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

\+ O.M.P. 211/2000

AGRA COLD RETREADS PVT. LTD. & ANR. ..... Petitioners
Through: Mr. Ambareesh Singh Bhadauria, Advocate.

versus

INDAG RUBBER LTD & ANR. ..... Respondents
Through: Mr. Saurabh Tiwari & Mr. Jasmeet Singh, Advocates.

Date of Decision : FEBRUARY 18, 2010

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment? No.
2. To be referred to the Reporter or not? No.
3. Whether the judgment should be reported in the Digest? No.

J U D G M E N T

MANMOHAN, J (ORAL)

1. Present objection petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act, 1996") challenging the arbitral Award dated 28th April, 1999 passed by Shri P.M. Bakshi, learned sole Arbitrator. It is pertinent to mention that the sole Arbitrator had been appointed by the Indian Council of Arbitration in pursuance to the arbitration clause contained in the Licence Agreement dated 01 November, 1991. The arbitration clause reads as under :-

> *23.* *<u>ARBITRATION</u>*
>
> *Any dispute or difference arising between the parties as to the construction or effect of any term or provision of this Agreement or as to the amount or extent of any liability hereunder or as to any matter or thing in any way arising in connection with this Agreement shall be settled by arbitration in accordance with the Indian Arbitration Act, 1940. Arbitration shall be conducted according to the Rules of Arbitration of the Indian Council of Arbitration. The venue of arbitration shall be at New Delhi.*

2. Mr. Ambareesh Singh, learned counsel for petitioners-objectors submitted that since the Licence Agreement dated 01st November, 1991, which contained the arbitration clause, was executed during the currency of the Arbitration Act, 1940, the said agreement was void and incapable of performance in view of Section 56 of the Indian Contract Act, 1872. Consequently, according to him, there was no arbitration agreement in subsistence when the disputes were referred to arbitration.

3. Mr. Ambareesh Singh further submitted that the Licence Agreement dated 01st November, 1991 was subjected to the condition that if plant and machinery was not paid for and installed by 30th June, 1992, the said agreement would automatically stand terminated. He stated that as the plant and machinery was installed after 30th June, 1992, the agreement stood terminated and the arbitration clause also perished.

4. Mr. Ambareesh Singh also submitted that the impugned Award was passed in violation of principles of natural justice as the petitioners-objectors had not been served with any notice either by the Arbitral Tribunal or by the Indian Council of Arbitration.

5. Mr. Ambareesh Singh emphasised the fact that petitioner No.2, Shri V.S. Bhaduria was personally not a party to the aforesaid Licence Agreement and consequently, petitioner No.2 could not be fastened with any liability under the impugned Award. He pointed out that the Licence Agreement dated 01st November, 1991 had been executed by petitioner No.2 only as an authorised representative of petitioner No.1. In view of the aforesaid, Mr. Ambareesh Singh submitted that the impugned Award was *coram non judice* and vitiated by fraud.

6. On the other hand, at the outset, Mr. Saurabh Tiwari, learned counsel for respondent-claimant submitted that the present objection petition filed by the petitioners-objectors was beyond limitation as though the Award had been rendered on 28th April, 1999, the present petition had been filed on 07th August, 2000. In this connection, he drew my attention to Sections 34(3) and 36 of the Act, 1996 which read as under:-

> ***34. Application for setting aside arbitral award. –***
>
> *xxxx xxxx xxxx xxxx*
>
> *(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:*
>
> *Provided that if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.*
>
> *xxxx xxxx xxxx xxxx*

> ***36. Enforcement. -*** *Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the court.*

7. Mr. Tiwari painstakingly took me through the various communications including orders sent by the Indian Council of Arbitration as well as the learned Arbitrator to the petitioners-objectors. Mr. Tiwari also referred to Rules 13(a), 17(a), (b) & (d), 39, 45, 60 and 68(a) of the Indian Council of Arbitration to stress the fact that a very elaborate procedure had been prescribed in the Rules as to how the parties to the arbitration agreement had to be served. From the communications on record, he stated that not only the Indian Council of Arbitration but also the Arbitrator had, after complying with the aforesaid Rules, taken various steps to serve the present petitioners-objectors.

8. Mr. Tiwari, placed reliance upon Section 27 of the General Clauses Act, 1897 and illustrations (e) and (f) to Section 114 of Evidence Act, 1872 to submit that in view of the various communications addressed to the petitioners-objectors at their last known address, notice of arbitration should be deemed to have been served upon the petitioners-objectors.

9. Mr. Tiwari further submitted that despite the repeal of the Arbitration Act, 1940, the arbitration clause in the Licence Agreement would still survive. In this connection, he placed reliance upon a judgment of this Court

in ***M/s. Rapti Contractors Vs. Reliance Energy Ltd. & Ors.*** reported in ***2009 (4) R.A.J. 434(Del)*** wherein it has been held as under:-

> *"20. In Shin Satellite Public Co. Ltd. v. Jain Studios Ltd., AIR 2006 SC 963 the Hon'ble Supreme Court had held –*
>
> > *"The proper test for deciding validity or otherwise of an agreement or order is 'substantial severability' and not 'textual divisibility'. It is the duty of the court to severe and separate trivial or technical part by retaining the main or substantial part and by giving effect to the latter if it is legal, lawful and otherwise enforceable. In such cases, the Court must consider the question whether the parties could have agreed on the valid terms of the agreement had they known that the other terms were invalid or unlawful. If the answer to the said question is in the affirmative, the doctrine of severability would apply and the valid terms of the agreement could be enforced, ignoring invalid terms. To hold otherwise would be "to expose the covenanter to the almost inevitable risk of litigation which in nine cases out of ten he is very ill able to afford, should he venture to act upon his own opinion as to how far the restraint upon him would be held by the court to be reasonable, while it may give the covenantee the full benefit of unreasonable provisions if the covenanter is unable to face litigation."*
>
> *Applying the doctrine of severability in Shin Satellite (supra) the Court had held –*
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> > *"In the present case, Clause 23 relates to arbitration. It is in various parts. The first part mandates that, if there is a dispute between the parties, it shall be referred to and finally resolved by arbitration. It clarifies that the rules of UNCITRAL would apply to such arbitration. It then directs that the arbitration shall be held in Delhi and will be in English language. It stipulates that the costs of arbitration shall be shared by the parties equally. The offending and objectionable part, no doubt, expressly makes the arbitrator's determination "final and binding between the parties" and declares that the parties have waived the rights of appeal or objection "in any jurisdiction". The said objectionable part, in my opinion, however, is clearly severable as it is*

> *independent of the dispute being referred to and resolved by an arbitrator. Hence, even in the absence of any other clause, the part as to referring the dispute to arbitrator can be given effect to and enforced. By implementing that part, it cannot be said that the Court is doing something which is not contemplated by the parties or by 'interpretative process', the Court is re-writing the contract which is in the nature of 'novatio'. The intention of the parties is explicitly clear and they have agreed that the dispute, if any, would be referred to an arbitrator. To that extent, therefore, the agreement is legal, lawful and the offending part as to the finality and restraint in approaching a Court of law can be separated and severed by using a 'blue pencil'.*
>
> *21. Applying the ratio of the above said case to the case at hand I am of the opinion that the offending clause, i.e. the clause stipulating that the arbitration shall be governed by the provisions of the Indian Arbitration Act, 1940, is clearly severable from the rest of the agreement. Consequently the part of the agreement which clearly expresses the intention of the parties to refer their disputes to arbitration is valid and enforceable. A fortiori in case the agreement contemplates adjudication of disputes under the Indian Arbitration Act, 1940 which had been repealed on the day the arbitration agreement was invoked or even on the date when the agreement was executed, the disputes between the parties are to be adjudicated by the arbitration Act which is applicable on the day the arbitration agreement was entered between the parties. The learned counsel for the respondents is unable to show any provision or precedent that in case the agreement is for adjudication of disputes under an Act which had already been repealed when the agreement was executed, then the entire agreement, the intention of the parties to get the disputes resolved through arbitration, shall be negated completely and the Arbitration Agreement shall be void.*

10. Mr. Tiwari pointed out that even though there was a delay in installation of machinery but the same stood condoned and waived in view of the petitioners-objectors' no objection to installation of the said machinery and also in view of the petitioners-objectors subsequent conduct in dealing with the respondent-claimant.

11. Mr. Tiwari also stated that petitioner-objector No.2 was not only the Managing Director but also the guarantor and, therefore, both the petitioners-objectors were jointly and/or severally liable for the liabilities incurred under the aforesaid Licence Agreement. He placed reliance upon Section 128 of the Contract Act which reads as under:-

> *"**128. Surety's liability.**—The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract."*

12. Mr. Tiwari denied that the impugned Award was either vitiated by fraud or *coram non judice*.

13. In rejoinder, Mr. Ambareesh Singh stated that the petitioners-objectors received a copy of the Award only for the first time on 20th May, 2000 i.e. when they were served with a copy of Suit No.880/2000. He stated that prior to the said date, the petitioners-objectors had not received a copy of the impugned Award. He also pointed out that during execution proceedings when the file was inspected on 06th April, 2000 by the petitioners-objectors, they did not receive a copy of the impugned Award.

14. 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. The Supreme Court in ***Delhi Development Authority*** *Vs.* ***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. v. Saw Pipes*** reported in ***(2003) 5 SCC 705*** 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.

15. In fact, the Supreme Court in ***McDermott International Inc. Vs. Burn Standard Co. Ltd. & Ors.*** reported in ***(2006) 11 SCC 181*** has succinctly summed up the scope of interference by this Court by stating *"the 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc....."*

16. In my view, objections filed by the petitioners are within limitation as there is no proof on record indicating that a signed copy of the impugned award had been received by the petitioners. Since a very strict period of limitation is prescribed in Section 34(3) of the Act, 1996, limitation would only start from the date a copy of the award is received by the party. As there is nothing on record to indicate that the petitioners had been served with a copy of the impugned award, present petition cannot be held to be barred by limitation.

17. However, I am of the opinion that in view of the repeal of Arbitration Act, 1940, the arbitration clause incorporated in the Licence Agreement would not become void. In fact, Section 85 of the Act, 1996 clearly stipulates that the Act, 1996 shall apply in relation to arbitral proceedings which commence under an arbitration clause after the new Act came into force. Sections 21 and 85 of the Act, 1996 are reproduced hereinbelow:-

> ***"21. Commencement of arbitral proceedings. -****Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.*
>
> *xxxx xxxx xxxx xxxx*
>
> ***85. Repeal and saving. –***
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> *(1) The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby repealed.*
>
> *(2) Notwithstanding such repeal, -*
>
> *(a) The provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;*
>
> *(b) All rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act."*

18. I am also in agreement with the argument of the learned counsel for respondent-claimant that the arbitration clause contained in the Licence Agreement would survive the termination, if any. In my opinion, if this were not so, then arbitration which is an alternative disputes resolution mechanism would cease to have any relevance as normally disputes between the parties tend to arise after termination of the agreement only.

19. As far as the plea of violation of principles of natural justice is concerned, I am of the opinion that in view of the various notices and letters which were issued both by the Secretariat of the Indian Council of

Arbitration as well as by the arbitrator at the registered address and the last known address of the petitioners-objectors, it has to be presumed that the petitioners-objectors were duly served and petitioners-objectors had knowledge of the arbitral proceedings. It is pertinent to mention that the address mentioned by petitioner no.2 in his affidavit in support of the petition filed under Section 34 of the Act, 1996 is similar to the address at which various notices and letters had been addressed both by the Secretariat of the Indian Council of Arbitration and the learned Arbitrator. In my view, this is a case where service has been effected in accordance with Order 29 Rule 2 of Code of Civil Procedure, 1908 which reads as under:-

> "*29.* ***SUITS BY OR AGAINST CORPORATIONS***
>
> *XXX* *XXX* *XXX*
>
> ***2. Service on corporation***.—*Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served---*
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> *(a) on the secretary or on any director, or other principal officer of the corporation, or*
>
> *(b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office then at the place where the corporation carries on business."*

20. Consequently, this is a fit case for presuming that service has been effected in accordance with Section 27 of the General Clauses Act, 1897 read with illustrations (e) and (f) to Section 114 of the Evidence Act, 1872. Accordingly, in my opinion, the petitioners-objectors having deliberately chosen not to appear before the Arbitral Tribunal cannot now raise a grievance that the arbitral Award is in violation of principles of natural justice.

21. However, I am of the opinion, that no award could have been passed against the petitioner-objector No.2 as there was no arbitration agreement executed between petitioner-objector No.2 and the respondent-claimant. The arbitration clause reproduced hereinabove is a part of Licence Agreement executed between petitioner No.1 and the respondent. Petitioner-objector No.2 had executed the said agreement only as an authorised representative of petitioner-objector No.1 and not in his personal capacity. I may mention that Section 7 of the Act, 1996 defines an arbitration agreement to be an agreement by the parties to submit their disputes to arbitration and the said agreement has to be in writing. Since, in the present case, there is no written arbitration agreement between petitioner-objector No.2 and the respondent-claimant, no liability could have been fastened by the Arbitrator on the petitioner-objector No.2.

22. In view of the aforesaid, objections with regard to petitioner-objector No.2 are allowed while objections with regard to petitioner-objector No.1 are dismissed but with no orders as to costs. Consequently, petitioner-objector No.1 is liable to pay the entire awarded sum.

MANMOHAN,J

FEBRUARY 18, 2010
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