Those people may be morally held responsible for the failure of a film, depending upon the nature of their role in the film on the screen or off the screen. However, for such moral failure, if any, they cannot be dragged before a court of law as responsible for loss and to ask them to compensate monetarily. Any such attempt will not have the sanction of law as it such action would oppose to



public policy and thus, unlawful. The agreement entered between the parties herein under Ex.C2 is one such nature of unlawful act not having any legal sanctity to withstand. No doubt, both parties agreed to the terms and entered into the said agreement. That does not mean that such unlawful act of the parties should automatically bear a legal sanction too. At this juncture, it is worth to note S.23 of the Indian Contract Act, 1872, which reads as follows:-

23. What consideration and objects are lawful, and what not;

The consideration or object of an agreement is lawful, unless -
it is forbidden by law; or
is of such a nature that, if permitted, it would defeat the provisions of any law;
or
is fraudulent; or
involves or implies, injury to the person or property of another; or
the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

50. The above provision of law makes it clear that the consideration or object of Ex.C2 is not lawful as it is opposed to public policy. Asking a person to compensate another person, who is not legally bound to do, is certainly an unlawful act and so any agreement or Contract entered into with such object or consideration automatically becomes unlawful



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and consequently void. At this juncture, at the risk of repeating, is to be noted that the event mentioned under Ex.C2 is not a collateral one to any other main contract and so it loses its legal sanctity under Section 31 too.

17. Apart from the above, the Arbitral Tribunal has also concluded that Ex.C2 – Memorandum of Understanding dated 07.06.2019 was an unworkable. In paragraph Nos.53 and 54, the Tribunal has observed as under:-

53.Further, without affecting the above findings and observations on the nature of Ex.C-2, this Tribunal is surprised to note certain contradiction in the term and conditions therein entered between the parties herein. Such contradictions make the very agreement itself an unworkable one and consequently, even assuming that the said agreement is lawful, based on such unworkable clauses, move of the parties to the same is entitled to approach for redressal for their grievance based on such agreement. While the preamble portion of Exhibit C-2 reaches that the second part namely the Respondent herein has undertaken the business of theatrical exploitation for the assured and guaranteed return of Rs. 20 Crores clause 5 of the terms of the said agreement reads totally contra, as it the Respondent has agreed with the Claimant that the entire business of theatrical



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exploitation of the said film shall be done by the Claimant himself.

54. In the said agreement, in between the above said preamble portion and clause 5, nothing is stated or explained as to why the parties have changed their mind regarding the party to make such theatrical exploitation of the film. At this juncture it is to be stated that the learned senior counsel appearing for the claimant relied on the decision of the Hon'ble Supreme Court reported in 1975 (1) SCC 199 to contend that change of terms in a contract itself does not vitiate the contract. This Tribunal is of the view that the above decision is not helping the claimant in any way going by the findings rendered therein at paragraph 16, which reads as follows:

16. We are not certain that if evidence of subsequent acting under a document is admissible, it might have the result that a contract would mean one thing on the day it is signed but by reason of subsequent event it would mean something a month or year later. Subsequent 'interpreting' statements might not always change the meaning of a word or a phrase. A word or a phrase, is not always crystal clear. When both parties subsequently say that by the word or phrase which, in the context, is ambiguous, they meant this, it only supplies a glossary as to the meaning of the word or phrase. After all, the inquiry is as to, what the intention of the parties



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was from the language used. And, why is it that parties cannot clear the latent ambiguity in the language by a subsequent interpreting statement? If the meaning of the word or phrase or sentence is clear, extrinsic evidence is not admissible. It is only when there is latent ambiguity that extrinsic evidence in the shape of interpreting statement in which both parties have concurred should be admissible. The parties themselves might not have been clear as to the meaning of the word or phrase when they entered into the contract. Unanticipated situations might arise or come into the contemplation of the parties subsequently which would sharpen their focus and any statement by them which would illuminate the darkness arising out of the ambiguity of the language should not be shut out. In the case of an ambiguous instrument, there is no reason why subsequent interpreting statement should be inadmissible.

A careful perusal of the above observation made by the Apex Court would make it clear that change of terms or mind of the parties must be a subsequent event after entering into the agreement and that there must be some ambiguity in understanding the intention of the parties to the agreement. In this case, the two different minds, opposite to each other, are apparent on the face of the very day of entering into the agreement itself regarding the right to release the film, going by the terms of the agreement itself. Neither it is a subsequent event or with ambiguity. Self-contradictory terms of an agreement cannot be



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termed as ambiguous. Only when a doubt arises on a particular clause or term as to its applicability or executability and such doubt is beyond any possible interpretation, then it can be said that such clause or term is ambiguous. In this case the preamble portion and clause 5 are contradicting with each other and each clause, if read, does not exhibit any ambiguity. When contradiction is not ambiguity, the above decision does not help the claimant in any way. Therefore, this Tribunal is not in a position to appreciate Exhibit C-2 as an intended and meaningful Contract between the parties, as it contains such material contradictions which goes to the root of the matter. Though, such being the position, exposed under Exhibit C-2, during the course of the hearing, it is admitted by the parties that the Claimant alone has done the entire business of theatrical exploitation of the said film as per clause 5 and not the Respondent as per the preamble portion. Therefore, the loss in collection of the revenue from the theatrical exploitation of the said film cannot be legally attributable to the Respondent. In any event, when this Tribunal has found that Ex C-2 is not lawful one, it makes no difference whether the film is released by the claimant or respondent. No doubt, clause 2 and 3 of the said agreement speak about mutual obligation of the parties if the benchmark collection of Rs. 20 Crores does or does not reach. This Tribunal has already found that the above clauses in the agreement do not fall either within section 30 or 31 of the Indian Contract Act, 1872 and on the other hand, the very agreement itself is unlawful and thus void as contemplated under Section 23 of the said Act. Therefore, clause 2 and 3 said agreement will not come to the rescue of the parties herein in any manner”.



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18. The impugned Award passed by the learned Arbitrator is challenged by the petitioner primarily on the ground that the impugned Award is patent illegality as it has come to an erroneous conclusion that the contract in Ex.C.2 - Memorandum of Understanding (MOU) dated 07.06.2019 was unworkable.

19. It is further submitted that having concluded that the contract that was not hit by Section 30 of the Indian Contract Act, 1872, the Arbitral Tribunal has come to an erroneous conclusion that the obligation under Ex.C2 – Memorandum of Understanding (MOU) dated 07.06.2019 was hit by Section 23 of the Indian Contract Act, 1872.

20. It is submitted that there was no pleadings to that effect by the respondent that in the arrangement in Ex.C2 - Memorandum of Understanding (MOU) dated 07.06.2019 was opposed to public policy.

21. It is further submitted that the conclusion in the impugned



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Award is patent illegality as the Arbitral Tribunal could not come to a conclusion it has arrived either on facts or on law and therefore the impugned Award is liable to be set aside.

22. The learned Senior Counsel for the petitioner has placed reliance on the following decisions:-

- i) **Delhi Airport Metro Express Private Limited vs. Delhi Metro Rail Corporation Limited**, (2022) 1 SCC 131
- ii) **Transfield Shipping Inc vs. Mercator Shipping Inc**, [2008]1A.C.61
- iii) **Photo Production Ltd., vs. Securicor Transport Ltd.**, (1980)
- iv) **Central Inland Water Transport Corporation Limited and Another vs. Brojo Nath Ganguly and Another**, (1986) 3 SCC 156

23. Defending the impugned Award, the learned Senior Counsel for the respondent submits that the impugned award is well reasoned and does not suffer from any of the voice which would subject it attract under Section 34 of the Arbitration and Conciliation Act, 1996.



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24. It is submitted that the learned Arbitrator has come to a correct conclusion and therefore the Award does not call for any interference, as there is no patent illegality in the impugned award passed by the learned Arbitrator.

25. In support of the learned Senior Counsel for the respondent has placed reliance on the following decisions :-

- “i) **Nathusa Pasusa Lad vs. Munir Khan**, 1941 SCC Online MP 85
- ii) **Gulabchand Gambhirmal vs. Kudilal Govindram and another**, 1958 SCC Online MP 80
- iii) **M/s.Anand Prakash Om Prakash vs. M/s.Oswal Trading Agency and another**, 1975 SCC Online Del 99
- iv) **Retanchand Hirachand v. Askar Nawaz Jung and Others**, AIR 1976 Andhra Pradesh 112
- v) **Jeypore Sugar Company Ltd., Chennai vs. Laxmi Organic Industries Limited, Mumbai and Others**, AIR 2016 (NOC) 288 (MAD.)
- vi) **Delhi Airport Metro Express Private Limited vs. Delhi Metro Rail Corporation Limited**, (2022) 1 SCC 131”



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26. I have considered the arguments advanced by the learned Senior Counsel for both the petitioner(claimant) and the learned Senior counsel for the respondent (respondent before the Arbitral Tribunal). I have also perused the impugned Award dated 03.06.2023 passed by the learned Arbitrator in O.S.A.Nos.304 & 305 of 2020. I have also perused the documents that has marked as exhibits before the Arbitral Tribunal.

27. Having considered the facts and circumstances of the case and the submission of the learned counsel on either side and decisions cited during the course of hearing and I am of the view, the award passed by the Arbitral Tribunal suffers from patent illegality inasmuch as the Arbitral Tribunal has expanded this scope of dispute before it.

28. In **Photo production Ltd. vs. Securicor Transport Ltd., [1980]**

AC 827, it has been held as follows:-

“ A basic principle of the common law of contract, to which there are to exceptions that are relevant in the instant case, is that parties to a contract are free to determine for themselves what primary obligations they will accept. They may state these in express



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words in the contract itself and, where they do, the statement is determinative; but in practice a commercial contract never states all the primary obligations of the parties in full; many are left to be incorporated by implication of law from the legal nature of the contract into which the parties are entering. But if the parties wish to reject or modify primary obligations which would otherwise be so incorporated, they are fully at liberty to do so by express words.

..... These secondary obligations of the contract breaker and any concomitant relief of the other party from his own primary obligations also arise by implication of law - generally common law, but sometimes statute, as in the case of codifying Statutes passed at the turn of the century, notably the Sale of Goods Act 1893. The contract, however, is just as much the source of secondary obligations as it is of primary obligations; and like primary obligations that are implied by law, secondary obligations too can be modified by agreement between the parties, although, for reasons to be mentioned later, they cannot, in my view, be totally excluded. In the instant case, the only secondary obligations and concomitant reliefs that are applicable arise by implication of the common law as modified by the express words of the contract.

Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach; but, with two exceptions, the primary obligations of both parties so



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far as they have not yet been fully performed remain unchanged. This secondary obligation to pay compensation (damages) for non-performance of primary obligations I will call the "general secondary obligation". It applies in the cases of the two exceptions as well."

29. In **Central Inland Water Transport Corporation Limited and Another vs. Brojo Nath Ganguly and Another**, (1986) 3 SCC 156, it has been stated as follows:-

87. In *Photo Production Ltd. v. Securicor Transport Ltd.* [(1980) AC 827] a case before the Unfair Contract Terms Act, 1977, was enacted, the House of Lords upheld an exemption clause in a contract on the defendants' printed form containing standard conditions. The decision appears to proceed on the ground that the parties were businessmen and did not possess unequal bargaining power. The House of Lords did not in that case reject the test of reasonableness or fairness of a clause in a contract where the parties are not equal in bargaining position. On the contrary, the speeches of Lord Wilberforce, Lord Diplock and Lord Scarman would seem to show that the House of Lords in a fit case would accept that test. Lord Wilberforce in his speech, after referring to the Unfair Contract Terms Act, 1977, said: (at p. 843) "This Act applies to consumer contracts and those based on standard terms and enables exception clauses to be applied with regard to what is just and



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reasonable. It is significant that Parliament refrained from legislating over the whole field of contract. After this Act, *in commercial matters generally, when the parties are not of unequal bargaining power*, and when risks are normally borne by insurance, not only is the case for judicial intervention undemonstrated, but there is everything to be said, and this seems to have been Parliament's intention, for leaving the parties free to apportion the risks as they think fit and for respecting their decisions.”

(emphasis supplied)

Lord Diplock said (at pp. 850-51):

“Since the obligations implied by law in a commercial contract are those which, by judicial consensus over the years or by Parliament in passing a statute, have been regarded as *obligations which a reasonable businessman would realise that he was accepting when he entered into a contract of a particular kind*, the court's view of the reasonableness of any departure from the implied obligations which would be involved in construing the express words of an exclusion clause in one sense that they are capable of bearing rather than another, is a relevant consideration in deciding what meaning the words were intended by the parties to bear.”

(emphasis supplied)

Lord Scarman, while agreeing with Lord Wilberforce, described (at p. 853) the action out of which the appeal before the House had arisen as “*a commercial dispute between parties well able to look after themselves*” and then added: “*In such a*



situation what the parties agreed (expressly or impliedly) is what matters; and the duty of the courts is to construe their contract according to its tenor”.

30. The Honourable Supreme Court in *Ssangyong Engineering and Construction Co Ltd versus National Highway Authority of India*, (2019) 15 SCC 131 has held that an award can be set aside on the ground of patent illegality under section 34 (2-A) of the Arbitration And Conciliation Act, 1996 only where the illegality in the award goes to the root of the matter. It further held that erroneous application of law by an Arbitral Tribunal or the re-appreciation of evidence by the court under section 34 (2-A) of the Arbitration and Conciliation Act, 1996 is not available.

31. The Court held that the above ground is available only where the view taken by the Arbitral Tribunal is an impossible view while construing the contract between the parties or where the award of the tribunal lacks any reasons. The Court further held that an award can be set aside only if an arbitrator/arbitral tribunal decide(s) the question beyond the contract or beyond the terms of reference or if the finding arrived by the Arbitral



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Tribunal is based on no evidence or ignoring vital evidence or is based on documents taken as evidence without notice to the parties.

32. The specific case of the respondent before the Arbitral Tribunal was that the contract in Ex.C2 - Memorandum of Understanding (MOU) dated 07.06.2019 was hit by Section 36 of the Indian Contract Act, 1872. The Arbitral Tribunal has answered the issues against the respondent which was the main contention before the Arbitral Tribunal.

33. The Arbitral Tribunal has examined the issue from the point of view Section 31 of the Indian Contract Act, 1872, and answered that the arrangement in Ex.C2 - Memorandum of Understanding (MOU) dated 07.06.2019 was also not that of a “contingent contract”. While answering the above question, the Arbitral Tribunal proceeded to hold that the contract was opposed to public policy under Section 23 of the Indian Contract Act, 1872 which was not canvassed by the respondent. The Award thus suffers from patent illegality and is therefore liable to be set aside.



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34. The conclusion arrived by the Arbitral Tribunal is clearly contrary/arrangement between the applicant and the respondent in Ex.C2 Memorandum of Understanding (MOU) dated 07.06.2019. Under Section 28 (3) of the Arbitration and Conciliation Act also mandates that while deciding and making an award, the Arbitral Tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.

35. Under these circumstances, the impugned Award is set aside with liberty to the claimant to restart arbitral proceedings in accordance with the proceedings of the Arbitration and Conciliation Act, 1996, from the date of the date of receipt of certified copy of this Original Petition shall stand excluded for the parties of computation of limitation for restarting the Arbitral proceedings.

36. Considering the fact that the evidence has already been recorded



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and Exhibits have been marked, the parties are liberty to request the new Arbitral Tribunal, if it is constituted to decide the case afresh based on the evidence recorded which has culminated in the impugned award.

37. This Original Petition stands allowed with the above liberty.

Consequently, connected application is closed. No costs.

10.04.2024

Index : Yes/No
Internet : Yes/No
Neutral Citation : Yes/No
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