Mmtc Ltd. vs M/S.Vedanta Ltd. on 18 February, 2019

Equivalent citations: AIR 2019 SUPREME COURT 1168, 2019 (4) SCC 163, 2019 (3) ABR 17, 2019 (202) AIC (SOC) 5 (SC), (2019) 2 ARBILR 58, (2019) 2 CAL HN 129, (2019) 2 CIVLJ 560, (2019) 2 RECCIVR 481, (2019) 3 JCR 110 (SC), (2019) 4 SCALE 391, (2020) 2 MAH LJ 21, AIR 2019 SC (CIV) 1450, AIRONLINE 2019 SC 112

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Bench: Vineet Saran, Mohan M. Shantanagoudar

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1862 OF 2014

MMTC LTD. … APPELLANT

Versus

M/S VEDANTA LTD. … RESPONDENT

JUDGMENT

MOHAN M. SHANTANAGOUDAR, J.

This civil appeal arises out of the judgment and final order dated 09.02.2009 passed by a Division Bench of the High Court of Judicature at Bombay in Appeal No. 949 of 2002, affirming the judgment and order dated 05.08.2002 of the Learned Single Judge whereby the Appellant's Objections Petition challenging the Majority Award dated 27.06.2001 had been disallowed. Vide the Majority Award, the Appellant had been directed to pay certain amounts to the Respondent under their agreement dated 14.12.1993.

2. The brief facts leading to the instant appeal are as follows:

> M/s Sterlite Industries (India) Ltd., (renamed M/s Vedanta Ltd., the Respondent herein) was a manufacturer of continuous Cast Copper Rods. Vide the agreement dated 14.12.1993, MMTC Ltd. (the Appellant herein), a government company, was appointed as a consignment agent from whom the Respondent could avail services such as storage, handling and marketing of the copper rods produced by the Respondent. Such rods were to be stored at various godowns of the Appellant. The agreement dated 14.12.1993 contained an arbitration clause.

3. Importantly, under the aforementioned agreement, the Appellant raised its own invoices in the name of the customers of the products sold and delivered. Goods were to be sold only against payment of 100% advance by the customer to the Appellant, who then had to remit the same to the Respondent after deducting service charges (i.e. commission) at the rate of Rs. 500/- per metric tonne.

4. The aforementioned agreement was materially altered for the first time on 06.01.1994, in terms of a Memorandum of Understanding between the parties. This amendment enabled the Appellant to supply goods to customers against a letter of credit (usance or stand-by), i.e. without advance payment, while maintaining that it was the "total responsibility" of the Appellant to ensure the bona fides of the letter of credit furnished and that the principal and interest were paid on the due date for the supplies made against the letter of credit. In case of a stand-by letter of credit, it was further specified that it was the Appellant's responsibility, in the event of non-payment by the due date, to negotiate the stand-by letter of credit in a timely way and credit the sale proceeds to the Respondent. Interest was fixed at 18.25% per annum.

5. A further revision to the above terms was undertaken vide a meeting between the parties on 20.01.1994, the minutes of which indicate that the Appellant could thereafter extend credit to customers on its own terms and responsibility, and in case of credit being extended, payment to the Respondent was to be effected by the Appellant upon delivery of the copper rods to the customer.

6. The dispute in the instant matter pertains to supplies of the Respondent's copper rods made by the Appellant to Hindustan Transmission Products Ltd. (in short, "HTPL") after April 1995. Payment for the same were not made by HTPL to the Appellant, who also subsequently failed to make payment for the supplied goods to the Respondent. Hence, the Respondent invoked the arbitration clause under the agreement dated 14.12.1993 and the dispute was referred to a three-member arbitral tribunal.

7. The majority of the arbitral tribunal found in favour the Respondent, and vide its award dated 27.06.2001, inter alia directed the Appellant to pay to the Respondent a sum of Rs. 15,73,77,296/- with interest at the rate of 14% p.a. from 05.02.1997 till the date of the award and at the rate of 18% p.a. thereafter, as well as an amount of Rs. 2.25 crores as interest on overdue payment up to 05.02.1996. The said award was confirmed by the learned Single Judge of the High Court of Bombay as well as the Division Bench thereof.

8. There were several grounds of challenge raised by the Appellant before the learned Single Judge of the High Court; however, before the Division Bench as well as before this Court the main ground raised concerns the arbitrability of the dispute under the arbitration clause under the agreement dated 14.12.1993. This ground encompasses all other arguments raised by the Appellant. To elaborate, it is the case of the Appellant that it used to supply the goods of the Respondent to customers arranged by the Appellant as per the Agreement dated 14.12.1993 only. However, sometimes, the Appellant had to make a deviation from this procedure at the request of the Respondent, i.e. M/s Vedanta Ltd., by allowing customers arranged by M/s Vedanta Ltd. to lift its goods stored in the Appellant's godowns. It is further the case of the Appellant that whenever it

made this deviation, the Appellant was not bound by the contract between the Respondent and the relevant customer, inasmuch as such contract was independent of and totally different from the agreement dated 14.12.1993. Whenever there was a direct agreement between the Respondent and its customers (not arranged through the Appellant), the payment was to be made directly by the customers to the Respondent for which the Appellant would not be responsible. However, if the transaction took place pursuant to the agreement dated 14.12.1993, i.e. if the Appellant was supplying the Respondent's goods to customers booked through the Appellant, the Appellant would be responsible for collecting the sale consideration from the customers, and to remit the same to the Respondent by deducting commission as agreed. Therefore, the direct agreement between the Respondent and its customer HTPL in the instant case would not be binding on the Appellant, and consequently could not have been subjected to the arbitration proceedings that led to the arbitral award dated 27.06.2001.

9. On the contrary, the case of the Respondent is that there is no such distinction within the nature of transactions undertaken by the Appellant on behalf of the Respondent. Moreover, it is submitted that though there was an agreement between the Respondent and HTPL, the terms of such agreement were communicated to the Appellant, upon whose acceptance of such terms the agreement dated 14.12.1993 stood modified to such extent.

10. Before proceeding further, we find it necessary to briefly revisit the existing position of law with respect to the scope of interference with an arbitral award in India, though we do not wish to burden this judgment by discussing the principles regarding the same in detail. Such interference may be undertaken in terms of Section 34 or Section 37 of the Arbitration and Conciliation Act, 1996 (for short, "the 1996 Act"). While the former deals with challenges to an arbitral award itself, the latter, inter alia, deals with appeals against an order made under Section 34 setting aside or refusing to set aside an arbitral award.

11. As far as Section 34 is concerned, the position is well□settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii), i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.

It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)

(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the

conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See Associate Builders v. DDA, (2015) 3 SCC 49). Also see ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705; Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445; and McDermott International v. Burn Standard Co. Ltd., (2006) 11 SCC 181).

It is relevant to note that after the 2015 amendments to Section 34, the above position stands somewhat modified. Pursuant to the insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of Section 75 or Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Additionally, sub-section (2A) has been inserted in Section 34, which provides that in case of domestic arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the same states that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.

12. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the Court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the Court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the Court under Section 34 and by the Court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings.

13. Having noted the above grounds for interference with an arbitral award, it must now be noted that the instant question pertains to determining whether the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. However, this question has been addressed by the Courts in terms of the construction of the contract between the parties, and as such it can be safely said that a review of such a construction cannot be made in terms of re-assessment of the material on record, but only in terms of the principles governing interference with an award as discussed above.

14. It is equally important to observe at this juncture that while interpreting the terms of a contract, the conduct of parties and correspondences exchanged would also be relevant factors and it is within the arbitrator's jurisdiction to consider the same. (See McDermott International Inc. v. Burn Standard Co. Ltd. (supra); Pure Helium India (P) Ltd. v. ONGC, (2003) 8 SCC 593, D.D. Sharma v. Union of India, (2004) 5 SCC 325).

15. We have gone through the material on record as well as the Majority Award, and the decisions of the learned Single Judge and the Division Bench. The majority of the arbitral tribunal as well as the Courts found upon a consideration of the material on record, including the agreement dated 14.12.1993, the correspondence between the parties and the oral evidence adduced, that the agreement does not make any distinction within the type of customers, and furthermore that the

supplies to HTPL were not made in furtherance of any independent understanding between the Appellant and the Respondent which was not governed by the agreement dated 14.12.1993.

16. The Appellant has highlighted before us several correspondences addressed to it from the Respondent that refer to the fact that sales to HTPL had been made under the Respondent's contract with HTPL. Indeed, it is evident from the agreement dated 28.07.1994 between HTPL and the Respondent that a direct agreement existed between them. However, as is undisputed, the Appellant received its commission in its entirety for the HTPL transaction, and thus clearly was a beneficiary of the agreement between the Respondent and HTPL. Moreover, in this regard, it was rightly observed in the Majority Award that the Appellant could not show under what separate agreement it was entitled to commission from such sales other than the agreement dated 14.12.1993, and for what services, if its only role in the transaction was to allow HTPL to lift goods from its godowns.

17. Indeed, it is not the case of the Appellant that it only provided storage services to the Respondent by allowing the Respondent to store its goods in the warehouse of the Appellant (i.e. that it only acted as a warehouse for the Respondent). In fact, a series of correspondences amongst the Appellant, the Respondent and HTPL clearly reveals that the Appellant was also actively involved in the transaction in question entered into between the Respondent and HTPL, and as such was a beneficiary under their agreement, as observed supra. The Appellant released the Respondent's goods to HTPL as per the directions of the Respondent without raising any objection, and thereafter engaged in correspondence in respect of the transaction.

18. It would be appropriate to refer to some such communications amongst the Appellant, the Respondent and HTPL for illustrative purposes. For instance, as mentioned by the Respondent in a communication dated 19.09.1994 addressed to HTPL, the Appellant was to honour the terms and conditions of the agreement between the Respondent and HTPL. The said communication also referred to negotiations about issuance of a letters of credit in favour of the Appellant. Additionally, as can be seen from the correspondence from the Appellant to the Respondent dated 26.08.1994, the Appellant wrote to it to confirm that credit had to be supplied to HTPL at the discounted interest rate of 16.25% p.a., which was affirmed by the Respondent on the same day. At the same time, the correspondence dated 28.03.1995 from the Respondent to the Appellant discloses that a letter of credit issued by HTPL initially sent to the Respondent was forwarded to the Appellant with directions to despatch goods after verification of the letter of credit and other related papers.

19. The issuance of letters of credit in the name of the Appellant with respect to the HTPL transaction was similar to the practice adopted in case of letters of credit or demand drafts issued in all other transactions, whether directly negotiated by the Respondent, or procured through the Appellant, which suggests that it was the duty of the Appellant in this case as well to ensure that usance letter of credits issued were bona fide, and in case of stand□by letters of credit, that they were negotiated in time in case of failure of payment on the due date, in terms of the agreement dated 14.12.1993.

20. The Courts also rightly relied upon the communication dated 06.12.1995 from the Respondent to the Appellant adverting to the terms and conditions of the contract between the parties and referring to the fact that in respect of the sales made to HTPL in the period of April, May and July 1995, an amount of Rs. 9.2 crores together with interest was still to be received. The response to the above communication, from the Appellant to the Respondent, dated 08.12.1995, stated that the Appellant had taken steps to set the matter right, and that the Appellant had had certain internal difficulties which had since been resolved and the Respondent would have no grounds to complain thereafter. This communication clearly demonstrates the duty of the Appellant to recover the dues from HTPL and forward the same to the Respondent.

21. Another important communication rightly relied upon by the Courts is the Appellant's letter dated 24.01.1996 to the Respondent, informing it about the institution of a suit for damages by HTPL with respect to the quality of the goods supplied. This correspondence refers to HTPL as a customer introduced to the Appellant by the Respondent. Crucially, it was addressed in terms of the agreement dated 14.12.1993, which amounts to a clear admission that the sales made to HTPL were in terms of the said agreement.

22. In this view of the matter, it is not open to the Appellant to argue that the agreement between the Respondent and HTPL was independent of the agreement dated 14.12.1993 between the Appellant and the Respondent and that the latter did not apply to such transaction.

23. Moreover, as noticed in the Majority Award and also by the Courts, the oral evidence of the officers of the Appellant indicates that the Appellant did not make any effort to ensure that the letters of credits pertaining to the supplies made to HTPL were honoured, pointing towards gross negligence on the part of the Appellant.

24. Based upon the above discussion, in our opinion, the view taken in the Majority Award, as confirmed by the High Court in the exercise of its powers under Sections 34 and 37 of the 1996 Act, is a possible view based upon a reasonable construction of the terms of the agreement dated 14.12.1993 between the Appellant and the Respondent and consideration of the material on record. We are also of the opinion that the dispute was covered under the agreement between the Appellant and the Respondent dated 14.12.1993, and as such the dispute is governed by the arbitration clause under the said agreement. Thus, we find no reason to disturb the Majority Award on the ground that the subject matter of the dispute was not arbitrable.

25. Appeal is, therefore, dismissed and the order of the High Court of Judicature at Bombay in Appeal No. 949 of 2002 is affirmed.

.....J. [Mohan M. Shantanagoudar] .....J. [Vineet Saran]
New Delhi;

February 18, 2019.