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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision:03.07.2024

+ **FAO(OS) (COMM) 123/2024**

**FORTUNA SKILL MANAGEMENT PVT. LTD. (FORMERLY
KNOWN AS IQOR GLOBAL SERVICES INDIA PVT. LTD.)**

....Appellant

Through: Mr. Ramesh Singh, Sr. Adv. along
with Mr. Akshay Ringe, Ms. Megha
Mukherjee, Mr. Anupam Singh, Mr.
Dhananjay Gupta and Ms. H. Nanya,
Advs.

versus

JAINA MARKETING & ASSOCIATES

.....Respondent

Through:

**CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MR. JUSTICE SACHIN DATTA**

SACHIN DATTA, J.

CM No.36369/2024 (Exemption)

1. Exemption is allowed, subject to all just exceptions.
2. The application is disposed of.

FAO(OS) (COMM) 123/2024

1. The present appeal has been filed under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (in short as 'A&C Act') read with



Section 13(1) of Commercial Courts Act, 2015, seeking setting aside of the impugned judgment dated 20.03.2024, passed by the learned Single Judge in a petition under Section 34 of the A&C Act [OMP (COMM.) No. 511/2023] and consequently, also the Arbitral Award dated 19.08.2023, passed by the learned Arbitral Tribunal.

2. The Appellant is stated to be a well-known service provider in the field of rendering after-sales services for various electronic equipments like laptops, mobile handsets, tablets, power banks and other accessories. The name of the Appellant was first changed from M/s iQor Global Services India Pvt. Ltd. to M/s Ivy Technology Servtech International Pvt. Ltd., and thereafter, again changed to Fortuna Skill Management Pvt. Ltd. The factum of the aforesaid change of name was duly brought to the notice of the Arbitral Tribunal which took the same on record.

3. The respondent/claimant is a partnership firm and stated to be engaged in the business of importing, trading, distribution, and sale of telecommunication equipment including mobile phones and its spare parts and accessories under the brand name of “Karbonn and Panasonic Mobiles”.

4. The parties are stated to have commenced their business dealings sometime in the year 2015, whereby the Respondent engaged the services of the Appellant Company for approximately 45-46 locations in India for the purpose of rendering customer care service for mobile phones being sold by the Respondent/Claimant. It is stated that a formal agreement was entered into between the parties on 29.01.2016. The services under the agreement can be broadly categorized into three categories- (i) under warranty, ii) out of warranty and (iii) mobile refurbishments. The Respondent/Claimant supplied spare parts to the Appellant on a ‘Sale and Purchase Model’ from



the date of the Agreement till September 2016 and under the 'Consignment Model' from October 2016 onwards.

5. Under the agreement between the parties, the Appellant was to account for the consumption of all the spare-parts received from the Respondent/Claimant, and make payment to the Respondent/Claimant for the parts consumed and not accounted for, and/or consumed for out of warranty cases.

6. Disputes arose between the parties as regards the payment to be made in respect of the services provided for repair or replacement of spare-parts by the Appellant, on being unable to reconcile their accounts for spare parts consumed.

7. Ultimately, after an attempt to resolve the matter through an amicable settlement failed to fructify, a notice invoking arbitration was issued by the Respondent/Claimant for a claim of Rs.3,36,01,782/- payable by the Appellant to it. The Arbitral Tribunal came to be constituted thereafter and the statement of claim was filed by the Respondent/Claimant. The case of the Respondent/Claimant is that, pursuant to the agreement dated 29.01.2016, the Respondent/Claimant used to supply spare-parts to the Appellant as the parties were having regular business transactions, maintaining a running ledger account and the parties used to reconcile their respective ledger accounts from time to time; that the Respondent reconciled the accounts for the period 01.09.2015 to 23.12.2016 *vide* Declaration Letter, filed as Document No.3 with the statement of claim; that the accounts for the period 24.12.2016 to 31.01.2017 were further reconciled by Declaration Letter, filed as Document No.4 with statement of claim; lastly the ledger account of the Respondent was reconciled and confirmed by the



Appellant for the period 01.02.2017 to 30.03.2017 by a Declaration Letter, filed as Document No.6 with statement of claim, under which the Appellant had acknowledged its debt to the respondent/claimant to the tune of Rs.8,03,87,690/-.

8. The accounts for the period 31.03.2017 to 25.05.2019 were reconciled by the respondent/claimant on the basis of the ledger entries of the various locations (at which the services were provided by the Appellant) in a chart filed as document no. 15 with the statement of claim, as per which, the final balance amount payable to the respondent/claimant was Rs.3,36,01,782/- which was the principal amount claimed in the arbitration. Since the claimant also encashed the bank guarantee of Rs. 1 Crore furnished by the Appellant, this figure of Rs.3,36,01,782/- was arrived at after deducting the sum of Rs. 1 Crore.

9. Claim no. 2 preferred before the Arbitral Tribunal was towards interest @ 18% per annum from 08.03.2018 till realization.

10. The statement of defense came to be filed by the Appellant before the Arbitral Tribunal wherein it was contended that (i) the reconciliation of account between the parties used to be done on the basis of the data maintained on a Customer Relation Management (CRM) system software set up by the respondent/claimant; (ii) from the CRM data it transpires that it is the Appellant who is entitled to recover an amount of Rs. 1.69 Crores as on June 2017 from the Respondent/Claimant; (iii) No reliance could be placed on “declaration letter” by the respondent/claimant since the same was signed by the representatives of the Appellant company on the bona fide belief that the same were correct, though in actual fact the same were



absolutely incorrect being contrary to the CRM data as well as the books of accounts being maintained by the Appellant company.

11. It is noticed that the statement of defence makes repeated reference to the “accounts maintained by the respondent” (para. 4 of preliminary objections and para. 10, 11, 13, 18, 23, 24 of the reply on merits).

12. Affidavits of evidence also came to be filed by respective witnesses of both the parties. The respective witnesses of the Claimant as also the witness of the Appellant were subject to cross-examination.

13. At the stage of final arguments, after the arguments on behalf of the Claimant are stated to have been completed, an application dated 03.09.2022 came to be filed by the Appellant before the Arbitral Tribunal seeking to place on record the physical copies of “delivery challans”. It was, *inter alia*, averred in the application as under:-

“3. That for the proper adjudication of the present application, certain facts need to be reiterated herein, In this regard it is submitted that the Respondent in its Statement of Defence ("SOD"), has set up a case that while returning the defective and/or unused spare parts to the Claimant, a delivery challan used to be generated from the CRM portal of the Claimant Such delivery challan(s) used to record the details and specifics of the types of spare parts being returned to the Claimant physically. Finally, the spare parts, defective and/or unused, used to be physically returned to the Claimant, who used to acknowledge receipt of the spare parts by putting endorsement on the delivery challans. The Respondent had filed 5 sample delivery challans as Exhibit RW-1/1, showing the delivery of the spare parts to the Claimant by Respondent along with its SOD in order to explain the mechanism being followed by the parties to record the delivery of the spare parts. It was demonstrated by the Respondent that the abovementioned delivery challans were generated from the CRM portal of the Claimant itself and the same also used to carry acknowledgement from the Claimant.

4. That the Respondent, during the course of arguments on 09.08.2022, filed a convenience compilation dated 09.08.2022,



which included a table of comparison of the values of delivery challans as it appears in the delivery challan and the values considered by the Claimant for giving credit to the Respondent for return of such spare parts. It is submitted in this regard that the value of the spare parts returned through the delivery challans are appearing in the CRM data filed by the Respondent as Exhibit RW-1/5, whereas the values considered by the Claimant for giving credit for the corresponding delivery challans appear in the alleged ledger of the Claimant firm filed as Document No. 14. Pertinently, a bare perusal of the abovementioned comparison established the following:

(a) The delivery challans are bilateral documents prepared contemporaneously for recording the return of spare parts by the Respondent to the Claimant. This is clear from the fact that such delivery challans are appearing in the CRM data as well as in Claimant's alleged ledger;

(b) The Claimant, who admits the receipt of the delivery challans, had given less credit towards the spare parts than the value of spare parts appearing in most of the delivery challans;

5. That the abovementioned comparison establishes that in respect of the delivery challans forming basis of the comparison, there was a huge difference amounting to Rs.3,13,22,635/- being the less credit given by the Claimant, when value of actual delivery challan and the value appearing in Claimant's alleged ledger were compared. The Claimant has not placed on record any supporting document including the delivery challans to explain the huge difference in the value recorded therein and the one considered by the Claimant.

6. That it is submitted that the purpose of the Respondent of filing of the aforesaid comparative statement was to demonstrate before this Hon'ble Tribunal that the claim of the Claimant was exaggerated to the extent of at least ₹3,13,22,635/- (though the actual difference is much more) merely on account of the fact that the Claimant gave less credit to the Respondent in respect of the spare parts returned by them. Respondent further submitted that there were large number of entries in Claimant's ledger, which were based on Claimant's unilaterally created consignment return notes without mentioning the corresponding delivery challan number therein. As the CRM data only records the delivery challan numbers and not the number of consignment delivery notes of the Claimant (being only Claimant's records), no further correlation was possible in the absence of any



common thread i.e., the delivery challan numbers.

7. That the Respondent, during the course of arguments on 09.08.2022, demonstrated that the Claimant had recorded lesser value (and in some cases higher value) of the spare parts returned as compared to the original value of the delivery challan. For this purpose, Respondent referred to the five delivery challans which were already on record of this Hon'ble Tribunal as a part of the SOD, besides producing a copy of one more delivery challan, which was not on record. On realizing that the sixth delivery challan was not on the record, the Hon'ble Tribunal directed the Claimant to respond to the issue raised by the Respondent in respect of the five delivery challans which were already on record. At that stage it was brought to the notice of the Hon'ble Tribunal by the Respondent that as the delivery challan numbers were appearing in the documents filed by both the sides, the existence of the delivery challans, as appearing in the comparative statement filed by the Respondent, could never be a subject matter of dispute. Therefore, nothing prevents this Hon'ble Tribunal from examining the issue highlighted by the Respondent in its comparative statement, in its entirety.

8. That during the course of arguments it was also enquired by the Hon'ble Tribunal as to whether physical copies of the delivery challans appearing in CRM data were available and the number of such delivery challans. In this respect it was explained by the Respondent that since there were very large number of delivery challans running in more than 30,000 pages the Respondent had only filed 5 sample delivery challans along with its SOD in order to avoid the burdening of the record of this Hon'ble Tribunal and that the comparative analysis filed by the Respondent was enough to establish Respondent's contention.

9. That, however, considering the query which fell from the Hon'ble Tribunal during the hearing on 09.08.2022, and in order to avoid non-consideration of Respondent's submissions due to non-availability of the copies of the remaining delivery challans, Respondent is filing the present application seeking permission of this Hon'ble Tribunal to file on record some more delivery challans which will establish that the Claimant has acted in the most unlawful manner and as per its own whims and fancies. It may not be out of place to submit that M/s Jaina Marketing & Associates being the Claimant in the present arbitration, the burden of proof was on them, and it was them who ought to have filed the delivery challans rather than relying on unilaterally prepared consignment delivery notes and the alleged ledgers. However, they avoided to do so for the



obvious reasons.

10. That the Respondent, therefore, in order to assist this Hon'ble Tribunal in answering to their queries and to expose falsity of the claim, by way of the present application, is seeking permission of this Hon'ble Tribunal to place on record, the copies of some more delivery challans. The abovementioned delivery challans are not new documents but already find mention in the CRM data which is on record of this Hon'ble Tribunal as Exhibit RW-115 and many of them are also appearing in the alleged ledger of the Claimant. However, the physical copies of the same are now being placed on record in order to satisfy this Hon'ble Tribunal regarding the authenticity of the same and to satisfy their queries. The delivery challans will throw light on the facts of this case and shall be helpful in the effective adjudication of disputes between the parties. It is clarified herein that since physical copies of all the delivery challans run into more than 30,000 pages and therefore, to avoid burdening the record of this Hon'ble Tribunal, only some of them are being filed as of now, and if the Hon'ble Tribunal so directs, the Respondent can file physical copies of all the delivery challans which are in Respondent's possession and Respondent reserves its right to do so.

11. That, the abovementioned delivery challans are relevant, besides being admissible being bilateral and indisputable documents prepared contemporaneously by the parties to record return of the spare parts. Claimant cannot have any objection to production of the delivery challans in as much as Claimant's own documents, refer to these very delivery challans and seek to rely upon them, Hence, no prejudice to would be caused to anybody and the said delivery challans will only throw more light on facts already on record.”

14. Thereafter, a reply dated 03.10.2022 was filed by the Respondent/Claimant to the aforesaid application. It was *inter alia* averred therein as under:-

“6.6 There is no cross-examination of the Claimant's witness on the aspect of sending the spares through Delivery Challans and purported short credit and I or no credit being given. None of the Credit Notes and Consignment Goods Returned Notes have been disputed either by Respondent's witness nor confronted or suggested to Claimant's witness.”



15. The Respondent/Claimant also emphasised on the conduct of the Appellant in filing its additional evidence before the Arbitral Tribunal at a belated stage. It was also pointed out that permitting these documents to be filed at such a belated stage would completely derail the arbitration and the evidence would have to virtually commence again.

16. Vide Order dated 10.10.2022, the Arbitral Tribunal rejected the aforesaid application of the Appellant *inter alia* stating as under:-

“The delivery challans were in the knowledge of the Respondents at the stage of the pleadings when the documents were filed. In fact the Respondent had filed five delivery challans. No reasons have been given why the delivery challans now sought to be filed could not be filed earlier. The ground given in paragraph 9 of the Application that the documents are now sought to be filed in view of certain queries made by the Arbitral Tribunal cannot be a valid ground for filing the documents at such late stage. The Arbitral Tribunal finds merit in the contention of the claimant’s counsel that if the additional documents are taken on record the arbitration proceedings would be relegated to the stage of trial.”

17. While dismissing the aforesaid application, the learned Arbitrator took note of the judicial pronouncements in the case of ***Asia Pacific Breweries v. Superior Industries*** (2009) 109 DRJ 497, ***Sri Ramanand v. Delhi Development Authority*** 2016 SCC Online Del 4925, ***Polyflor Ltd. v. Sh AN Goenka*** 2016 SCC Online Del 2333, ***Crocs INC USA v. Liberty Shoes & Ors*** 2018 SCC Online Del 10325, ***Gold Rock World Trade Ltd v. Veejay Lakshmi Engineering Works Ltd*** (2007) 143 DLT 113, ***Haldiram (India) Pvt Ltd v. Haldiram Bhujawala & Anr.*** 2009 (109) DRJ 639 and ***Fats Inc v. Zen Technological Ltd*** 2008 (103) DRJ 693.

18. The arbitral award was rendered on 19.08.2023, the same *inter alia* concludes as under:-



- (i) After taking note of the Declaration Letters submitted by the Appellant to the Respondent/Claimant, it was noted that the contents thereof were duly signed by a representative of the Appellant, and that the Appellant had admitted the signatures of its official on all the three Declaration Letters.
- (ii) In order to prove that the Declaration Letters were signed without verification of the accounts maintained by the Appellant, the best evidence that the Appellant could have produced and which was in its possession, were its own ledgers and account books which would have demonstrated what was the outstanding balance and in favour of which party and as on the date up to which the accounts had been reconciled as per the declaration letters. However, the Appellant did not produce its books of accounts. It could therefore be inferred that the account books of the Appellant were not supporting the case of the Appellant and it could not be said that the amount shown as outstanding in the declaration letter did not match with the Appellant's account books and/or the declaration letters were signed without the verification of the accounts maintained by the Appellant.
- (iii) The Arbitral Tribunal rejected the contention that the CRM data was to form the basis on which the amounts between the parties were to be reconciled, as alleged by the Appellant. It was noted that no settlement of accounts is possible without credit notes, debit notes, credit goods return notes and consignment return notes, service claim invoices, data relating to TDS (Tax Deduction at Source). None of this data was available in the CRM.



(iv) The Appellant had failed to file the primary evidence in his possession to show the extent of return of spare-parts.

(v) With regard to the spare-parts returned through courier, the Appellant had failed to place on record the primary evidence with respect to the sending of the courier and proof of delivery.

(vi) The conduct of the parties and the correspondence between them shows that for the purpose of reconciliation of accounts, both at the stage when the declaration letters were issued by the Respondent and at a later stage when discussions were made to reconcile the accounts, the parties did not rely upon the CRM but rather they relied upon the books of accounts.

19. After thoroughly analysing and evaluating the material and the evidence on record, the Arbitral Tribunal arrived at the conclusion that *“the respondent has not produced its account books nor has filed the primary documents like delivery challans and job sheets. It has been held above that no settlement of accounts is possible without physical documents which include the credit notes, debit notes, credit goods return notes, consignment return notes, service claim invoices, data relating to TDS (Tax Deduction at Source), none of which data is available in the CRM and therefore the CRM data cannot form the basis on which the accounts between the parties were to be reconciled. As the respondent has chosen not to file its account books or the delivery challans and other documents such as job sheets etc., it would have to suffer the consequences. In view of the above discussion the claim of Jaina for the principal amount of Rs.3,36,01,783/- is liable to be allowed and the counter claim is liable to be rejected. The claimant is also entitled to interest at 9% per annum from the date of filing of the statement*



of claim up to the date of the Award and to future interest at the same rate up to the date of payment. Issues 1 and 2 are answered accordingly”.

20. In addition to the above, the Arbitral Tribunal awarded costs of Rs.14,98,700/- and interest @ 9% per annum from the date of filing the statement of claim upto the date of award and future interest at the same rate upto the date of payment.

21. The aforesaid award was assailed by the Appellant under Section 34 of the A&C Act and the same came to be dismissed by the impugned judgment.

22. The learned single Judge took note of the elaborate exercise conducted by the learned Arbitrator, the factual finding rendered on the basis thereof. It was noted that the Appellant had not produced its own ledgers and account books to dispel the contents of the declaration letters, and that it had not examined the witnesses who would have been in a position to depose in respect of the declaration letters.

23. It was also held that vide Order dated 10.10.2022, the Arbitral Tribunal had rightly dismissed the application of the Appellant seeking to place on record the additional documents after the final arguments on behalf of the Claimant had already been concluded. The learned single Judge relied upon the decision ***Union of India v. UP. State Bridge Corpn. Ltd.*** (2015) 2 SCC 52, and consequently held that the Arbitral Tribunal could not be faulted for disallowing the application which would have taken the case back to the stage of examination of witnesses.

24. On merits, learned single Judge took note of the voluminous material on the basis of which the arbitral award was rendered and noted that the sufficiency of evidence and the weight to be attached to any of the evidence



placed before the Arbitral Tribunal, are aspects within the domain of the Arbitral Tribunal. The impugned judgment also took note of the Appellant's submission that the evidence in the form of statement of Appellant's witnesses with regard to the delivery challans ought to have been taken on record as secondary evidence under Section 65(g) of the Indian Evidence Act, 1872. In this regard, it has been held in the impugned judgment that the Indian Evidence Act, 1872 is not strictly applicable to arbitral proceedings; also there was no averment in the affidavit of the witnesses of the Appellant with reference to the delivery challans and the inference sought to be derived there from. Having found nothing amiss in the findings rendered, and the conclusion/s arrived at by the learned Arbitrator, the application under Section 34 came to be dismissed.

25. In the present appeal, the Appellant has sought to once again assail the arbitral award and has contended that the claim could not have been awarded solely based on the unilateral ledger account of the Respondent/Claimant, without ascertaining the quantity of the spare-parts in dispute.

26. It is also strenuously contended that the Appellant's application for additional evidence ought to have been allowed and that the same resulted in the failure of justice, and also infraction of Section 18 of the A&C Act, which mandates that "each party shall be given a full opportunity to present his case". It has also been again urged that Section 65(g) of the Indian Evidence Act, 1872 warranted that the witness statement of RW1 ought to have been treated as secondary evidence of the "delivery challans" sought to be produced vide the said application.



27. The aforesaid contentions of the learned counsel for the Appellant are thoroughly misconceived. Essentially, the Appellant has sought to re-adjudicate the same factual issues which have been comprehensively dealt with and pronounced upon in the impugned award. The said findings have also been evaluated in the impugned judgment and nothing amiss has been found with regard thereto.

28. The attempt of the Appellant to seek re-appraisal/re-appreciation of in these proceedings under Section 37 of the A&C Act, is untenable in law, especially given the threadbare examination in the arbitral award of all the relevant factual aspects. The arbitral award rightly took into account the fact that (i) the declaration letters admittedly executed on behalf of the Appellant categorically admit the outstanding liability of the Appellant; (ii) the Appellant did not produce its own books of accounts to dispel the inevitable inference arising from the said declaration letters. The belated attempt on the part of the Appellant to place on record “some delivery challans” vide order dated 10.10.2022 was clearly lacking in the *bona fides* and the belated application filed before the Arbitral Tribunal, was rightly dismissed.

29. The contention on behalf of the Appellant that the dismissal of the aforesaid application resulted in infraction of Section 18 of the A&C Act and/or attracted Section 34 (2) (iii) of the A&C Act, is thoroughly misconceived. Section 18 of the A&C Act stipulates that “each party shall be treated with equality and each party shall be given a full opportunity to present his case”. Section 18 of the A&C Act is verbatim reproduction of Article 18 of the UNICITRAL Model Law. The Court of Appeal of Singapore in *China Machine New Energy Corporation v. Jaguar Energy*



Guatemala LLC&Anr. [2020] SGCA 12, traced the drafting history of Article 18 of the Model Law, as under:

“94 The starting point of the analysis is the travaux préparatoires of Art 18 of the Model Law. The travaux show that the drafters of Art 18 were, in fact, primarily concerned with placing limits on the right to be heard so as to prevent its abuse by unscrupulous parties who might otherwise seek extension after extension of any applicable timeline on the basis that each would be necessary to ensure that party’s “full” opportunity of presenting its case.

(a) While initial drafts of the due process provision provided that “at any stage of the proceedings each party [should be] given a full opportunity of presenting his case”, it was decided that the phrase “at any stage of the proceedings” should be deleted as “[i]t was felt that the words ‘at any stage’ ... might be relied upon by a party who wished to prolong the proceedings or to make unnecessary submissions” (Report of the Working Group on International Contract Practices on the Work of its Fourth Session (A/CN.9/232, 10 November 1982) at para 104; Report of the Working Group on International Contract Practices on the Work of its Sixth Session (A/CN.9/245, 22 September 1983) at para 73).

(b) In the course of discussions on Art 19 of the draft Model Law (the present Art 18), one member expressed concern that “the provision may also be a basis for delaying tactics”, and proposed that the word “full” be replaced by the word “adequate” (Analytical Compilation of comments by Governments and international organizations on the draft text of a model law on international commercial arbitration (A/CN.9/263, 19 March 1985) (“Analytical Compilation”), Art 19(3) at para 7).

(c) In a similar vein, the International Bar Association proposed replacing the word “full” with the phrase “full and proper”, as the word “full”, on its own, was “relatively imprecise” and “might be capable of being interpreted in an unduly restrictive sense” (Analytical Compilation, Art 19(3) at para 8).

95 While the latter two proposals were not eventually implemented (and the word “full” was retained), that was only because the Working Group ultimately considered it sufficiently clear that concerns of due process must be balanced against concerns for the efficiency and expediency, and so this would not entitle a party to obstruct or delay the proceedings (Analytical Commentary, Art 19 at para 8):

... Other provisions, such as articles 16(2) [requiring that jurisdictional objections be raised no later than in the statement of



*defence], 23(2) [permitting a tribunal to refuse requests to amend a claim or defence] and 25(c) [permitting the tribunal to issue an award in default], present certain refinements or restrictions in specific procedural contexts in order to ensure efficient and expedient proceedings. These latter provisions, which like all other provisions of the model law are in harmony with the principles laid down in article 19(3) [the present Art 18], **make it clear that “full opportunity of presenting one’s case” does not entitle a party to obstruct the proceedings by dilatory tactics and, for example, present any objections, amendments, or evidence only on the eve of the award.***

96 The point that the travaux make tolerably clear is that the word “full” in Art 18 of the Model Law was not intended to create a right of unlimited scope. On the contrary, and as mentioned, the drafters were clearly conscious of the need to limit the scope of Art 18, so that it would not be abused by parties seeking to delay and prolong proceedings.”

30. The Singapore Court of Appeal concluded as under:

“104 The foregoing discussion of the applicable principles may be summarised as follows:

(a) The parties’ right to be heard in arbitral proceedings finds expression in Art 18 of the Model Law, which provides that each party shall have a “full opportunity” of presenting its case. An award obtained in proceedings conducted in breach of Art 18 is susceptible to annulment under Art 34(2)(a)(ii) of the Model Law and/or s 24(b) of the IAA.

(b) The Art 18 right to a “full opportunity” of presenting one’s case is not an unlimited one. It is impliedly limited by considerations of reasonableness and fairness.

(c) What constitutes a “full opportunity” is a contextual inquiry that can only be meaningfully answered within the specific context of the particular facts and circumstances of each case. The overarching inquiry is whether the proceedings were conducted in a manner which was fair, and the proper approach a court should take is to ask itself if what the tribunal did (or decided not to do) falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done.

(d) In undertaking this exercise, the court must put itself in the shoes of the tribunal. This means that: (i) the tribunal’s decisions can only be assessed by reference to what was known to the tribunal at the time, and it follows from this that the alleged breach of natural justice must have been brought to the attention



of the tribunal at the material time; and (ii) the court will accord a margin of deference to the tribunal in matters of procedure and will not intervene simply because it might have done things differently.”

31. In *Redfern and Hunter on International Arbitration* by Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter (Oxford University Press, Sixth Edition, 2015), it is stated as under:

“6.13 The parties must not purport to confer powers upon an arbitral tribunal that would cause the arbitration to be conducted in a manner contrary to the mandatory rules or public policy of the state in which the arbitration is held. One important mandatory rule that has already been considered requires that each party should be given a fair hearing or, as the Model Law expresses it, ‘a full opportunity of presenting his case’.

*6.14 At first sight, the word ‘full’ can be misleading: it conjures visions of a party having an entitlement to present as much argument and evidence as it sees fit. **But, in this context, the word ‘full’ must be given a sensible meaning, and in practice it seems unlikely that a national court would set aside an award where the tribunal took a clearly reasonable and proportionate approach to limiting the scope of the evidence that a party wished to present.** Confirming this, most sets of modern arbitration rules now expressly provide that a party need be given only a ‘reasonable opportunity to present its case’, which should encourage arbitral tribunals to balance opportunity with efficiency in determining appropriate arbitral procedures.*

32. In *Redfern and Hunter* (supra) it is also stated as under:

*“11.73 The court of the forum state will naturally have its own concept of what constitutes a ‘fair hearing’. In this sense, as was said in a leading case in the United States, the New York Convention ‘essentially sanctions the application of the forum state’s standards of due process’. This does not mean, however, that the hearing must be conducted as if it were a hearing before a national court in the forum state. It is generally enough if the court is satisfied that the hearing was conducted with due regard to any agreement between the parties, and in accordance with the principles of equality of treatment and **the right of each party to have a reasonable—rather than exhaustive—opportunity to present its case.***

11.74 The national court at the place of enforcement thus has a limited role. Its function is not to decide whether or not the award is correct, as a



matter of fact and law; its function is simply to decide whether there has been a fair hearing. Only a significant and material mistake in the course of the proceedings should be sufficient to lead the court to conclude that there was a denial of ‘due process’

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11.77 Another example of an unsuccessful attempt to rely on this ground is *JorfLafar Energy Co. SCA (Morocco) v AMCI Export Corporation (US)*.⁹⁶ The parties were given the opportunity at an early stage of the arbitration to submit witness statements, but AMCI chose not to do so. At a later stage in the proceedings, AMCI requested an oral hearing to present witness evidence. Having been denied the opportunity to do this, AMCI was unsuccessful in its attempt to resist enforcement of the award for violation of due process. The US District Court for the Western District of Pennsylvania held that AMCI had been given an equal and fair opportunity to present its case, and thus had to suffer the consequences of its own failure to present its case when given that opportunity. “

33. In *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards — Commentary*, edited by Dr Reinmar Wolff (C.H. Beck, Hart, Nomos Publishing, Second Edition, 2019), it is stated as under:

“2. Right to Submit Evidence

Article V(1)(b)’s due process requirement includes the parties’ right to submit evidence in support of their case. Concerning the admissibility, relevance, and weight of evidence, national courts generally respect the wide discretion granted to arbitral tribunals by national arbitration statutes and institutional rules. National courts are, therefore, reluctant to deny recognition or enforcement of awards on the grounds of the tribunals’ evidentiary rulings. In particular, national courts seldom refuse recognition or enforcement of an award because the arbitral tribunal denied disclosure requests for (allegedly vital) evidence. If the arbitral tribunal excludes any evidence, it does not need to allow the parties to comment on its reasons for exclusion in advance; rather, it has been deemed sufficient for the tribunal to address this issue in its final award. In line with the general causality requirement, courts have held that an arbitral tribunal’s refusal to hear evidence may violate due process, “only if that evidence could have influenced the outcome of the proceedings” or “[w]hen the exclusion of relevant evidence actually deprived a party of a fair hearing.”



34. In *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* by Dr Peter Binder (Sweet & Maxwell, Third Edition, 2010), it is stated as under:

““Each party should be given full opportunity of presenting his case” establishes the second fundamental principle, which is also often referred to as the “right to a fair trial”. Its purpose is to ensure that each party has enough time - and the tribunal’s attention - when stating its case. According to art.19(2), however, unless the parties agree otherwise, the tribunal may conduct the arbitration in the manner it considers appropriate. This includes “the power to determine the admissibility, relevance, materiality and weight of any evidence”. This power can, of course, restrict the parties’ right to present their cases if the tribunal decides that a certain point has been elaborated enough or is only being elaborated by the party for dilatory purposes. The Analytical Commentary adds that the “full opportunity of presenting one’s case does not entitle a party to obstruct the proceedings by dilatory tactics and, for example, present any objections, amendments, or evidence only on the eve of the award.”

35. Thus, the salutary principle enshrined in Section 18 of the A&C Act, 1996, cannot be construed as conferring an unbridled right to any party in an ongoing Arbitration, to seek to file additional documents/adduce additional evidence, regardless of the stage of the proceedings.

36. A single Judge of Bombay High in ***Pradyuman Kumar Sharma v. Jays Agar M. Sancheti***, (2013) 5 Mah LJ 86, in similar circumstances, has held as under:

“27. Question that arises for consideration of this Court is whether the learned arbitrator has violated the principles of natural justice or has not rendered full opportunity to the petitioner by allowing to lead additional evidence at the stage of closure of oral arguments of the respondents for the purpose of proving his case that the agreements relied upon by the respondents were forged and fabricated.

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36. The expression ‘full opportunity to present his case’ used in section 18 of the Act, would, in my view, mean full opportunity to be given to both the parties before the learned arbitrator. Both the parties were already



allowed to lead its evidence by the learned arbitrator. Both had led oral as well as documentary evidence. After the petitioner closed his evidence, respondents had commenced and almost completed their arguments before the learned arbitrator. The respondents had no opportunity to lead any further evidence as the evidence of both the parties was closed. The learned arbitrator, therefore, was right, in my view, in rejecting the application belatedly made by the petitioner for permitting the petitioner to apply for issuance of writ of summons to this Court to Mr. Mishra or to refer the document for examination of a handwriting expert. In my view, under the guise of full opportunity, a party cannot be permitted to delay and/or frustrate the arbitration proceedings by one or the other means.

*37. The record indicates that the petitioner was in habit of delaying arbitration proceedings though the learned arbitrator had shown all indulgence to the petitioner and had granted full opportunity to present his case including permission to lead oral evidence. In my view, no party has an unfettered right to adduce evidence and/or make oral submissions at any stage of the proceedings as canvassed by Mr. Anturkar, the learned counsel appearing on behalf of the petitioner. Under section 24(1) of the Act, arbitrator is empowered to decide whether to hold his hearings for the presentation of evidence or for oral arguments or whether proceedings shall be conducted on the basis of documents and other material unless otherwise agreed by the parties. In this case, both the parties were given opportunity to lead its evidence and to make oral arguments. Insofar as opportunity to lead his evidence is concerned, the petitioner had examined two witnesses and had closed his evidence. The petitioner had filed petition in this Court for issuance of witness summons against the handwriting expert and withdrew the said petition. The expression used in proviso to section 24(1) of the Act that the arbitrator shall hold oral hearing at appropriate stage of the proceedings on a request by a party, unless the parties have agreed that no oral hearing shall be held, would not mean that a party can apply for oral hearing which would include leading of oral evidence at any stage as desired by that party. In my view, making an application for leading oral evidence or for permission for issuance of writ of summons at the stage of conclusion of final arguments by the respondents herein, would not be an appropriate stage of the proceedings when such application could be made by the petitioner. **In my view, application was made not at appropriate stage but was made at inappropriate stage and time with a view to further delay the proceedings which was pending for quite some time. The learned arbitrator therefore, was justified, in my view, to reject the said application made by the petitioner at belated stage. If the petitioner would have been granted such opportunity, petitioner would have cured the lacuna in his evidence already led which would have been pointed out in the oral arguments of the respondents herein which had commenced after conclusion of oral***



evidence and had almost completed. The learned arbitrator has to be fair to both the parties and thus to prevent any injustice to the respondents, in my view, the learned arbitrator was justified in rejecting the said application made at belated stage. In my view, section 19(3) and (4) has to be read with section 18 and with proviso to section 24 of the Act on the aspect of procedure, hearing and compliance of natural justice by an arbitrator.

38. Question then arises for consideration of this Court is whether by rejecting application made by the petitioner seeking permission to apply in this Court for issuance of writ of summons or for referring the disputed document to handwriting expert at belated stage, would be at all in violation of principles of natural justice and no prejudice would have been caused to the petitioner by rejecting his application to lead oral evidence. The petitioner wanted to apply for permission to file proceedings in this Court for issuance of witness summons or to refer the disputed document to handwriting expert at belated stage for the purpose of proving his allegation that the documents relied upon by the respondents were forged and fabricated documents. Though an opportunity was given by the learned arbitrator earlier, petitioner did not examine the Expert witness, though his affidavit was filed. Perusal of record indicates that the petitioner himself had relied upon the same agreements in various proceedings filed by him and/or did not deny existence and contents of the said agreements in criminal proceedings. The petitioner also admitted the correctness of certified copy produced by the respondents before the learned arbitrator. If both the parties have relied upon the same documents in various proceedings without raising any dispute in respect of the existence and/or contents thereof, and not having disputed the correctness of the certified copy thereof in the proceedings before the learned arbitrator, in my view, the application made by the petitioner for referring the said disputed document to handwriting expert or to get the writ of summons issued by this Court at belated stage was nothing but one more attempt to delay and frustrate the outcome of arbitration proceedings which was pending for quite some time. The petitioner having admitted the agreements relied upon and annexed to the proceedings in several other proceedings between the same parties, petitioner in my view, could not have proved any fact contrary to one that was already admitted by him in series of proceedings. The learned arbitrator thus, in my view was right in rejecting the said application which was made at belated stage. No prejudice thus, could be caused to the petitioner by rejection of such application by the learned arbitrator which application, in my view, was totally unwarranted and mischievous. As no prejudice would have been caused by rejecting such application, such order, in my view, would not amount to be in violation of principles of natural justice.



39. The learned arbitrator has rendered a finding of fact after considering all the documents and after giving full opportunity to both the parties and such findings are not perverse and therefore, cannot be interfered with by this Court under section 34 of the Act. I am not inclined to accept the submission made by Mr. Anturkar, the learned counsel appearing for the petitioner that the learned arbitrator did not give full opportunity to the petitioner. I am also not inclined to accept submission that if a Civil Court could not have rejected an application in these facts to lead evidence at any stage of proceedings, even arbitrator could not have rejected such application.

40. On conjoint reading of the provisions of sections 18, 19 and 24 of the Act, it is clear that scheme of the Act insofar as powers of the arbitrator is concerned, the provisions of Code of Civil Procedure which empowers the Court to follow the procedure provided therein are slightly different. In my view, even a Civil Court, in these facts, would not have granted an opportunity to lead oral evidence once evidence was closed by both the parties and arguments of the plaintiff were substantially completed.”

37. In the present case, as rightly noticed by the learned Arbitral Tribunal and by the learned single Judge, there was nothing which prevented the Appellant from seeking to file the delivery challans, or any other document on which it wished to place reliance, at an appropriate stage of arbitral proceedings. This was particularly so in the light of the reliance placed by the Respondent/Claimant on the declaration letters issued by the Appellant, and in the light of its clear stand that the liability of the parties qua each other, arose on the basis of the ledger accounts, and could not be determined on the basis of CRM data. It had been specifically pleaded by Respondent/Claimant in its rejoinder filed in response to the statement of defence that “accounting for the transactions was being done separately by the accounts departments against acknowledgement of actual physical delivery of the Goods. The accounts departments do not merely rely on CRM data to put any entry in the ledger account. Hence, a mere entry in the



CRM data without actual physical delivery of the goods is immaterial.” It was also categorically averred by the Respondent/Claimant that the Appellant “failed to return the defective or unused parts and also make payment in lieu thereof and hence, present arbitral proceedings. The delivery challans unless acknowledged by the representative of Claimant are immaterial and of no use.” Despite the above, the alleged delivery challans were not produced by the Appellant at the appropriate stage.

38. A perusal of the affidavits filed by the witnesses of the Appellant also reveals that there is no reference therein to the delivery challans sought to be filed vide Application dated 03.09.2022. As such, it is wholly misconceived to contend that the statement of witness of the Appellant could have been taken to be secondary evidence of the said delivery challans under Section 65(g) of Indian Evidence Act.

39. The reliance by the Appellant on the judgment of the Supreme Court in **K. K. Velusamy v. N. Palanisamy**, (2011) 11 SCC 275 is also misconceived. The said judgment is in the context of the provisions of Order 18 Rule 17 of the Code of Civil Procedure, 1908 (‘the Code’) and was rendered in the peculiar facts of that case. Even in the context of Order 18 Rule 17, the Supreme Court observed that the same could not be construed in a manner so as to enable the parties to place additional material or evidence which could not be produced when the evidence was recorded. It was specifically stated in para 10 of the said judgment as under:-

“10. Order 18 Rule 17 of the Code is not a provision intended to enable the parties to recall any witnesses for their further examination-in-chief or cross-examination or to place additional material or evidence which could not be produced when the evidence was being recorded. Order 18 Rule 17 is primarily a provision enabling the court to clarify any issue or doubt, by recalling any witness either suo motu, or at the request of any



party, so that the court itself can put questions and elicit answers. Once a witness is recalled for purposes of such clarification, it may, of course, permit the parties to assist it by putting some questions.”

40. In ***K. K. Velusamy*** (supra), the Supreme Court further construed Section 151 of the Code in an expansive manner, to hold that the same could not be construed to limit or circumscribe the inherent power of the Court to deal with exceptional situations. Even in that context, the Court sounded a word of caution viz. that the said power is not intended to be used routinely, merely for the asking.

41. The learned Single Judge also rightly relied upon the judgments of the Supreme Court in ***UP. State Bridge Corpn. Ltd.*** (supra) and ***Alpine Housing Development Corporation Pvt. Ltd. v. Ashok S. Dhariwal***, 2023 SCC OnLine SC 55, to emphasize that one of the cardinal foundations of the efficacy of the arbitration is “fair, speedy and inexpensive trial”. It was rightly held that in the facts of the present case, there was no warrant to entertain Appellant’s belated application, which could have taken the case back to the stage of trial and examination of witnesses.

42. Also, as already noticed, the conclusions arrived at in the impugned award, are based on, and fortified by multiple findings of facts as regards the underlying issues. Crucially, the Appellant did not produce its own books of accounts, despite making multiple reference to the same in its statement of defence. There is no warrant to interfere with the award on the ground of dismissal of the Appellant’s application dated 03.09.2022 seeking to file additional documents, virtually at the fag end of arbitral proceedings.



43. For the aforesaid reasons, no merit is found in the instant appeal; the same is, consequently, dismissed.

VIBHU BAKHRU, J

SACHIN DATTA, J

JULY 3, 2024
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