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M/S. Ogene Systems India Ltd. Vs.technology Development Board

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Court : Delhi

Decided On : Sep-25-2017

Appellant : M/S. Ogene Systems India Ltd.

Respondent : Technology Development Board

Advocate for Def. : Mr. Jeevesh Tandon

Advocate for Pet/Ap. : Mr. Avijit Mani Tripathi

Judgement :

$~ * IN THE HIGH COURT OF DELHI AT NEW DELHI FAO (OS) 95/2017 + M/S. OGENE SYSTEMS INDIA LTD. .....

... Petitioner
Through: Mr.Avijit Mani Tripathi with Mr.Kumar Abhishek, Advs. TECHNOLOGY DEVELOPMENT BOARD . Respondent versus Through: Mr.Jeevesh Mehta with Ms.Shivani Tandon, Advs. CORAM: HONBLE THE ACTING CHIEF JUSTICE HON'BLE MR. JUSTICE C.HARI SHANKAR ORDER2509.2017 % C. HARI SHANKAR, J.

1. We had, on 25th September 2017, dismissed this appeal, stating that the reasons therefore would follow. This judgment proceeds to record the reasons for our decision.

2. This appeal under Section 37(i) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the Act) assails an order dated 10th January, 2017, passed by the learned Single Judge, in a petition preferred before him, by the appellant, under Section 34 of the Act.

3. To infuse some clarity in the prefatory recitation of facts that follows, the appellant and respondent are referred to , hereinafter, as Ogene and TDB respectively. FAO(OS) 95/2017 Page 1 of 21 4. The dispute between Ogene and TDB relates back to a loan agreement, dated 31st March, 2010, whereunder, TDB provided loan assistance of Rs.13.5 crores to Ogene, in four installments of Rs.4.5 crores, Rs.4 crores, Rs.4 crores and Rs.1 crore. Whereas the principal amount was to be repaid, by the Ogene, starting 01st October, 2011, interest thereon, was to be paid starting 01st October, 2012 the latter in half yearly instalments, on the amount of loan outstanding on the date of payment, @ 5% per annum, assessed simply, commencing from the first disbursement/payment of loan assistance. Payment of accrued interest was to commence from 01st October, 2012.

5. Under a duly executed agreement dated 25th May, 2010, Ogene pledged its shares, with TDB, as security for the loan. Further, on 26th May, 2010, Ogene hypothecated its entire movable property in favour of TDB, and also mortgaged its immovable property, in the form of land located in Andhra Pradesh, with TDB, by deposit of title deeds.

6. On 05th October, 2011, Ogene and TDB entered into a supplementary loan agreement, rescheduling the repayment of the loan.

7. On Ogene failing to liquidate its dues, under the aforementioned loan agreement dated 31st March, 2010, notices dated 05th February, 2013 and 17th May, 2013 were issued to it by TDB. As matters stood, on 13th April, 2013, a total amount of Rs.13,82,58,846/- was allegedly outstanding, by Ogene, to TDB. FAO(OS) 95/2017 Page 2 of 21 8. The aforementioned notices dated 05th February, 2013 and 17th May, 2013 failing to elicit any response from Ogene, TDB invoked the arbitral clause, contained in the loan agreement dated 31st March, 2010 (supra). Consequently, the aforementioned dispute between the Ogene and TDB, were referred to the sole arbitration of Justice Yogender Kumar Sangal, a

retired Judge of the High Court of Allahabad.

9. Ogene, and its Managing Director Dr. B.M. Chaudhary, were

... RESPONDENTS
1 and 2, before the learned Sole Arbitrator, whereas M/s Swine Finance & Trading Pvt Ltd was Respondent No.3.

10. Nine claims were filed, by TDB, before the learned Sole Arbitrator, which stand enumerated in the award, dated 19th May, 2015, of the learned Sole Arbitrator, thus:-

"(i) (ii) 2- Rs.2,71,66,705/- Claim No.1- Rs. 12,54,81,136/- Lacs from the Respondent No.1 to 3 jointly and severally as balance principal amount disbursed to the Respondent No.1 from time to time under the Loan Agreement dated 31st March, 2010. Claim No.as accumulated interest from the Respondent No.1 to 3 jointly and severally which is calculated from the date of disbursement of loan assistance upto 30.06.2014 in terms of the Loan Agreement dated 31st March, 2010. (iii) Claim No.3- Interest @ 10% p.a. as additional interest on defaulted amount of the above claim against Respondent No.1 to 3 jointly and severally w.e.f. 01.07.2012 till FAO(OS) 95/2017 Page 3 of 21 the filing of the present claim, in terms of the Loan Agreement dated 31st March, 2010. (iv) Claim No.4- To (v) Claim No.5- To to the recover total outstanding due together with interest and other charges by sale of all movable assets hypothecated it under Deed of Hypothecation dated 26.05.2010. recover total outstanding due together with interest and other charges by sale of immovable property mortgage to the Claimant Board in terms of the Loan Agreement dated 31st March, 2010. And supplementary agreement as above. the (vi) Claim No.6- To recover total outstanding dues together with interest and other charges by sale of movable and immovable properties of the Respondent No.1 to 3, the guarantors jointly and severally.. the (vii) The Claimants claim and entitled to recover the pendent-lite and future interest @ of 15% per annum in favour of the claimants Board and against the

... RESPONDENTS

jointly and the agreements. severally as per terms of (viii) Claim No.8- Costs incurred by them on the recovery

... RESPONDENTS
jointly and severally. proceedings against (ix) Claim No.9- Costs incurred by them in the the proceedings from arbitrary

... RESPONDENTS
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11. The award notes that, though appearance was initially entered, by counsel, on behalf of Ogene and Dr.B.M. Chaudhary as well as on behalf of M/s. Swine Finance & Trading Pvt. Ltd., and that said counsel accepted a copy of the Statement of Claim submitted by respondent and also sought time to file reply FAO(OS) 95/2017 Page 4 of 21 thereto, Ogene & Dr. B.M. Chaudhary, thereafter, not only stopped appearing in the proceedings, but also failed to intimate, to the arbitrator, the reasons for not remaining present, either personally or through counsel.

12. Consequently, vide order dated 22nd August, 2014, issued under Section 25 of the Act, the learned Arbitrator proceeded against Ogene and Dr. B.M. Chaudhary, ex parte. For ready reference, Section 25 of the Act may be reproduced, thus: 25. Default of a party- Unless otherwise agreed by the parties, where, without showing sufficient cause,- (a) fails the claimant to communicate his statement of claim in accordance with sub-section (1) of section 23, the arbitral tribunal shall terminate the proceedings; (b) the respondent fails to communicate his statement of defenece in accordance with sub-section (1) of section 2l3, the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegations by the claimant and shall have the direction to treat the right of the respondent to file such statement of defence as having been forfeited. (c) a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it. FAO(OS) 95/2017 Page 5 of 21 13. No application, challenging the said order, dated 22nd August 2014, or seeking recall thereof, was moved, before the learned Sole Arbitrator, by any of the respondents

before him, i.e. Ogene, Dr. B.M. Chaudhary or M/s. Swine Finance & Trading Pvt. Ltd. The decision, of the Sole Arbitrator to proceed, against Ogene before him ex parte, thereby attainted finality.

14. In its support, TDB filed, before learned Arbitrator, evidence in the form of affidavits of their Assistant Legal Officer, Mr.Rakesh Bhardwaj, as well as other documents.

15. The respondents before him (including Ogene) having been set ex parte, the learned Arbitrator proceeded to hear counsel appearing for TDB, and thereafter, returned the following findings: (i) The factum of a loan of Rs.1350 lakhs, having been taken by Ogene, from TDB, vide loan agreement dated 31st March, 2010, read with supplementary agreement dated 05th October, 2011, stood proved by the oral evidence of Mr.Rakesh Bhardwaj, as also the following documents: (a) (b) (c) (d) loan agreement dated 31st March, 2010 alongwith NOC from the banks, board resolutions, supplementary agreement dated 05th October, 2011, personal guarantee agreement dated 25th May 2010 executed by M/s. Swine Finance & Trading Pvt. Ltd., for the appellant, (e) agreement for corporate guarantee dated 25th May, 2010, FAO(OS) 95/2017 Page 6 of 21 (f) (g) (h) (i) (j) agreement for pledge of shares, dated 25th May, 2010, shortfall undertaking dated 25th May, 2010, executed by the Ogene as well as M/s. Swine Finance & Trading Pvt. Ltd., undertaking for non-disposal of shares, dated 25th May, 2010, executed by Dr. Chaudhary, undertaking for non-disposal of shares, dated 25th May, 2010, executed by M/s. Swine Finance & Trading Pvt. Ltd., personal guarantee agreement, dated 25th May 2010, by Dr.Chaudhary, (k) deed of hypothecation, dated 26th May, 2010. (l) declaration and undertaking regarding mortgage by disposed of title deeds, dated 26th May, 2016, (m) show cause notice, dated 5th February, 2013, issued by TDB to Ogene, (n) (o) (p) further notice, dated 17th May, 2013 issued by TDB to Ogene, statements of accounts, letter of appointment of the Arbitrator dated 17th February, 2014, (q) NOC from banks and financial institutions dated 08th May, 2010, creating charge on the Ogenes property, FAO(OS) 95/2017 Page 7 of 21 (r) Board Resolution, dated 30th March 2010, of the Ogene, (s) Board Resolution, dated 28th March, 2010 of M/s. (t) letter of slump sale agreement, dated 08th February, Swine Finance & Trading Pvt. Ltd, and

2010. (ii) The communications dated 15th March, 2014 and 19th March, 2014 addressed by Dr. B.M. Chaudhary, Managing Director of the appellant, revealed the following: (a) The fact that Ogene had entered into loan agreement, with TDB, which required Ogene to repay the loan with interest, stood conceded. (b) The execution of deeds, relating to the borrowing of the loan and furnishing of security, were also undisputed. (c) The said communications further stated that, due to operational problems and serious financial liquidity constraints, Ogene had not been able to generate sufficient cash flow for repayment of loan as per the schedule stipulated in the loan agreement. The factum of default, by Ogene, in fulfilling its obligation under the loan agreement, also stood acknowledged thereby. (iii) The only request, in the communication from Dr. Chaudhary to TDB, was, in fact, that further time be granted, to the Ogene, to repay the loan with accrued interest. FAO(OS) 95/2017 Page 8 of 21 (iv) The default, on the part of Ogene in repaying the loan taken by it from TDB, also stood proved by the affidavit of Mr. Rakesh Bhardwaj. The notice, dated 05th February, 2013, sent by TDB to Ogene, calling for immediate payment, did not elicit any result. (v) In the circumstances, there was complete admission, on the part of Ogene, regarding the availment by it, of loan from TDB, as well as default on its part, in repaying the said loan. The respondent, was therefore, in fact, entitled to an award, even applied the principles contained in Order XII Rule 6 of the Code of Civil Procedure 1908, (hereinafter referred to as the CPC).

16. Following on the above reasoning, the learned Arbitrator allowed the claims of TDB against Ogene, for the principal amount of Rs.12,54,81,136/- alongwith interest of Rs.2,71,66,705/- and additional interest @ 10% per annum w.e.f. 01st July, 2010 till the filing of the claim petition, as well as pendente lite and future interest @ 15% per annum.

17. The aforementioned award, dated 19th May, 2015 passed by the learned Sole Arbitrator, was assailed, by Ogene, before the learned Single Judge of this Court, under Section 34 of the Act, vide OMP4972015.

18. One of the principal grievances, ventilated by Ogene before the learned Single Judge, was that the learned Sole Arbitrator had not afforded adequate opportunity,

to Ogene, to participate and FAO(OS) 95/2017 Page 9 of 21 defend itself in the arbitration proceedings. It was also, inter alia, sought to be contended, in this regard, that Ogene was not aware of its having been proceeded ex parte and that, in fact, it had written, to its counsel, on 10th November 2014, to submit a reply, to the learned Sole Arbitrator, on its behalf.

19. On this aspect of the matter, the learned Single Judge has held thus: granted represented in is unable to agree with the number that sufficient The Court the submissions made by learned counsel for the

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as regards the learned Arbitrator having not afforded the

... Petitioner
adequate opportunity in the arbitration proceedings. The learned extracted passage shows Arbitrator of opportunities to the

... Petitioner
to file a statement of defence. However, the

... Petitioner
s counsel abruptly stopped appearing before the learned Arbitrator. It was for the

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to have followed up with its counsel and made sure that it is properly the arbitral proceedings. The order setting out the

... Petitioner
ex parte was passed by the learned Arbitrator on 22nd August, 2014. Even thereafter, hearings took place as is apparent from para 11 of the impugned Award. There was sufficient time for the

... Petitioner
to have diligently followed up the matter with its counsel and ascertained the progress of the arbitral proceedings. There is nothing stated about the date on which the

... Petitioner
contacted its counsel to find out about the progress of the arbitration case. The only date given is that the

... Petitioner
had sent a copy of the reply to its counsel on 10th November, FAO(OS) 95/2017 Page 10 of 21 in 2014. Why it was not done earlier is also not explained. The reasons given by the

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for not participating the arbitration proceedings is, therefore, not convincing at all. If indeed to the knowledge of the

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its counsel stopped appearing, then the

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clearly did not decide to make any alternative arrangement by engaging another counsel and following up the arbitration proceedings. In the circumstances, the Court is unable to accept the submission that the impugned Award is passed in violation of the principles of natural justice or that the Learned Arbitrator denied the

... Petitioner
a full opportunity of presenting its defence in the arbitration proceedings. The Court does not find any violation of Section 18 of the Act as is sought to be made out by the counsel for the

... Petitioner
. (emphasis supplied) 20. The learned Single Judge also found in para 16, of the impugned judgment, that, even after proceeding ex parte against Ogene, the learned Sole Arbitrator had not allowed TDBs claim mechanically, but had, in fact required evidence to be led by the claimant, perused the affidavits in evidence, filed by TDB as well as documents supporting TDBs claim. The award, it was held, had been passed only after discussing holistically, the evidence available before the learned Sole Arbitrator, and that, therefore, no infraction of Sections 28 (3) or

31(3) of the Act could, therefore, be said to have taken place. FAO(OS) 95/2017 Page 11 of 21 21. Invoking Section 37 of the Act, the appellant has preferred the present appeal before us.

22. We have heard Mr. Avijit Mani Tripathi, appearing for the appellant, and Mr. Jeevesh Tandon, appearing for the respondent, and have meticulously perused the record.

23. We may observe, at the outset, that our jurisdiction, under Section 34, or Section 37 of the Act, would also appear to be somewhat circumscribed by the following critical observations, which find place in the order of the Supreme Court in Sachin Gupta v K.S. Forge Metal (P) Ltd. (2013) 10 SCC540 There was no necessity for the learned Single Judge to convert itself into a court of first appeal. It was certainly not necessary to examine the dispute between the parties so minutely or to make such strong remarks against any of the parties.

24. Neither could the learned Single Judge, exercising jurisdiction under Section34 of the Act, have second guessed the findings of the learned Sole Arbitrator, nor can we, in further appeal therefroom, third guess the same. This principle may, in our perception, be justifiably regarded as jurisprudentially fossilized.

25. Keeping in mind the above caveat, and in view of the law applicable to Sections 34 and 37 of the Act, that, by now, stands crystallized, it is not necessary for us to delve deep into the various grounds set out in the appeal, or urged by learned FAO(OS) 95/2017 Page 12 of 21 Counsel at the bar. Suffice it to state that the appellant expresses its dissatisfaction both at the manner in which the learned Sole Arbitrator proceeded-which, in the appellants submission, infracts basis canons of natural justice-as well as at the merits of the award ultimately rendered by him-which, learned Counsel emphatically submits, suffers from fatal errors both of fact and law.

26. This Bench has, in the recent past, had several occasions to discuss the law relating to the scope of interference, with arbitral awards, under Section 34 of the Act. On a panoramic appreciation of the earlier existing judicial thought on the issue, as manifested by decisions ranging from Renusagar Power Company Ltd.

v. General Electric Company 1994 Supp. (1) SCC644to Associated Builders v. DDA (2015) 3 SCC49 this Court, in its decision in NHAI v. Hindustan Construction Company Ltd. MANU/DE/2699/2017 delineated the following propositions:-

"(i) The four reasons motivating the legislation of the Act, in 1996, were (a) to provide for a fair and efficient arbitral procedure, (b) to provide for the passing of reasoned awards, to ensure that the arbitrator does not (c) transgress his jurisdiction, and FAO(OS) 95/2017 Page 13 of 21 (d) to minimize supervision, by courts, in the arbitral process. (ii) The merits of the award are required to be examined only for examining whether the award is in conflict with the public policy of India. in certain specified circumstances, (iii) An award would be regarded as conflicting with the public policy of India if (a) it is contrary to the fundamental policy of Indian law, or (b) it is contrary to the interests of India, (c) it is contrary to justice or morality, (d) it is patently illegal, or (e) it is so perverse, irrational, unfair or unreasonable that it shocks the conscience of the court. (iv) An award would be liable to be regarded as contrary to the fundamental policy of Indian law, for example, if (a) it disregards orders passed by superior courts, or the binding effect thereof, or (b) it is patently violative of statutory provisions, or (c) it is not in public interest, or (d) the arbitrator has not adopted a "judicial approach", i.e. has not acted a fair, reasonable and objective approach, or has acted arbitrarily, capriciously or whimsically, or FAO(OS) 95/2017 Page 14 of 21 (e) the arbitrator has failed to draw an inference which, on the face of the facts, ought to have been drawn, or (f) the arbitrator has drawn an inference, from the facts, which, on the face of it, is unreasonable, or (g) the principles of natural justice have been violated. (v) The "patent illegality" had to go to the root of the matter. Trivial illegalities were inconsequential. (vi) Additionally, an award could be set aside if (a) either party was under some incapacity, or (b) the arbitration agreement is invalid under the law, Or (c) the applicant was not given proper notice of appointment of the arbitrator, or of the arbitral proceedings, or was otherwise unable to present his case, or (d) the award deals with a dispute not submitted to arbitration, or decides issues outside the scope of the dispute submitted to arbitration, or (e) the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or (f) the arbitral procedure was not in accordance with the agreement of the parties, or in

accordance with Part I of the Act, or FAO(OS) 95/2017 Page 15 of 21 (g) the award contravenes the Act, or (h) the award is contrary to the contract between the parties. (vii) "Perversity", as a ground for setting aside an arbitral award, has to be examined on the touchstone of the Wednesbury principle of reasonableness. It would include a case in which (a) the findings, in the award, are based on no evidence, or (b) the Arbitral Tribunal takes into account something irrelevant to the decision arrived at, or (c) the Arbitral Tribunal ignores vital evidence in arriving at its decision. (viii) At the same time, (a) a decision which is founded on some evidence, which could be relied upon, howsoever compendious, cannot be treated as "perverse", (b) if the view adopted by the arbitrator is a plausible view, it has to pass muster, (c) neither quantity, nor quality, of evidence is open to re-assessment in judicial review over the award. (ix) "Morality" would imply enforceability, of the agreement, given the prevailing mores of the day. "Immorality", however, can constitute a ground for interfering with an arbitral award only if it shocks the judicial conscience. FAO(OS) 95/2017 Page 16 of 21 (x) For examining the above aspects, the pleadings of the parties and materials brought on record would be relevant. (x) The court cannot sit in appeal over an arbitration award. Errors of fact cannot be corrected under Section 34. The arbitrator is the last word on facts."

27. In our judgment, dated 18th September, 2017 in FAO (OS) 227/2017 (MTNL v. Finolex Cable Ltd)., after having noted the above propositions applicable to Section 34 of the Act, we had further observed, with respect to the appellate jurisdiction conferred by Section 37 of the Act as under:-

"41. It is apparent, therefore, that, while interference by court, with arbitral awards, is limited and circumscribed, an award which is patently illegal, on account of it being injudicious, contrary to the law settled by the Supreme Court, or vitiated by an apparently untenable interpretation of the terms of the contract, requires to be eviscerated. In view thereof, the decision of the ld. Single Judge that reasoning of the arbitral award in this regard was based on no material and was contrary to the contract, cannot be said to be deserving of any interference at our hands under Section 37 of the Act. In a pronouncement reported at MANU/DE/0459/2015, MTNL v. Fujitshu India Pvt. Ltd. (FAO(OS) No.63/2015), the Division Bench of this court has held that an appeal under Section 37 is like a second appeal, the first

appeal being to the court by way of objections under Section 34. Being in the nature of a second appeal, this court would be hesitant to interfere, with the FAO(OS) 95/2017 Page 17 of 21 decision of the learned Single Judge, unless it is shown to be palpably erroneous on facts or in law, or manifestly perverse. 28. The following passages, from the judgment of a Division Bench of this Court in State Trading Corpn of India Ltd. v. Toepfer Intl Asia Pte Ltd, 2014 (5) RAJ301 also inform our conclusions: 6. 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 off 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 ones 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 FAO(OS) 95/2017 Page 18 of 21 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 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. FAO(OS) 95/2017 Page 19 of 21 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. (Emphasis supplied) 29. Applying the above principles to the case at hand, we are unable to discern any such infirmity, either in the award passed by the learned Sole Arbitrator, or in the impugned judgment dated 10th January, 2017 of the learned Single Judge, as would fatally imperil either. The submission, of Ogene, that there had been a violation of principles of natural justice, are obviously without merit. It is also significant to reiterate, in this context, that no challenge was laid, by Ogene or any of the other respondents before the learned Sole Arbitrator, to the order, dated 22nd August, 2014, passed by him under Section 25 of the Act, whereby the said respondents before him were proceeded ex parte.

30. In so far as the merits of the case are concerned, the evidence relied upon by the learned Sole Arbitrator cannot be FAO(OS) 95/2017 Page 20 of 21 said to be immaterial, neither, consequently, can the reliance, thereon by the learned Sole Arbitrator, be characterized as misplaced.

31. The view taken by the learned Sole Arbitrator is, at the very least, plausible. It cannot be said that the Arbitrator mis- interpreted any clause in the work order

between Ogene and TDB, or exhibited perversity in appreciating the facts of the case, the law applicable thereto, or the evidence available before him. We, at least, are equally interdicted, by precedent and statue, from re-appraising the same.

32. No infirmity can, therefore, be said to exist in the impugned judgment of the learned Single Judge, as would merit any interference by us, under Section 37 of the Act.

33. The appeal of Ogene has, therefore, necessarily to fail. It is, accordingly, dismissed without any order as to costs. C.HARI SHANKAR, J.

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