

Soma Networks Software vs Canon India Pvt. Ltd on 12 February, 2018

IN THE COURT OF SHRI GIRISH KATHPALIA,
DISTRICT & SESSIONS JUDGE
SOUTH EAST : SAKET COURT, NEW DELHI.

ARBITRATION No. 420/2016 (21340/2016)

SOMA NETWORKS SOFTWARE
ENGINEERING PVT. LTD.
HAVING ITS REGISTERED OFFICE AT
A-133, NEETI BAGH, NEW DELHI 110049 PETITIONER

VERSUS

CANON INDIA PVT. LTD.
HAVING ITS REGISTERED OFFICE AT
D-179, OKHLA INDUSTRIAL AREA
PHASE-I, NEW DELHI 110020

. . . . RESPONDENT

Date of filing : 01.09.2016 First date before this court : 23.05.2017
Arguments concluded on : 01.02.2018 Date of Decision : 12.02.2018
Appearance: Ms. Smita Kant, counsel for petitioner Ms. Shweta Bharti, Shri J.K. Chaudhary
and Ms. Swet Shikha, counsel for respondent J U D G M E N T

1. By way of this petition, brought under the provisions of Section 34 of the Arbitration & Conciliation Act 1996, petitioner has sought setting aside of the arbitral award dated 02.05.2016, passed by learned Sole Arbitrator appointed at the Delhi International Arbitration Arbitration No. 420/16 (21340/16) Page 1 of 30 pages Soma Networks Software Engg Pvt. Ltd. vs Canon India Pvt. Ltd. Centre, whereby claim of the present respondent was partly allowed to the tune of Rs. 21,44,726/- with future interest at a rate of 18% per annum against the present petitioner. Reply to the petition was filed on behalf of respondent and I heard learned counsel for both sides, who took me through record.

2. Briefly stated, factual matrix, under which dispute between the parties originated is as follows.

2.1 By way of Rental Agreement dated 20.08.2008, parties entered into a fixed period agreement, whereunder two multi-functional colour printers with two trolleys, two stabilizers, two eCopy software and one WAM (hereinafter collectively referred to as "the said printers") were leased out on monthly rental of Rs. 37,856/- including

taxes by the present respondent to the present petitioner for a period of 36 months with effect from 31.12.2008 to 31.12.2011. The rental agreement stipulated that in case of delayed payments, the present petitioner would be liable to pay interest at a rate of 1.5% per month.

2.2 On the basis of the above rental agreement, the said printers were installed in the Gurgaon office of the present petitioner on 31.12.2008. Simultaneously, parties also entered into a service agreement towards maintenance of the said printers.

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In respect of printer no. 1, invoices till the month of October 2009 and in respect of printer no. 2, invoices till the month of November 2009 were cleared by the present petitioner. When despite respondent's repeated requests and reminders, the present petitioner did not clear its outstanding liability, respondent was constrained to terminate the rental agreement by way of repossession of the said printers on 05.07.2010.

2.4 Towards outstanding liability, the present respondent issued notice dated 19.07.2010 through its counsel. When petitioner chose to ignore the legal notice, respondent invoked arbitration clause of the rental agreement and issued notice dated 20.08.2010, proposing the name of a retired Additional District & Sessions Judge as sole arbitrator in terms with the arbitration clause. But the present petitioner opted to ignore even that notice and also neither accepted nor rejected name of the proposed arbitrator, nor suggested any other name.

2.5 Under these circumstances, the present respondent filed a petition under Section 11 of the Arbitration & Conciliation Act, 1996 before the Hon'ble Delhi High Court which was allowed, thereby appointing the learned sole arbitrator, whose award is presently under challenge.

3. The present petitioner joined the arbitral proceedings, which after going through completion of pleadings, admission/denial of Arbitration No. 420/16 (21340/16) Page 3 of 30 pages Soma Networks Software Engg Pvt. Ltd. vs Canon India Pvt. Ltd. documents, recording of evidence followed by marathon final arguments finally culminated into the impugned award. After an elaborate discussion of the rival factual and legal matrix setup by parties, the learned sole arbitrator allowed claim of the present respondent partly, holding the present respondent entitled to a sum of Rs. 21,44,726/- from the present petitioner with interest at a rate of 18% per annum. Hence, the present petition.

4. Broadly stated, petitioner has assailed the impugned award on two grounds. Firstly, it is contended on behalf of petitioner that there was no valid arbitration agreement between the parties. Secondly, the

present respondent took no steps to mitigate the loss in view of clause 6

(c) (ii) (ii) of the Rental Agreement and Section 73 of the Contract Act and the learned sole arbitrator fell in error by ignoring this aspect while passing the impugned award. On the other hand, respondent has supported the impugned award, contending that clause 13 of the Rental Agreement is a clear and lawful arbitration agreement and there was no violation of clause 6 (c) (ii) (ii) of the Rental Agreement or Section 73 of the Contract Act. On these two aspects, learned counsel for both sides took me through record and the judicial precedents. The said two aspects of challenge to the impugned award are being examined separately as follows.

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C L A U S E 13 o f R E N T A L A G R E E M E N T 5 . 1
Learned counsel for petitioner argued that according to the legal position, unless there is an explicit stipulation in the concerned agreement or clause to the effect that decision of the arbitrator shall be final and binding, there cannot be an arbitration agreement/clause. It was argued by learned counsel for petitioner that since clause 13 of the Rental Agreement, which is relied upon by the respondent and the learned sole arbitrator, does not explicitly stipulate that decision of the arbitral tribunal would be final and binding, it cannot be treated as arbitration clause. On this aspect, learned counsel for petitioner placed reliance on the judgments of Hon'ble Supreme Court of India in the cases of Jagdish Chander vs Ramesh Chander & Ors., 2007(2) RAJ 638 (SC); Bihar State Mineral Development Corporation & Anr. vs Encon Builders (I) (P) Ltd., (2003) 7 SCC 418; and K.K. Modi vs K. N. Modi & Ors., (1998) 3 SCC 573.

5.2 Per contra, learned counsel for respondent strongly contended that clause 13 of the Rental Agreement is complete in itself as a valid arbitration agreement. It was argued by learned counsel for respondent that it is the intention of the parties to an agreement that has to be kept in mind while deciding as to whether the agreement/clause in Arbitration No. 420/16 (21340/16) Page 5 of 30 pages
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question is a valid arbitration agreement/clause. Learned counsel for respondent placed reliance on the judgment of Hon'ble Supreme Court of India in the case of Rukmanibai Gupta vs Collector, Jabalpur & Ors., (1980) 4 SCC 556.

5.3 It would be apposite to first traverse through the legal position related to the meaning and content of "arbitration agreement".

5.4 Section 7 (1) of the Arbitration & Conciliation Act 1996 defines the term Arbitration Agreement thus:

"7. Arbitration Agreement - (1) In this part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."

As per further sub-sections of Section 7 of the Act, an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement but the same has to be in writing, whether by way of a document signed by parties or exchange of communications, claims and defence etc. 5.5 In the case of Bihar State Mineral Development Corporation & Anr. (supra), relied upon by counsel for petitioner, the Hon'ble Supreme Court of India held that the essential elements of an arbitration agreement are that there must be a present or a future Arbitration No. 420/16 (21340/16) Page 6 of 30 pages Soma Networks Software Engg Pvt. Ltd. vs Canon India Pvt. Ltd. difference in connection with some contemplated affair; that there must be clear intention of the parties to get settled such difference by a private tribunal; that the parties must agree in writing to be bound by the decision of such tribunal; and that the parties must be at ad idem.

5.6 In the case of K.K. Modi (supra), relied upon by counsel for petitioner, the Hon'ble Supreme Court of India held that amongst the attributes which must be present for an agreement to be considered as an arbitration agreement are that the agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement; that the jurisdiction of the tribunal to decide the rights of the parties must be derived either from the consent of the parties or from order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration; that the agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal; that the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides; that the agreement of the parties to refer their dispute to the decision of the tribunal must be intended to be enforceable in law; and that the agreement must contemplate that the tribunal will make a decision upon dispute which is already formulated at the time when a reference is made to the tribunal. The Hon'ble Supreme Court of India further observed that while there are no conclusive tests, by and large one can follow a set of guidelines in Arbitration No. 420/16 (21340/16) Page 7 of 30 pages Soma Networks Software Engg Pvt. Ltd. vs Canon India Pvt. Ltd. deciding whether the agreement is to refer an issue to an expert or whether the parties have agreed to resolve the disputes through arbitration. It was held that nomenclature used by the parties is not conclusive and the court has to examine the true intent and purport of the agreement.

5.7 The judgment in the case of Jagdish Chander (supra) is relied upon by learned counsel for petitioner only on the limited observation of the Hon'ble Supreme Court of India that one of the attributes of arbitration agreement is that the parties should have agreed that decision of the arbitral tribunal will be binding on them.

5.8 In the case of Rukmanibai Gupta (supra) relied upon by learned counsel for respondent, the Hon'ble Supreme Court of India while dealing with the provisions under the Arbitration Act 1940 held that an arbitration agreement is not required to be in any particular form and what is required to be ascertained is whether the parties have agreed that if disputes arise between them in respect of the subject matter of the contract, such disputes shall be referred to arbitration, then such an arrangement would spell out an arbitration agreement.

5.9 In the case of Karnataka Power Transmission Corporation Ltd. vs Deepak Cables (India) Ltd., (2014) 11 SCC 148, Arbitration No. 420/16 (21340/16) Page 8 of 30 pages Soma Networks Software Engg Pvt. Ltd. vs Canon India Pvt. Ltd. the Hon'ble Supreme Court of India recapitulated various judicial precedents on the issue under discussion and held thus :

"8. From the aforesaid provision, it is graphically clear that unless an arbitration agreement stipulates that the parties agree to submit all or certain disputes which have arisen or which may arise in respect of defined legal relationship, whether contractual or not, there cannot be reference to an arbitrator. To elaborate, it conveys that there has to be intention, expressing the consensual acceptance to refer the dispute to an arbitrator. In the absence of an arbitration clause in an agreement, as defined in Sub-section 4 of Section 7, the dispute/disputes between the parties cannot be referred to the arbitral tribunal for adjudication of the disputes".

In the said case, the concerned arbitration clause of the contract specifically stipulated about finality and bindingness of the decision of the Engineer upon the parties. But the Hon'ble Supreme Court of India while carrying out analysis of the concerned clause observed thus :

"24. There is also a stipulation that his decision in respect of every matter so referred to shall be final and binding upon the parties until the completion of works and is required to be given effect to by the contractor who shall proceed with the works with due diligence. To understand the intention of the parties, this part of the clause is important. On a studied scrutiny of this postulate, it is graphically clear that it does not provide any procedure which would remotely indicate

that the Engineer concerned is required to act judicially as an adjudicator by following the principles of natural justice or to consider the submission of both the parties. ..."

5.10 In the case of Jagdish Chander (supra) also, the Hon'ble Supreme Court of India recapitulated various judicial pronouncements on the issue under consideration and held thus :

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"8. This court had occasion to refer to the attributes or essential elements of an arbitration agreement in K.K. Modi vs K. N. Modi & Ors., (1998) 3 SCC 573: 1998 (2) R.A.J. 1, Bharat Bhushan Bansal vs U.P. Small Industries Corporation Ltd., 1999(2) SCC 166: 1999(1)R.A.J 378 and Bihar State Mineral Development Corporation & Anr. vs Encon Builders (I) (P) Ltd., (2003) 7 SCC 418: 2003 (3) R.A.J. 1. In State of Orissa vs Damodar Das, 1996 (2) SCC 216, this Court held that a clause in a contract can be construed as an 'arbitration agreement' only if an agreement to refer disputes or differences to arbitration is expressly or impliedly spelt out from the clause. We may at this juncture set out the well settled principles in regard to what constitutes an arbitration agreement :

(i) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and a willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.

(ii) Even if the words 'arbitration' and 'arbitral tribunal (or arbitrator)' are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause

being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are : (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put
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forth their case before it. (d) The parties should have agreed that the decision of the Private Tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to Arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains words which specifically excludes any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the Authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the Authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

(iv) But mere use of the word 'arbitration' or 'arbitrator' in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an

agreement requiring or Arbitration No. 420/16 (21340/16) Page 11 of 30 pages
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contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future. (emphasis supplied) 5.11 In the case of Jagdish Chander (supra) the concerned clause in the agreement stipulated that if during continuance of partnership any dispute arose, the same shall be mutually decided by partners or shall be referred for arbitration if the parties so determine. The Hon'ble Supreme Court of India took a view that the expression "determine" used in the concerned clause reflected intention of the parties that they are required to reach a decision by application of mind as to whether the dispute be referred to arbitration or not. The Hon'ble Supreme Court of India categorically held that if the clause had merely said that in the event of disputes arising between the parties, they shall be referred to arbitration, it would have been an arbitration agreement.

5.12 In the case of K.K. Modi (supra) the concerned clause of the agreement was :

"3. ... implementation will be done in consultation with the financial institutions.

For all disputes, clarifications etc in respect of implementation of this agreement, the same shall be referred to the Chairman, IFCI or his nominees whose decision will be final and binding on both the groups".

Despite the stipulation of finality and bindingness of the decision of IFCI Chairman and despite the use of words "arbitration" in communication between the parties, the Hon'ble Supreme Court of India held it not to Arbitration No. 420/16 (21340/16) Page 12 of 30 pages
Soma Networks Software Engg Pvt. Ltd. vs Canon India Pvt. Ltd. be an arbitration agreement because intention of parties was not to have any judicial determination on the basis of evidence led before the Chairman IFCI, nor was the Chairman IFCI required to base his decision only on the material placed before him by the parties and their submission and he was free to make his own inquiries and apply his own expertise with or without help of other experts.

5.13 The above discussed judicial precedents would reflect that the cases where emphasis was laid on the stipulation of finality and bindingness in the agreement are those in which the concerned clause did not specifically stipulate the procedure of dispute resolution to be arbitration under the applicable arbitration law. The ratio laid down in all those judicial pronouncements clearly is that mere stipulation of finality and bindingness, on which so much of emphasis was laid by

learned counsel for petitioner, is not the decisive factor while arriving at a decision as to whether the agreement or the clause under consideration is an arbitration agreement. It is the concerned clause or agreement which has to be read in its entirety in order to deduce the intention of the parties as to whether the intention was to get the disputes referred to arbitration.

5.14 Falling back to the present case, in order to arrive at intention of the parties in the process of examining the challenge to the validity of arbitration clause, it would be necessary at the outset to refer Arbitration No. 420/16 (21340/16) Page 13 of 30 pages Soma Networks Software Engg Pvt. Ltd. vs Canon India Pvt. Ltd. to the said clause, which is as under.

"13. All disputes or differences arising between the parties in respect of these terms and conditions shall be settled by arbitration under the provisions of the Arbitration and Conciliation Act 1996. The venue of arbitration shall be Delhi".

5.15 It would also be significant to examine clause 14 of the Rental Agreement, which is as follows.

"14. This agreement shall, subject to the dispute resolution procedure herein above set out in clause 13, be subject to the exclusive jurisdiction of courts of Delhi and shall be governed by and construed in accordance with the laws of India".

5.16 From above two clauses, an irresistible conclusion is that the parties had expressed clear and unambiguous intention that all disputes arising between them in respect of the Rental Agreement shall be settled by arbitration; that the said arbitration shall be under the Arbitration and Conciliation Act 1996; that the seat of arbitration shall be in Delhi; and that the jurisdiction for adjudication of disputes shall be of the Delhi courts and the said resort to Delhi courts shall be subject to the parties adopting the dispute resolution procedure stipulated in clause 13 of the Rental Agreement.

5.17 As held in the case of Jagdish Chander (supra) non-use of Arbitration No. 420/16 (21340/16) Page 14 of 30 pages Soma Networks Software Engg Pvt. Ltd. vs Canon India Pvt. Ltd. words "arbitration" and "arbitral tribunal" or "arbitrator" would not detract a clause from being interpreted as an arbitration agreement if the attributes or elements of arbitration agreement are established. As further quoted above from the said judgment, the stipulation of finality

and bindingness of the decision of the arbitrator has to be looked for in a case where the concerned clause does not use the words "arbitration" or "arbitral tribunal" since if those expressions are not used, the court has to look for other attributes of arbitration agreement. Therefore, merely on account of absence of an explicit stipulation in clause 13 of the Rental Agreement regarding finality and bindingness, the said clause cannot be held to be not an arbitration clause since all the attributes of an arbitration agreement are clearly established.

5.18 Clause 13 of the Rental Agreement stipulated the process of "arbitration" not vaguely or loosely but specifically as an exercise under the Arbitration and Conciliation Act of 1996, Section 35 whereof explicitly lays down the finality and bindingness of an arbitral award on not just the warring parties but even their successors in interest. It is the content and not form of the clause which has to be kept in mind.

5.19 In an exercise to deduce intention of the parties, it also would be significant that as mentioned above, in clause 13 of the Rental Agreement, parties even arrived at agreement qua the seat of arbitration which also shows that they intended to refer their disputes to arbitration.

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Soma Networks Software Engg Pvt. Ltd. vs Canon India Pvt. Ltd. 5.20 Even clause 14 of the Rental Agreement conveys clear intention of the parties that disputes shall be taken to courts of Delhi only subject to the dispute resolution procedure set out in clause 13. In other words, parties were more than sufficiently conscious that for resolution of their disputes, they have to fall back upon clause 13 only, which also is a significant indicator of their intention to refer disputes to arbitration.

5.21 Unlike in the case of Karnataka Power Transmission (supra) in the present case, clause 13 of the Rental Agreement specifically stipulates that the dispute resolution procedure has to be the procedure laid down under the Arbitration and Conciliation Act 1996. It is also not a case where the private tribunal contemplated by the parties for dispute resolution is free to decide as per his own expertise etc. The tribunal contemplated has no option, but to follow the procedure laid down under the Arbitration & Conciliation Act, 1996.

5.22 Further, it is not a case of appointment of arbitrator by one of the parties unilaterally. The learned sole arbitrator was appointed by the Hon'ble Delhi High Court in the proceedings under Section 11 of Arbitration and Conciliation Act 1996, applying clause 13 of the Rental Agreement.

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 Soma Networks Software Engg Pvt. Ltd. vs Canon India Pvt. Ltd. 5.23 There is yet another aspect. In all the judicial pronouncements, cited by both sides, the interpretation given to the concerned clause was such that the clause in itself was not rendered redundant. But in the present case, going by the interpretation given to clause 13 of the Rental Agreement by learned counsel for petitioner, the said clause would be rendered totally redundant and would leave unanswered quandary as to why the parties inserted a redundant clause in their agreement. In the proceedings under Section 34 of the Arbitration and Conciliation Act, the court cannot give such an interpretation to a clause of the contract which would make the clause redundant.

5.24 In view of above discussion, I am unable to uphold the petitioner's objection that clause 13 of the Rental Agreement was not an Arbitration Clause between the parties.

CLAUSE 6 (c) (ii) (ii) OF RENTAL AGREEMENT

6. Learned counsel for petitioner argued that in terms of Section 73 of the Contract Act, the present respondent was duty bound to mitigate losses by selling away the said printers after repossession, which was not done. It was further argued that even clause 6 (c) (ii) (ii) of the Rental Agreement specifically stipulated that money from selling the said printers had to be deducted while satisfying claims of the present Arbitration No. 420/16 (21340/16) Page 17 of 30 pages Soma Networks Software Engg Pvt. Ltd. vs Canon India Pvt. Ltd. respondent but the same was not done. It was argued that instead of selling away the said printers after repossession, the present respondent deducted a sum of Rs. 10,000/□per printer as notional value of the same, which was upheld by the learned sole arbitrator and thereby the arbitrator ventured into interpretation and thereby rewriting of clause 6

(c) (ii) (ii) of the agreement and that crept in illegality into the award. It was argued that the learned sole arbitrator gave no reasons justifying a sum of Rs. 10,000/□ per printer as a fair notional price of the same. Learned counsel for petitioner placed reliance on the judgment of Hon'ble Supreme Court of India in the case of Sharma & Associates Contractors Pvt. Ltd. vs Progressive Constructions Ltd., (2017) 5 SCC

743.

7. Per contra, learned counsel for respondent argued that the learned sole arbitrator has given detailed reasons for accepting a sum of Rs. 10,000/□ per printer as notional value of the said printers after repossession of the same. It was argued that computers and peripherals,

by their very nature become obsolete very soon and their market value drastically falls, so the said printers after repossession could have been sold only as a scrap and that value of the said printers would have been much lesser. It was argued that the learned sole arbitrator faced with two views namely actual sale price and approximate sale price accepted the latter view keeping in mind the nature of goods, so there was no illegality in the view taken by the learned sole arbitrator and opting for Arbitration No. 420/16 (21340/16) Page 18 of 30 pages Soma Networks Software Engg Pvt. Ltd. vs Canon India Pvt. Ltd. one view instead of the other does not amount to interpreting or rewriting the contract.

Learned counsel for respondent placed reliance on the judgments of Hon'ble Supreme Court of India in the cases of M. Lachia Setty & sons Ltd. vs Coffee Board, Bangalore, (1980) 4 SCC 636; Richmond Mercantile Ltd. F Z C vs Viner gy International Pvt. Ltd., MANU/MH/1079/2016; State Trading Corporation of India Ltd. vs M/s Toepfer International Asia Pte Ltd., FAO (OS) 242/2014 decided on 02nd July 2014; Rashtriya Ispat Nigam Ltd. vs M/s Dewan Chand Ram Saran, Civil Appeal No. 3905/12 decided on 25.04.2012 by the bench of Hon'ble Mr. Justice H.L. Gokhale; Fiza Developers and Inter□ Trade Pvt. Ltd. vs AMCI (I) Pvt. Ltd. & anr., (2009) 17 SCC 796; and Maharashtra State Electricity Distribution Company Ltd. vs Datar Switchgear Ltd. & Ors., MANU/SC/0017/2018.

8. To start with, it would be apposite to refer to clause 6 (c) (ii)

(ii) of the Rental Agreement which is at the fulcrum of this discussion and the same is worded as follows.

"6. Notwithstanding anything contrary contained in this agreement, this agreement may be terminated by CIPL forthwith (without being liable in any manner to the hirer for the same) during the fixed period of hire (as stated in the schedule I) and the Equipment will be repossessed by the CIPL if:

(a)

(b)

(c)

(ii) When CIPL brings this agreement to an end for one of the Arbitration No. 420/16 (21340/16) Page 19 of 30 pages Soma Networks Software Engg Pvt. Ltd. vs Canon India Pvt. Ltd.

reasons given above, the hirer shall pay to CIPL :

(a) all the rental charges and maintenance charges hirer owe to CIPL on the date of end of the agreement;

(b) any costs in relation to the Equipment and services and collecting the rental or maintenance charges;

(c) compensation of CIPL's loss of profit computed as mentioned below.

This will be the sum of the fixed monthly rental charges hirer would have to pay during the remainder of the period of hire less the total of the following :

(i)

(ii) the money from selling the Equipment after all deduction have been taken".

9. The above mentioned clause, according to petitioner could not be stretched to cover notional price of the said printers, since the concerned clause specifically stipulated that the equipment had to be sold and the cost recovered has to be deducted while computing the compensation, but since the learned sole arbitrator approved of the notional price of the said computers, the award is bad in law.

10. This argument of petitioner has been examined in detail by the learned sole arbitrator in the impugned award. The learned arbitrator took a view that the witness of the present respondent is a marketing personnel and it is nobody's case that the said printers were not owned by the respondent and it is also nobody's case that after the contract period of 36 months, the said printers would have been purchased by the respondent and that being so, the present petitioner has no concern at all as to whether the printers were actually sold or not. Further, the learned sole arbitrator also observed that even the present Arbitration No. 420/16 (21340/16) Page 20 of 30 pages Soma Networks Software Engg Pvt. Ltd. vs Canon India Pvt. Ltd. petitioner did not lead any evidence to challenge the notional value of the said printers. After discussing the material on record, the learned sole arbitrator delivered a finding of fact that the amount of Rs. 10,000/□per printer is not imaginary value but the same is based on factual criteria.

11. In the case of Richmond Mercantile Ltd. FZC (supra), the Hon'ble Bombay High Court discussed the judgment of Hon'ble Supreme Court of India in the case of Murlidhar Chiranjilal vs Harishchandra Dwarkadass, MANU/SC/0113/1961 (referred to before the learned arbitrator on behalf of present petitioner) and observed thus :

"60. Insofar as the judgment of the Supreme Court in case of Murlidhar Chiranji Lal (supra) relied upon by the learned senior counsel for respondent is concerned, it is held by the Supreme Court that the petitioner is debarred from claiming any part of damages which is due to his neglect to take such steps and it is his duty to take all reasonable steps to mitigate the loss consequent on the breach. In the facts of this case, the petitioner had taken various steps to mitigate the loss. The petitioner had examined two witnesses whose evidence remained uncontroverted. The arbitral tribunal has rendered a finding of fact that even in respect of those two shipments, there was a loss suffered by the petitioner inspite of the steps taken by the petitioner to mitigate the loss. The said judgment of the Supreme Court thus would not assist the case of the respondent".

In the present case also, owing to the nature of goods involved, i.e., printers, had the same been actually sold in the market, the same would
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Soma Networks Software Engg Pvt. Ltd. vs Canon India Pvt. Ltd. not have fetched even Rs. 10,000/□ per printer, which is the notional value accepted by the learned sole arbitrator. It cannot be disputed that the pace with which technology is growing in this country, all electronic items become obsolete in a matter of few months and thereafter can be sold only as scrap. In such a scenario, instead of selling away the said computers in market to fetch much lower price, if the present respondent opted to take notional value at a rate of Rs. 10,000/□ per printer, which was rather to the benefit of the present petitioner, it cannot be found fault with and consequently, view taken by the learned arbitrator also cannot be held to be not sustainable.

12. The concerned clause 6 (c)(ii)(ii) of the Rental Agreement uses the expression "money from selling the equipment" and not an expression "money after selling the equipment" or an expression "money from selling the equipment in market". As mentioned above, it is nobody's case that upon expiry of contract period, the said printers would have automatically become property of the petitioner by way of hire□ purchase or even by way of subsequent sale. As also mentioned above, the present petitioner did not lead an iota of evidence to establish that had the said printers been sold in open market or to petitioner itself, the same would have fetched more than Rs. 10,000/□ per printer. Admittedly, the said printers were used by the present petitioner for commercial purposes and large number of printouts had already been taken by the time the said printers were repossessed. In the backdrop of
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Soma Networks Software Engg Pvt. Ltd. vs Canon India Pvt. Ltd. such circumstances, the concerned clause was amenable to multiple interpretations and the view taken by the learned

sole arbitrator being one of those, upholding the notional price of the said printers was a plausible view and it cannot be said that the learned sole arbitrator ventured beyond his jurisdiction.

13. In the case of Rashtriya Ispat Nigam Ltd. (supra) the Hon'ble Supreme Court of India held thus :

"29. In any case, assuming that clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator. The legal position in this behalf has been summarized in paragraph 18 of the judgment of this court in SAIL vs Gupta Brother Steel Tubes Ltd. (supra) and which has been referred to above.

Similar view has been taken later on Sumitomo Heavy Industries Ltd. vs ONGC Ltd. reported in [2010 (11) SCC 296] to which one of us (Gokhale J.) was a party. The observations in paragraph 43 thereof are instructive in this behalf. This paragraph 43 reads as follows :

43. The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one.

One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal.

As held by this Court in Kwaliti Mfg. Corpn. v.

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Central Warehousing Corpn*. The Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so the decision of the umpire has to be accepted as final and binding.

*[2009 (5) SCC 142] (emphasis supplied)

14. Besides, in the case of National Highways Authority of India vs Oriental Structural Engineers Pvt. Ltd., MANU/DE/0080/2015, the Hon'ble Delhi High Court referred to the judgment of Hon'ble Supreme Court of India in the case of Steel Authority of India Ltd. vs Gupta Brother Steel Tubes Ltd., (2009) 10 SCC 63 in which it was held that an error by the arbitrator related to interpretation of contract is an error within his jurisdiction and is not an error on the face of the award and is not amenable to corrections by the courts. It was further held that the legal position is no longer res integra that the arbitrator having been made final arbiter of resolution of disputes between the parties, the award is not open to challenge on the ground that arbitrator reached at a wrong conclusion. Traversing through various judicial pronouncements, the Hon'ble Delhi High Court held that if we were to start analyzing the contract between the parties and interpreting the terms and conditions thereof and which will necessarily have to be in the light of the contemporaneous conduct of the parties, it Arbitration No. 420/16 (21340/16) Page 24 of 30 pages Soma Networks Software Engg Pvt. Ltd. vs Canon India Pvt. Ltd. will be nothing else than sitting in appeal over the arbitral award and that is not permissible.

15. The scope of judicial review of an arbitral award is akin to review under Article 226 of the Constitution of India of the decision of bodies, where it is a settled principle of law that judicial review is of the decision making process and not of the decision itself on merits and the same cannot be converted into an appeal. Even Section 34 (2) (a) of the Act of 1996 amply clarifies the grounds of challenge on the lines of violation of principles of natural justice in making of the award or invalidity of the arbitral agreement and non arbitrability of disputes arbitrated and composition of the arbitral tribunal or arbitral procedure being not in accordance with the agreement between the parties. None of the legislated grounds permits to challenge an arbitral award on merits.

16. In the case of Delhi Development Authority vs Bhardwaj Brothers, MANU/DE/1753/2014, a division bench of the Hon'ble Delhi High Court observed thus :

"It cannot also be lost sight of that non-conferring of finality on the arbitral awards not only affects the speed and expense of arbitration but also has a more subtle consequences of, extensive judicial review changing the nature of the arbitral process to an even greater extent. If arbitration becomes simply another lever of decision making, subject to judicial review on merits, arbitrators may begin to decide cases and write opinions in such a way as to insulate their awards Arbitration No. 420/16 (21340/16)

against judicial reversal producing opinions that parrot the appropriate statutory standards in conclusory terms, but suffer from a lack of reasoned analysis. Such a shift from the arbitral model in which decision makers are free to focus solely on the case before them rather than on the case as it might appear to an appellate court, to the administrative model, in which decision makers are often concerned primarily with building a record for review, in my opinion would substantially undercut the ability of arbitrators to successfully resolve disputes. The courts therefore have no business weighing the merits of the grievance, considering whether there is equity in a particular claim or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court may deem meritorious.

The courts if start undertaking to determine the merits of the grievance, would be usurping the function which under the Arbitration Act, 1996 is entrusted to the arbitration tribunal. This plenary review by the courts of the merits would make meaningless the provisions that the arbitral award is final, for in reality it would almost never be final".

17. It would be significant to note that in the case of Maharashtra State Electricity Distribution Company Ltd. (supra) also, the Hon'ble Supreme Court of India dealt with the issue of mitigation of damages as a separate chapter of the judgment and observed thus :

"60. Mr. Rafique Dada also countered the argument of the appellant on mitigation of damages with the submission that this aspect was specifically considered and contention of the appellant in this behalf was rejected not only by the arbitral tribunal but by the High Court as well. He referred to the relevant portion of the discussion in the award as well as the judgments.

We find that the arbitral tribunal has dealt with this aspect and held that the contract objects were custom built in Arbitration No. 420/16 (21340/16) Page 26 of 30 pages Soma Networks Software Engg Pvt. Ltd. vs Canon India Pvt. Ltd.

the following manner :

55. Respondents submitted that the claimants did not make any effort to mitigate the loss suffered.

The submission is without any merit for more than one reason. In the first instance the contract objects manufactured in pursuance of the orders of the respondents were custom built, i.e. to the specifications laid down by the respondents and these contract objects cannot be disposed in open market. Datar deposed with reference to Ex. C16 that efforts were made to sell the contract objects stranded in the factory to other electricity boards but those efforts did not succeed. It was contended by the respondents that the claimant should have dismantle the stranded contract objects and sold the components thereof. The submission is only required to be slated to be rejected. Once a electronic instrument is dismantled, then the value almost becomes nil. In any event, the claimants have established that efforts were made to mitigate the loss.

61. The learned Single Judge as well as the Division Bench of the High Court has given its imprimatur to the aforesaid findings. It, therefore, becomes apparent that the objects in question were manufactured by respondent no. 2 to suit the specific needs of the appellant and they could not be used otherwise. Therefore, there was no possibility on the part of respondent no. 2 to make an endeavour to dispose of the same in order to mitigate the losses".

18. The judgment in the case of Sharma & Associates Contractors Pvt. Ltd. (supra) was referred to by the learned counsel for petitioner to buttress her argument that in contractual disputes, parties have to be strictly governed by the terms of contract and in such cases, Arbitration No. 420/16 (21340/16) Page 27 of 30 pages Soma Networks Software Engg Pvt. Ltd. vs Canon India Pvt. Ltd. equity has no role to play. That being so, according to learned counsel for petitioner, the respondent should have strictly adhered to the above mentioned clause and should have adjusted the actual sale price of the said printers instead of resorting to notional price and the learned sole arbitrator, by allowing the notional price to be deducted fell in error of law, therefore, the impugned award is liable to be set aside.

19. But the judgment in the case of Sharma & Associates Contractors Pvt. Ltd. (supra) came up in totally distinct factual and legal situation with an altogether different context. In the said case, tender floated by X was awarded to Y with permission for sub-contract; Y sub-contracted the work to the respondent, who further sub-contracted the work to the appellant; payment dispute between appellant and respondent was referred to the arbitrator, who passed award in favour of appellant; Hon'ble Single Judge of the High Court affirmed the award but Hon'ble Division Bench set aside the same and hence the issue came up before the Hon'ble Supreme Court of India. The Hon'ble Supreme

Court of India framed the issue as to whether the contract between the respondent and Y could govern the relationship between the appellant and the respondent. The Hon'ble Supreme Court of India answered the issue in negative, holding that since appellant in its contract with the respondent was satisfied with the escalation clause, without insisting for ensuring that enhancement of rates by the principal employer X in favour of Y would ensure flowing of the same benefit to the appellant as well, Arbitration No. 420/16 (21340/16) Page 28 of 30 pages Soma Networks Software Engg Pvt. Ltd. vs Canon India Pvt. Ltd. whereas the respondent had ensured the same while entering into contract with Y, the contract between the respondent and Y could not be extended to the appellant, though the respondent thereby deprived the appellant that benefit.

It is in this context that the Hon'ble Supreme Court of India held that equity has no role to play where parties are governed by a contract and the dispute is a contractual dispute.

20. There is no allegation in the present case that the learned sole arbitrator did not adopt a judicial approach or acted in violation of jus naturale. It is also nobody's case that the learned sole arbitrator has not acted bonafide or has not dealt with the subject in a fair, reasonable and objective manner or that the decision of the learned sole arbitrator was actuated by any extraneous consideration. No perversity or irrationality in the award has been made out nor it is contended to be a case of non-application of mind by the learned sole arbitrator.

21. In view of above discussion, I am unable to uphold the petitioner's objection that the impugned arbitral award is vitiated on the grounds of abrogation of clause 6 (c) (ii) (ii) of the Rental Agreement and/or Section 73 of the Contract Act.

CONCLUSION

22. As mentioned above, the impugned arbitral award was Arbitration No. 420/16 (21340/16) Page 29 of 30 pages Soma Networks Software Engg Pvt. Ltd. vs Canon India Pvt. Ltd. challenged only on two grounds, which have been discussed and rejected above.

23. I find no merit in the objections raised against the impugned arbitral award. Consequently, the petition is dismissed. A copy of this judgment along with original record of learned arbitrator be sent back and petition file be consigned to records.

Announced in the open court on
(GIRISH KATHPALIA) GIRISH

this 12th day of February, 2018
District & Sessions Judge

KATHPALIA

South East, Saket Courts

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