

(2022) 12 GAU CK 0037

Gauhati High Court

Case No: Arb.A. No. 3 Of 2019

M/S Nuvoco Vistas
Corporation Ltd

APPELLANT

Vs

M/S S.M. Engineers
(India) Pvt Ltd

RESPONDENT

Date of Decision: Dec. 22, 2022

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 34, 34(2), 34(2)(b), 37(1)(c)
- Registration Act, 1908 - Section 17
- Arbitration Act, 1940 - Section 30, 33
- Foreign Awards (Recognition And enforcement) Act, 1961 - Section 7(1)(b)(ii)

Hon'ble Judges: Parthivjyoti Saikia, J

Bench: Single Bench

Advocate: K. Goswami, D. Das

Final Decision: Dismissed

Judgement

1. Heard Mr. K. Goswami, learned senior counsel appearing for the appellant. Also heard Mr.D. Das, the learned senior counsel representing the respondent.

2. This is an application under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 seeking to set aside the judgment and order dated

29.09.2018 passed by the Addl. District Judge No.1 Kamrup (M) Guwahati in Misc. Arbitration Appeal No.25 of 2017.

3. The appellant is a registered company under the Companies Act, 1956. On 30.01.2012, it entered into an agreement with the respondent for hiring a

particular machine. The monthly rent was fixed at Rs.1,60,000/-plus service tax. The term of agreement was for twelve months from the date of

commissioning of the machine at the designated site. It was agreed between the parties that the appellant would carry away the machine from its

original site. Subsequently, the site of commissioning of the machine was changed to another place instead of the original intended site. Therefore, a

supplementary agreement was also entered into between the parties on 31.01.2012. The machine was delivered to the appellant and the tenure of the

agreement was to continue till 22.05.2013.

4. The machine was not returned by the appellant within stipulated time and therefore, the respondent sustained financial loss. However, in the month

February, 2015, the machine was returned to the respondent. They found that serious damage was caused to the machine because of lack of proper

maintenance by the appellant. Therefore, the respondent staked the claim of Rs.1,96,56,669/-.

5. The appellant has claimed that the machine which it had hired from the respondent was required to be installed on land, which made the same to be

an immovable property as per Section 2(6) of the Arbitration Act, 1908. Therefore, the appellant claimed that its agreement with the respondent

should have been registered under Section 17 of the Registration Act, 1908.

6. The dispute ultimately went to the Arbitrator. The Arbitration Tribunal agreed with the respondent holding that the respondent would be entitled to

be paid by the appellant, (1) the rent from May, 2013 to January, 2015, (2) amount of cost of repairing of the plant, (3) interest at the rate of 12% per

annum upon the total amount of arrear rent and cost of repair and some other reliefs.

7. Being aggrieved by the judgment of the Arbitrator, an appeal under Section 34 of the Act was filed. The learned appellate court agreed with the

decision of the Arbitrator and dismissed the appeal.

8. I have given my anxious considerations to the submissions made learned counsel of both sides.

9. Section 34 of the Act of 1996 is based on Article 34 of the UNCITRAL Model Law and the scope of the provisions for setting aside the award is

far less than it was under the Sections 30 or 33 of the 1940 Act. The new Act was brought into being with the express Parliamentary objective of curtailing judicial intervention. Section 34 significantly reduces the extent of possible challenge to an award.

10. Section 34 provides that an arbitral award may be set aside by a court on certain grounds specified therein. These grounds are:

1. Incapacity of a party
2. Arbitration agreement not being valid
3. Party not given proper notice of arbitral proceedings
4. Nature of dispute not falling within the terms of submission to arbitration
5. Arbitral procedure not being in accordance with the agreement

11. Section 34(2)(b) mentions two more grounds which are left with the Court itself to decide whether to set aside the arbitral award:

1. Dispute is not capable of settlement by arbitral process
2. The award is in conflict with the public policy of India.

12. Thus the powers of the court U/S. 34 is limited and courts should not expand their own powers granted by the statute. Any such attempts by the courts while exercising their powers under S.34 of the Arbitration and Conciliation Act, 1996 shall frustrate the purpose of the above said Act itself. 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.

13. For giving meaning to the term 'Public Policy', in *Renusagar Power Co. Ltd. vs. General Electric Co.*, 1994 Supp. (1) SCC 644, the Court has observed thus:-

66. Article V(2)(b) of the New York Convention of 1958 and Section 7(1)(b)(ii) of the Foreign Awards Act do not postulate refusal of recognition

and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is confined

to the recognition and enforcement being contrary to the public policy of the country in which the award is set to be enforced. There is nothing to indicate that the expression ""public policy"" in Article V(2)(b) of the New York Convention and Section 7(1)(b)(ii) of the Foreign Awards Act is not used in the same sense in which it was used in Article I(c) of the Geneva Convention of 1927 and Section 7(1) of the Protocol and Convention Act of 1937. This would mean that ""public policy"" in Section 7(1)(b)(ii) has been used in a narrower sense and in order to attract to bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression ""public policy"" in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.

14. Referring to Renusagar Power Co. Ltd. (supra) the Apex Court in Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.(AIR 2003 SC 2629)

has held ---

“The phrase 'Public Policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar's case (supra), it is required to be held that the award could be set aside if it is patently illegal. Result would be - award could be set aside if it is contrary to: -

(a) fundamental policy of Indian law; or

- (b) the interest of India; or
- (c) justice or morality, or
- (d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could

also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to

be adjudged void.â€

15. The Supreme Court of India in ONGC Vs Western Geo International Ltd. (2014) 9 SCC 263 further has expanded the scope of ""Public policy

including reasonableness, fundamental principles providing a basis for administration of Justice and enforcement of law in addition to the principles laid

down by the above said SAW pipes judgment (supra). Hence the term public policy as per the Western Geo Judgment includes all the following

aspects:

(i) Judicial Approach (Judicial approach ensures the authority to act in a fair, reasonable and objective manner and not based on some extraneous

considerations

(ii) Application of mind and recording reasons

(iii) Decision should not fall out of reasonableness if tested on the touch stone of Wednesbury principle of reasonableness

16. In Associate Builders v. Delhi Development Authority AIR 2015 SC 620, the Hon,ble Supreme Court has explained what constituted the

fundamental policy of Indian law. In that process, it extracted certain passages from its earlier decision in ONGC Ltd. v. Western Geco International

Ltd (supra).In para 40 of that judgment, it was observed as under:

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor

is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved

before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it,

untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest.

17. In *Associate Builders* (supra) the Apex Court also referred to the decisions in *P.R. Shah, Shares & Stock Brokers (P) Ltd.* (supra) where it was reiterated that the Court does not sit in appeal over the Award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. It was reiterated that the Award could be challenged only on the grounds mentioned under Section 34(2) of the Act.

18. Coming back the case in hand, the only ground taken by the appellant is that its agreement with the respondent should have been registered because the machine which the appellant hired, was required to be embedded into the earth for operating the same and then it becomes an immovable property. This ground does not hold good in the eye of law. The machine was transported by the appellant itself, and therefore, it is a movable property. I have reasons to disagree with the appellant that its agreement with the respondent should have been registered under the provisions of the Registration Act.

19. Now, this Court is of the opinion that the learned Additional District Judge has rightly appreciated the facts and circumstances of the case and dismissed the appeal.

20. The present application is devoid of merit and stands dismissed accordingly.