

Bharat Sanchar Nigam Limited Vs. Bwl Industries Pvt. Ltd.

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Court : Delhi

Decided On : Apr-23-2010

Judge : Manmohan, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 34, 34(2), 73 and 74; ;
[Arbitration Act, 1940](#)

Appeal No. : O.M.P. 415/2003

Appellant : Bharat Sanchar Nigam Limited

Respondent : Bwl Industries Pvt. Ltd.

Advocate for Def. : Bharti Badesra, Adv.

Advocate for Pet/Ap. : H.S. Phoolka, Sr. Adv.,; Sharat Kapoor and; Kanwar Faisal

Disposition : Petition dismissed

Judgement :

Manmohan, J.

1. Present petition has been filed under Section 34 of [Arbitration and Conciliation Act, 1996](#) (hereinafter referred to as 'Act, 1996') challenging the arbitral Award dated 4th October, 2003 passed by the Sole Arbitrator, Mr. Justice (Retd.) K.S.

Sidhu.

2. Mr. H.S. Phoolka, learned senior counsel for petitioner-objector impugns the findings of fact arrived at by the Arbitrator. He further submits that in view of the liquidated damages clause in the present Agreement, Arbitrator should have awarded damages/costs without saddling the petitioner-objector with the responsibility to prove the said damages. In this connection, Mr. Phoolka relies upon a judgment of the Supreme Court in Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd. reported in : (2003) 5 SCC 705 and the judgments of this Court in Union of India v. Hakam Chand and Co. reported in 2009 (1) Arb. L.R. 421 (Delhi) (DB) and Union of India v. Daulat Ram Industries reported in 2009 (2) Arb. L.R. 327 (Delhi).

3. In fact, the Arbitrator in the impugned Award has reached the conclusion that delay, if any, in furnishing the requisite documents did not have an adverse impact on the delivery of goods by respondent-claimant. The Arbitrator has further found that petitioner-objector had failed to place any material on record to show that it had suffered any loss or damages. The relevant findings arrived at by the Arbitrator are reproduced hereinbelow :

26. After sizing up the facts and circumstances mentioned above as a whole, I find myself unable to understand as to why the claimant did not furnish to the respondent copy of the documents, Ex. CW1/12 Colly, from 20.2.1997 to 26.9.1997. But this delay, for which the claimant may be held accountable, does not seem to have had much adverse impact in the delivery of the goods by the claimant to the respondent within a reasonable time after the T.A.C. had been issued to the claimant on 25.8.1997. This delay will also be considered next, while dealing with Point #3 stated as such in paragraph 18 of this award above.

Point #3

What relief, if any, is the claimant entitled to?

xxx xxx xxx

30. Furthermore, the respondent has not placed any material on record to prove that the alleged delay committed by the claimant in completing the supplies by 25.6.1998 instead of 28.2.1998 had caused any loss or damage to him for recovery of any compensation in that behalf....

(emphasis supplied)

4. Having heard the parties, I am of the view that the scope of interference by this Court with an arbitral award under Section 34(2) of Act, 1996 is extremely limited. Supreme Court in Delhi Development Authority v. R.S. Sharma and Company, New Delhi reported in (2008) 13 SCC 80, after referring to a catena of judgments including Oil & Natural Gas Corporation Ltd. (supra) has held that an arbitral award is open to interference by a court under Section 34(2) of the Act, 1996 if it is contrary to either the substantive provisions of law or the contractual provisions and/or is opposed to public policy.

5. It is settled legal position, both under [Arbitration Act, 1940](#) and to a even greater extent under Act, 1996, that arbitral tribunal's decision is generally regarded as final and courts cannot substitute its own evaluation on questions of law and facts to come to the conclusion that arbitral tribunal has acted contrary to the bargain between the parties. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisal of evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the Courts to take upon itself the task of being a judge on the evidence before the arbitrator (Refer to Sudarsan Trading Co. v. Government of Kerala and Anr. reported in : (1989) 2 SCC 38).

6. Consequently, this Court is of the view that findings of fact given by the arbitral tribunal are not liable to be interfered with unless such findings are perverse and unconscionable. Moreover, as held in Lesotho Highlands Development Authority v. Impregilo Spa and Ors. reported in 2005 UK HL 43, arbitrators do not exceed their powers simply by making a mistake. In Burchell v. Marsh reported in 58 U.S. 344 (1855), the United States Supreme Court held that if an award is within submission, and contains an honest decision of the arbitrators, then a Court would not set it aside for error, either in law or fact. According to the United States

Supreme Court, a contrary course would be a substitution of the judgment of the judiciary in place of the chosen forum, namely, the arbitrators and would make the award the commencement, not the end of the litigation.

7. Consequently, I am of the opinion that factual findings arrived at by the Arbitrator cannot be challenged on merits as that would amount to re-appreciation of evidence which is not permissible in Section 34 proceedings. In any event the same are not perverse or unconscionable.

8. As far as the issue with regard to liquidated damages is concerned, I am of the view that three learned Single Judges of this Court in *Indian Oil Corporation v. Lloyds Steel Industries Ltd.* reported in 144 (2007) DLT 659, *Haryana Telecom Ltd. v. Union of India and Anr.* reported in : AIR 2006 Delhi 339 and *Union of India and Anr. v. Samrat Press in O.M.P. 361/2002* decided on 3rd October, 2008 have held that the judgment of *Oil and Natural Gas Corporation Ltd. (supra)* is based upon the peculiar language of the contract therein as it specifically stipulated that liquidated damage was a 'genuine pre-estimate of damages duly agreed by the parties'. In the present case, the liquidated damages clause does not incorporate the said peculiar phraseology. Clauses 16.1 and 16.2 of the contract are reproduced hereinunder :

16.1 The date of delivery of the stores stipulated in the acceptance of tender should be deemed to be the essence of the contract and delivery must be completed not later than the dates specified therein. Extension will not be given except in exceptional circumstances. Should, however, deliveries be made after expiry of the contract delivery period, without prior concurrence of the Purchaser, and be accepted by the consignee, such deliveries will not deprive the Purchaser of his right to recover liquidated damages under Clause 16.2 below. However, when supply is made within 21 days of the contracted original delivery period, the consignee may accept the stores and in such cases the provision of Clause 16.2 will not apply.

16.2 Should the tenderer fail to deliver the stores or any consignment thereof within the period prescribed for delivery the Purchaser shall be entitled to recover % of the value of the delayed supply for each week of delay or part thereof,

subject to maximum of 5% of the value of the delayed supply; provided that delayed portion of the supply does not in any way hamper the commissioning of the other systems. Where the delayed portion of the supply materially hampers installation and commissioning of the other systems, L/D charges shall be levied as above on the total value of the purchase order. Quantum of liquidated damages assessed and levied by the purchase shall be final and not challengeable by the supplier.

9. In fact, this Court in Indian Oil Corporation v. Lloyds Steel Industries Ltd. (supra) held as under:

39. No doubt, the parties to a contract may agree at the time of contracting that, in the event of breach, the party in default shall pay a stipulated sum of money to the other. However, the stipulated sum has to be a genuine pre-estimate of damages likely to flow from the breach and is termed as liquidated damages. If it is not a genuine pre-estimate of the loss, but a amount intended to secure performance of the contract, it may be a penalty....

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41. It is clear from the above that Section 74 does not confer a special benefit upon any party, like the petitioner in this case. In a particular case where there is a clause of liquidated damages the Court will award to the party aggrieved only reasonable compensation which would not exceed an amount of liquidated damages stipulated in the contract. It would not, however, follow therefrom that even when no loss is suffered, the amount stipulated as liquidated damages is to be awarded. Such a clause would operate when loss is suffered but it may normally be difficult to estimate the damages and, therefore, the genesis of providing such a clause is that the damages are pre-estimated. Thus, discretion of the Court in the matter of reducing the amount of damages agreed upon is left unqualified by any specific limitation. The guiding principle is 'reasonable compensation'. In order to see what would be the reasonable compensation in a given case, the Court can adjudge the said compensation in that case. For this purpose, as held in Fateh Chand (supra) it is the duty of the Court to award compensation according to settled principles. Settled principles warrant not to

award a compensation where no loss is suffered, as one cannot compensate a person who has not suffered any loss or damage. There may be cases where the actual loss or damage is incapable of proof; facts may be so complicated that it may be difficult for the party to prove actual extent of the loss or damage. Section 74 exempts him from such responsibility and enables him to claim compensation inspite of his failure to prove the actual extent of the loss or damage, provided the basic requirement for award of 'compensation' viz. the fact that he has suffered some loss or damage is established. The proof of this basic requirement is not dispensed with by Section 74. That the party complaining of breach of contract and claiming compensation is entitled to succeed only on proof of 'legal injury' having been suffered by him in the sense of some loss or damage having been sustained on account of such breach, is clear from Sections 73 and 74. Section 74 is only supplementary to Section 73, and it does not make any departure from the principle behind Section 73 in regard to this matter. Every case of compensation for breach of contract has to be dealt with on the basis of Section 73. The words in Section 74 'Whether or not actual damage or loss is proved to have been caused thereby' have been employed to underscore the departure deliberately made by Indian Legislature from the complicated principles of English Common Law, and also to emphasize that reasonable compensation can be granted even in a case where extent of actual loss or damage is incapable of proof or not proved. That is why Section 74 deliberately states that what is to be awarded is reasonable compensation. In a case when the party complaining of breach of the contract has not suffered legal injury in the sense of sustaining loss or damage, there is nothing to compensate him for; there is nothing to recompense, satisfy, or make amends. Therefore, he will not be entitled to compensation [see *State of Kerala v. United Shippers and Dredgers Ltd.* : AIR 1982 Ker. 281]. Even in *Fateh Chand (supra)* the Apex Court observed in no uncertain terms that when the section says that an aggrieved party is entitled to compensation whether actual damage is proved to have been caused by the breach or not, it merely dispenses with the proof of 'actual loss or damage'. It does not justify the award of compensation whether a legal injury has resulted in consequence of the breach, because compensation is awarded to make good the loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be

likely to result from the breach. If liquidated damages are awarded to the petitioner even when the petitioner has not suffered any loss, it would amount to 'unjust enrichment' which cannot be countenanced and has to be eschewed.

42. It is too preposterous on the part of the petitioner to submit that it should get the liquidated damages stipulated in the contract even when no loss is suffered.

(emphasis supplied)

10. In *Union of India and Anr. v. Samrat Press* (supra) another Single Judge of this Court held as under:

13. Objection is raised to the aforesaid findings of arbitrator relying upon the Judgment of *ONGC v. SAW Pipes Ltd.* : (2003) 5 SCC 705. I, however find that, that case turned on the peculiar language of the agreement in question in that case. This Court also has in *Indian Oil Corporation v. Lloyds Steel Industries Ltd.* 2008 (1) R.A.J. 170 (Del) after noticing *ONGC* (supra) held that without damage/loss being proved, liquidated damages could not be allowed and no fault could be found with the arbitral award for the said reason.

14. Merely because the agreement provides for liquidated damages and the award does not allow liquidated damages for the reason of the interpretation of law by the arbitrator would not make the award contrary to the agreement so as to have the same set aside. The arbitrator is entitled to adjudicate legality or interpretation of a term of the agreement and not bound to follow the same literally. If the arbitrator by examining the legal effect of the agreement holds the same to be not entitling the petitioner to liquidated damages without proving loss or damage, the same does not call for interference with the arbitral award. The purpose of the 1996 Act was to reduce/limit the challenge to the arbitral awards. Of course, the Apex Court in *ONGC* (supra) has interpreted the new Act also to mean that the court is empowered to set aside the award if not in accordance with law. In my view, an arbitral award would be in accordance with law, if the correct law is applied, even though a wrong view or interpretation of the same has been taken.

15. In the facts and circumstances of the present case, the principle of law required application of facts and even if in such application of facts the arbitrator reaches a conclusion different from the one which the court may reach, the same still does not call for setting aside of the award. Only if, irrespective of the factual application, the conclusion reached by the arbitrator under no circumstance can be reached under the law, is in my respectful view a ground under Section 34 of the Act for setting aside of the award made out. In this regard, I may notice that ONGC (supra) had struck a different note than the then prevalent law. It had been held by a Constitution Bench of the Apex Court in *Fateh Chand v. Balkishan Das* : AIR 1963 SC 1405 that a provision in an agreement for liquidated damages did not ipso facto call for such damages to be awarded and to be entitled to damages, loss and damages had to be proved. The Apex Court in *ONGC (supra)*, relying upon the peculiar language in the agreement of the parties having arrived at a genuine pre-estimate of the loss which shall be suffered for the reason of the delay and further agreeing that assessment of such loss was difficult, had held the parties to be bound by the same and upheld the award of liquidated damages. Not with standing the said judgment, as in *Indian Oil Corporation (supra)*, the courts have, depending upon the facts of the case continued to follow the Constitution Bench judgment unless finding the language to be as in *ONGC* case. The arbitrator in the present case also has noticed that the agreement did not provide of the liquidated damages being a genuine pre-estimate and held the petitioner to be not entitled to the same. Thus, it cannot be said that the award on the said claim is contrary to the law prevailing or for that reason contrary to public policy. As long as a correct law is applied even if a wrong view of the same is taken, the arbitrator being a judge chosen by the parties themselves is empowered by the parties to finally decide the matter not only of fact but also of law and this Court does not sit in appeal over the award. See *Tribal Co-operative Marketing Development Federation of India Ltd. v Auro Industries Limited and Anr.* 98 (2002) DLT 654 and *Flex Engineering Ltd. v Antartica Construction Co. and Anr.* 2007 (2) ARB LR 387 (Delhi). The award cannot be set aside even if the decision appears erroneous. Even under the 1940 Act where the scope of interference with award was much more, the Apex Court in *Tarapore and Co. v. Cochin Shipyard Ltd. Cochin and Anr.* : AIR 1984 SC 1072 and *U.P. Hotels and Ors. v. U.P. State*

Electricity Board : AIR 1989 SC 268 held that arbitrator decision on a question of law is also binding even if erroneous and in P.V. Subba Naidu and Ors. v. Government of A.P. and Ors. : (1998) 9 SCC 407 the Apex Court further held that courts are not right in examining and interpreting the contract to see whether the claim was sustainable under the contract. I, therefore, do not find any merit in this objection also of the petitioner.

11. I further find that neither before the Arbitrator nor before this Court in the present objection petition any averment has been made that the present case belongs to a category where actual loss or damage is impossible to prove. Therefore, the judgment of the Division Bench in Hakam Chand & Co. (supra) has no applicability to the facts of the present case. Moreover, the case of Daulat Ram Industries (supra) has no applicability to the issue involved in the present case as the said judgment does not deal with the issue of liquidated damages but relates to an issue as to which price would prevail.

12. Consequently, in my view, as the Arbitrator has concluded on facts that petitioner-objector has suffered no loss, petitioner-objector is not entitled to any amount as liquidated damages.

13. Accordingly, present petition being devoid of merits is dismissed but with no order as to costs.

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