IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : ARBITRATION AND CONCILIATION ACT, 1996

Date of decision: 2nd July, 2014.

FAO(OS) 242/2014

STATE TRADING CORPORATION OF INDIA LTD ……Appellant
Through: Dr. A. Francis Julian, Sr. Advocate along with Mr. Danish Zubair Khan, Adv.

Versus

M/S TOEPFER INTERNATIONAL ASIA PTE LTD. ……Respondents
Through: Mr. Neeraj Kishan Kaul, Sr. Adv. along with Mr. A. Majumdar, Mr. Arvind Kumar Gupta and Mr. Siddarth Ranka, Advs.

CORAM :-
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 impugns the order dated 28th January, 2014 of the learned Single Judge of this Court of dismissal of the objections, being OMP 106/2014 filed by the appellant, to the Arbitral Award dated 27th September, 2013 of an Arbitral Tribunal comprising of the nominees of the appellant and the respondent, who as per the Arbitration Agreement were to be the retired judges of the High Court or the Supreme Court, and of a third arbitrator who was required to be senior to the nominated arbitrators.

2. The particulars of the dispute which were referred to arbitration, the respective versions of the parties and the respective contentions of the parties are recorded in detail in the unanimous arbitral award running into 36 pages and have been recapitulated by the learned Single Judge also in his order running into as many as 19 pages. Considering the nature of the jurisdiction which we are exercising and the contentions before us, we do

not feel the need to reiterate the same. Suffice it will be to state that the appellant bought Yellow Peas from the respondent, a company incorporated under the laws of Singapore and the dispute was qua the liability for demurrage levied for delay in unloading of the goods shipped by the respondent from Canada to the appellant at Vishakhapatnam. The Arbitral Tribunal held the respondent entitled to demurrage for 53 days 12 hours and 47 minutes amounting to USD 1,070,652.78 from the appellant and also awarded interest at the rate of 6% per annum against the appellant, from the date of notice i.e. 12th October, 2010 till the actual realization of the award amount. The counter claim of the appellant, of having earned a dispatch of 14 minutes for which the appellant claimed to be entitled to USD 5,833.33 from the respondent was dismissed. The respondent was also awarded cost of arbitration.

3. The challenge by the appellant to the award before the learned Single Judge was on the ground of the interpretation by the Arbitral Tribunal of the terms of the contract, relating to lay time and demurrage, being based on the principle/ practice applicable to charter party disputes when it should have been based on the law applicable to the sale of goods and contracts.

4. The learned Single Judge has held:

i. That the appellant has failed to show as to how the award could be said to be opposed to public policy of India, as interpreted by the Supreme court in ONGC Ltd. vs. Saw Pipes Ltd. (2003) 5 SCC 705;

ii. that the tribunal had dealt at length with each and every of the appellant's contentions, even though raised for the first time at the stage of final hearing, and rejected them on merits by giving reasons;

iii. that even the commentaries, being The Law of Demurrage by Hugo Tiberg (4th edition), and Benjamin, Sale of Goods (4th edition) relied upon by the appellant were found to be supporting the contentions of the respondent, rather than of the appellant;

iv. the Arbitral Tribunal had applied its mind to the pleadings, the evidence adduced before it and the terms of the contract and the court would not reappraise the matter as if it were an appeal;

v. interpretation of a term of the contract is a matter within the jurisdiction of the tribunal - it may be capable of two possible views, but if the view taken by the Arbitral Tribunal is a plausible view, though not the only correct view, it would prevail and the court cannot substitute it with its own interpretation;

vi. the arbitral awards can be interfered by the court, only if the findings therein are totally perverse or based on a wrong proposition of Law;
vii. in the present case, there was no patent error in the reasons/findings given by the Arbitral Tribunal in rejecting the appellant's contentions and in disallowing the application of the appellant for filing of amended written statement as the matter was entirely in the domain of the Arbitral Tribunal and there was no vested right in the appellant to insist upon the amended written statement being taken on record;
viii. the Arbitral Tribunal is the final Arbiter of facts.

5. The challenge in this appeal is on the ground that the learned Single Judge ignored that the interpretation of the contract between the parties given by the Arbitral Tribunal is contrary to the express terms and conditions thereof and the Arbitral Tribunal has given a meaning to the terms and conditions which is not contemplated in the contract. The senior counsel for the appellant thus wants us to read the contract between the parties, particularly the clauses relating to demurrage, and then to judge whether the interpretation thereof by the Arbitral Tribunal is correct or not.

6. In our view, the interpretation in Saw Pipes Ltd. supra of the ground in Section 34 of the Act for setting aside of the arbitral award, for the reason of the same being in conflict with the public policy of India, would not permit setting aside, in the aforesaid facts. A Section 34 proceeding, which in essence is the remedy of annulment, cannot be used by one party to convert the same into a remedy of appeal. In our view, mere erroneous/wrong finding of fact by the Arbitral Tribunal or even an erroneous interpretation of documents/evidence, is non-interferable under Section 34 and if such interference is done by the Court, the same will set at naught the whole purpose of amendment of the Arbitration Act.

7. Arbitration is intended to be a faster and less expensive alternative to the courts. If this is one's motivation and expectation, then the finality of the arbitral award is very important. The remedy provided in Section 34 against an arbitral award is in no sense an appeal. The legislative intent in Section 34 was to make the result of the annulment procedure prescribed therein potentially different from that in an appeal. In appeal, the decision under review not only may be confirmed, but may also be modified. In annulment, on the other hand, the decision under review may either be invalidated in whole or in part or be left to stand if the plea for annulment is rejected. Annulment operates to negate a decision, in whole or in part,

thereby depriving the portion negated of legal force and returning the parties, as to that portion, to their original litigating positions. Annulment can void, while appeal can modify. Section 34 is found to provide for annulment only on the grounds affecting legitimacy of the process of decision as distinct from substantive correctness of the contents of the decision. A remedy of appeal focuses upon both legitimacy of the process of decision and the substantive correctness of the decision. Annulment, in the case of arbitration focuses not on the correctness of decision but rather more narrowly considers whether, regardless of errors in application of law or determination of facts, the decision resulted from a legitimate process.

8. In the case of arbitration, the parties through their agreement create an entirely different situation because regardless of how complex or simple a dispute resolution mechanism they create, they almost always agree that the resultant award will be final and binding upon them. In other words, regardless of whether there are errors of application of law or ascertainment of fact, the parties agree that the award will be regarded as substantively correct. Yet, although the content of the award is thus final, parties may still challenge the legitimacy of the decision-making process leading to the award. In essence, parties are always free to argue that they are not bound by a given "award" because what was labeled an award is the result of an illegitimate process of decision.

9. This is the core of the notion of annulment in arbitration. In a sense, annulment is all that doctrinally survives the parties' agreement to regard the award as final and binding. Given the agreement of the parties, annulment requires a challenge to the legitimacy of the process of decision, rather than the substantive correctness of the award.

10. Joseph Raz in his paper "The Politics of the Rule of Law" has opined that the function of the rule of law is to facilitate the integration of a particular piece of legislation with the underlying doctrines of the legal system; the authority of the courts to harness legislation to legal doctrine arises neither from their superior wisdom nor from any superior law of which they are the custodians; it arises out of the need to bring legislation in line with doctrine. The courts ensure coherence of purpose of law, ensuring that its different parts do not fight each other. The learned author has further observed that a law which is incoherent in purpose serves none of its inconsistent purposes very well. Purposes conflict if due to contingencies of life serving one will in some cases retard the other. The second basis for the

authority of the courts to integrate legislation with doctrine is the need to mix the fruits of long established traditions with the urgencies of short term exigencies. In ensuring the coherence of law, the courts are expected to ensure the effectiveness of the democratic rule. In giving weight to the preservation of long established doctrines i.e., the traditions, they protect the long term interest of the people from being swamped by the short term. We have taken the liberty to quote from the aforesaid paper since the courts are being repeatedly called upon to adjudicate on the various provisions of the re-enacted arbitration law. From the various pronouncements in the last about 18 years since re-enactment, it appears that the danger of interpreting the new Act in a manner doing away with the whole object/purpose of re-enactment is imminent. The courts continue to be inundated till date, in spite of repeal of the old Act 18 years ago, with cases thereunder also, particularly of challenge to the arbitral award. Provisions of the old and the new Act relating to inference with the arbitral award are vastly different. However, when the courts, in the same day are wrestling with a matter concerning arbitral award under the old Act and with that under the new Act, the chances of culling out the huge difference between the two are minimal. It is not to be forgotten that the courts deal with and rule on disputes where monies and properties of real persons are at stake. The courts do not decide in abstract. Thus, when in one case the courts interfere with the arbitral award for the reason of the same not rendering to the litigant what the courts would have granted to him, the courts find it difficult in the very next case, though under the new Act, to apply different parameters.

11. Arbitration under the 1940 Act could not achieve the savings in time and money for which it was enacted and had merely become a first step in lengthy litigation. Reference in this regard can be made to para 35 of Bharat Aluminium Company Vs. Kaiser Aluminium Technical Services Inc. (2012) 9 SCC 552. It was to get over the said malady that the law was sought to be overhauled. While under the old Act, the award was unenforceable till made rule of the court and for which it had to pass various tests as laid down therein and general power/authority was vested in the court to modify the award, all this was removed in the new Act. The new Act not only made the award executable as a decree after the time for preferring objection with respect thereto had expired and without requiring it to be necessarily made rule of the court but also did away with condonation of delay in filing the said objections. The reason/purpose being expediency. The grounds on which the objections could be filed are also such which if made out, the only consequence thereof could be setting aside of the award. It is for this reason

that under new Act there is no power to the court to modify the award or to remit the award etc. as under the old Act. A perusal of the various grounds enunciated in Section 34 will show that the same are procedural in nature i.e., concerning legitimacy of the process of decision. While doing so, the ground, of the award being in conflict with Public Policy of India, was also incorporated. However the juxtaposition of Section 34(2)(b)(ii) shows that the reference to 'Public Policy' is also in relation to fraud or corruption in the making of the award. The new Act was being understood so [see Konkan Railway Corporation Ltd. Vs. Mehul Construction Co. (2000) 7 SCC 201 (para 4 and which has not been set aside in S.B.P. & Co. Vs. Patel Engineering Ltd. (2005) 8 SCC 618)] till the Supreme Court in Saw Pipes Ltd. (supra) held that the phrase 'Public Policy of India' is required to be given wider meaning and if the award on the face of it is patently in violation of statutory provisions, it cannot be said to be in public interest and such award/judgment/decision is likely to adversely affect the administration of justice. In para 37 of the judgment it was held that award could be set aside if it is contrary to fundamental policy of Indian Law or the interest of India or justice or morality or if it is patently illegal. A rider was however put that illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that the award is against the public policy. Yet another test laid down is of the award being so unfair and unreasonable that it shakes the conscience of the court.

12. The courts have thereafter been inundated with challenges to the award. The objections to the award are drafted like appeals to the courts; grounds are urged to show each and every finding of the arbitrator to be either contrary to the record or to the law and thus pleaded to be against the Public Policy of India. As aforesaid, the courts are vested with a difficult task of simultaneously dealing with such objections under two diverse provisions and which has led to the courts in some instances dealing with awards under the new Act on the parameters under the old Act.

13. The result is that the goal of re-enactment has been missed.

14. The re-enactment was not only to achieve savings in time and prevent arbitration from merely becoming the first step in lengthy litigation but also in consonance with the international treaties and commitments of this country thereto. Since the enactment of the 1940 Act, the international barriers had disappeared and the volume of international trade had grown phenomenally. The new Act was modeled on the model law of international

commercial arbitration of the United Nations Commission on International Trade Law (UNICTRAL). It was enacted to make it more responsive to contemporary requirements. The process of economic liberalization had brought huge foreign investment in India. Such foreign investment was hesitant, owing to there being no effective mode of settlement of domestic and international disputes. It was with such lofty ideals and with a view to attract foreign investment that the re-enactment was done. If the courts are to, notwithstanding such re-enactment, deal with the arbitration matters as under the old Act it would be a breach of the commitment made under the treaties on international trade.

15. Applying the aforesaid test, we are afraid, the arguments of the senior counsel for the appellant are beyond the scope of Section 34.

16. The senior counsel for the respondent has in this regard rightly argued that the scope of appeal under Section 37 is even more restricted. It has been so held by the Division Benches of this Court in Thyssen Krupp Werkstoffe Vs. Steel Authority of India MANU/DE/1853/2011 and Shree Vinayak Cement Clearing Agency Vs. Cement Corporation of India 147 (2007) DLT 385. It is also the contention of the senior counsel for the respondent that the argument made by the appellant before the learned Single Judge and being made before this Court, that the particular clause in the contract is a contract of indemnification, was not even raised before the Arbitral Tribunal and did not form the ground in the OMP filed under Section 34 of the Act and was raised for the first time in the arguments.

17. The Supreme Court in Rashtriya Ispat Nigam Ltd. Vs. Dewan Chand Ram Saran (2012) 5 SCC 306 refused to set aside an arbitral award, under the 1996 Act on the ground that the view taken by the Arbitral Tribunal was against the terms of the contract and held that it could not be said that the Arbitral Tribunal had travelled outside its jurisdiction and the Court could not substitute its view in place of the interpretation accepted by the Arbitral Tribunal. It was reiterated that the Arbitral Tribunal is legitimately entitled to take the view which it holds to be correct one after considering the material before it and after interpreting the provisions of the Agreement and if the Arbitral Tribunal does so, its decision has to be accepted as final and binding. Reliance in this regard was placed on Sumitomo Heavy Industries Ltd. Vs. ONGC Ltd. (2010) 11 SCC 296 and on Kwality MFG. Corporation Vs. Central Warehousing Corporation (2009) 5 SCC 142. Similarly, in P.R. Shah, Shares & Stock Broker (P) Ltd. V. B.H.H.

Securities (P) Ltd. (2012) 1 SCC 594 it was held that a Court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating evidence and an award can be challenged only under the grounds mentioned in Section 34(2) and in the absence of any such ground it is not possible to reexamine the facts to find out whether a different decision can be arrived at. A Division Bench of this Court also recently in National Highways Authority of India Vs. M/s. Lanco Infratech Ltd. MANU/DE/0609/2014 held that an interpretation placed on the contract is a matter within the jurisdiction of the Arbitral Tribunal and even if an error exists, this is an error of fact within jurisdiction, which cannot be reappreciated by the Court under Section 34 of the Act. The Supreme Court in Steel Authority of India Ltd. Vs. Gupta Brother Steel Tubes Ltd. (2009) 10 SCC 63 even while dealing with a challenge to an arbitral award under the 1940 Act reiterated that an error by the Arbitrator relatable to interpretation of contract is an error within his jurisdiction and is not an error on the face of the award and is not amenable to correction by the Courts. It was further held that the legal position is no more res integra that the Arbitrator having been made the final Arbiter of resolution of dispute between the parties, the award is not open to challenge on the ground that Arbitrator has reached at a wrong conclusion.

18. If we were to start analyzing the contract between the parties and interpreting the terms and conditions thereof and which will necessarily have to be in the light of the contemporaneous conduct of the parties, it will be nothing else than sitting in appeal over the arbitral award and which is not permissible.

19. Resultantly, there is no merit in the appeal which is dismissed with the costs of Rs.20,000/- payable to the respondent alongwith the awarded amount.

Sd/-
RAJIV SAHAI ENDLAW, J.

Sd/-
CHIEF JUSTICE

JULY 02, 2014.