

M/S. Karnataka State Co-Operative vs M/S. United Commercial Company on 30 January, 2020

IN THE COURT OF THE LXXXIII ADDITIONAL CITY CIVIL
AND SESSIONS JUDGE AT BENGALURU CITY[CCH-84]

PRESENT: Sri S.A. HIDAYATHULLA SHARIFF,
B.A., LL.M.,
LXXXIII Additional City Civil and
Sessions Judge

Dated this the 30th day of January 2020

COM.A.S.No.45/2012

petitioner: M/s. Karnataka State Co-operative
Marketing Federation Limited, No.9,
Cunningham Road, P.B.No.150,
Bangalore-560052.
Represented by its Managing
Director, Sri. H.G.Shivananda and
Murthy, (Respondent in Arbitration)

[By Sri. SPK, Advocate]

/v e r s u s/

Respondents: 1. M/s. United Commercial Company,
Kalibari Road, Silchar-788001,
District Cachor, Assam State,
Represented by its Partner Sri.
Mahaveer Prasaar Jain, (Claimant
in Arbitration).

Sri. Kukkaji Ramakrishna Bhat,
Sole Arbitrator,
District & Sessions Judge (Retd),
F-112, 4C, 1st Floor, Central

2

CT 1390_Com.A.S.45-2012_Judgment .doc

Chambers, 2nd Main Road,
Gandhinagar, Bangalore-560009.

[R1 by: Sri. GKM, Advocate,
R2 by: Arbitrator]

Date of institution of the suit	:	26/04/2012		
Nature of the suit	:	Arbitration suit		
Date of commencement of recording of the evidence	:			
Date on which the Judgment was pronounced.	:	30/01/2020		
	:	Year/s	Month/s	Day/s
Total duration		07	09	04

(S.A. Hidayathulla Shariff)
LXXXIII ACC & SJ: Bengaluru

The petitioner M/s. Karnataka State Co-operative Marketing Federation Limited has filed this petition U/S.34 of Arbitration & Conciliation Act against the 1st respondent M/s. United Commercial Company to set aside the arbitral award dated 31/1/2012 made in

A.C.No.8/2019 by the sole arbitrator in the matter of

3

CT 1390_Com.A.S.45-2012_Judgment .doc

dispute between the petitioner and the 1st respondent.

Consequently to allow the counter claim of the petitioner

and to dismiss the claim made by the 1st respondent in

A.C.No.8/2009.

2. The brief facts of the case as stated in the petition by the petitioner is that the 1st respondent who was the claimant before the Arbitrator filed claim petition with a prayer to pass an award for payment of Rs.1,20,55,000/- towards the balance amount alleged to be payable to the

1st respondent along with interest thereon @ 24% per annum from 13/4/2005 till realization of the amount.

3. The case of the 1st respondent who was the claimant before the Arbitrator in brief is that it is a partnership firm dealing in commodities including sugar had entered into a memorandum of understanding dated 5/3/2005 with the petitioner agreeing to purchase 2325 Metric tons of premium quality granulated white sugar @ 16,550/- per metric ton. The memorandum of understanding was followed by addendum dated 4
CT 1390_Com.A.S.45-2012_Judgment .doc

15/3/2005. The 1st respondent also claimed that the petitioner is the seller and the 1st respondent is the buyer under the memorandum of understanding with M/s.

Astral Exim International represented by Mrs. Bhavana Viswanath is the facilitator. The 1st respondent has also claimed that the seller under the MOU clearly stated that it certified, represented and warranted with full corporate authority and responsibility certified that it could fulfill the requirement of the MOU and could provide the product. The 1st respondent also contended that the word 'representative' after the word 'seller' is an insertion with a pen in the MOU. It was agreed that proportionate to the payment released by the buyer to the seller after inspection and clearance of stock, the buyer has to issue NOC to the seller so that amount would be released to

the Associate Agency by the seller. The 1 st respondent also contended that the associate agency of the seller was M/s. Super Commercial Company (SCCO) Limited at Nagpur. It is further stated by the 1 st respondent that

5

CT 1390_Com.A.S.45-2012_Judgment .doc

the petitioner in its letter dated 29/1/2015 insisted that in order to contain the price of Rs.16.55 per KG the entire amount shall be remitted to the petitioner and it was stated that clause 9 of MOU stage wise payment detailed expected from the buyer was also stated. The 1 st respondent further contended that it did not enter into any agreement with the associate agency namely M/s. SCCO and for all practical purposes the petitioner who had received all the money from the 1 st respondent is bound to be the seller and is answerable and accountable for the same. The 1st respondent further contended that though MOU is executed on 5/3/2005 the payment made to the extent of 3,24,00,000/- related to various dates by way of DDs purchased between 20/2/2005 and 12/3/2005 and the receipts were given on 17/3/2005. The 1st respondent further contended that another payment of Rs.9,00,000/- was made by the 1 st respondent to the petitioner by way of DD on 25/5/2005 and another sum of Rs.50,00,000/- on 5/3/2005 and

6

CT 1390_Com.A.S.45-2012_Judgment .doc

receipts were issued for the same, ultimately resulting in

total payment of Rs.3,83,00,000/- from the 1st respondent to the petitioner.

4. The 1st respondent in its claim petition further contended that it wrote a letter on 12/3/2005 to transfer partial funds to SCCO Nagpur and the associate agency informed the 1st respondent that unless and until they receive the monies the product would not be dispatched. The 1st respondent explaining the said situation further contended that there was delay in the dispatch and that the 1st respondent ultimately was upset with the transaction. The 1st respondent communicated a letter dated 21/9/2005 to the petitioner enclosing letter of SCCO, Nagpur dt. 10/9/2005 and requesting the petitioner to take further steps for the payment of the balance amount of Rs.1,20,55,000/- and out of this amount the 1st respondent agreed to waived off Rs.6,00,000/- towards excess railway charges. The respondent in the claim statement further contended that

7

CT 1390_Com.A.S.45-2012_Judgment .doc

ultimately the SCCO, Nagpur handed over pre-post dated cheques to the petitioners to the extent of Rs.1,06,55,000/- payable to the 1st respondent with the assurance that the cheque could be converted into DDs. However, the cheques were not converted into DDs as agreed and that the problem cropped up in this regard.

5. The 1st respondent in its claim statement further

contended that it had made the payment to the petitioner and there was an agreement between the petitioner and associate agency whereby the petitioner had accepted post dated cheques towards the repayment of balance and as such the 1st respondent got issued a legal notice on 24/3/2007, calling upon the petitioner to repay a sum of Rs.1,14,55,000/- with regard to supply of sugar along with admitted rate of interest @ 24% per annum. The 1st respondent in its claim statement further contended that having waited for a long time issued notice calling upon for appointment of arbitrator. The 1st respondent in the claim statement has further alleged that the petitioner

8

CT 1390_Com.A.S.45-2012_Judgment .doc

did not take action against the SCCO, lot of money invested by the 1st respondent was wasted and petitioner has not acted with responsibility and the 1st respondent had withdrawn concession of Rs.6,00,000/- shown to the petitioner. In the claim petition, 1st respondent has claimed a sum of Rs.1,20,55,000/- along with interest from the petitioner.

6. The petitioner has contested the claim petition before the Arbitral Tribunal by filing its written defense by taking of all legal grounds and contentions. The petitioner in its written defense has contended that the claim petition filed by the 1st respondent before the Arbitral Tribunal suffered from non joinder of parties and

the 1st respondent has failed to observe the terms and conditions of MOU dated 5/3/2005. The petitioner in its written defense has further contended that it is neither responsible nor accountable for the claim made by the petitioner before the arbitral tribunal as it has already been absolved of its responsibility under the

9

CT 1390_Com.A.S.45-2012_Judgment .doc

memorandum of understanding and it is not even liable to pay cost of the arbitration proceedings.

7. The sole arbitrator on the basis of the pleadings of the parties has framed following 10 issues:

1) Whether the claimant proves that there exists relationship of buyer and seller between the claimant and the respondent in respect of the subject matter of transaction involved in the claim?

2) Whether the respondent proves that the claim petition is liable to be dismissed for non joinder of M/s. Super Commercial Company as a party to this proceeding?

3) Whether the respondent proves that the claimant has failed to observe the terms and conditions of the memorandum of understanding dated 5/3/2005 and thereby violated the same?

4) Whether the respondent proves that it is neither responsible nor accountable to the claimant in relation to the transaction under the Memorandum of Understanding and the respondent is absolved of its responsibility under the memorandum of understanding?

5) Whether the claimant proves that it has made in all payment of Rs.3.83 crores to the respondent and

10

CT 1390_Com.A.S.45-2012_Judgment .doc

therefore the respondent is liable to account for the same?

6) Whether the claimant proves that the respondent was liable to make good the short supply of sugar and to refund the balance amount to the claimant?

7) Whether the claimant proves that, it is entitled to

recover Rs.1,20,55,000/- from the respondent with regard to the short supply of sugar by M/s. Super Commercial Company, Nagpur, with interest at 24% per annum?

8) Whether the respondent proves that it is not liable to bear the costs of arbitration in these proceedings?

9) Whether the claimant is entitled to an award as prayed?

10) What award or order?

8. Based on the above mentioned issues, parties

have lead their oral and documentary evidence and

addressed their arguments. The Arbitral Tribunal by its

award dated 31/1/2012 has allowed the claim of the 1st

respondent and rejected the contentions of the petitioner.

By stating the above mentioned facts, the petitioner has

challenged the impugned award dated 31/1/2012 passed

11

CT 1390_Com.A.S.45-2012_Judgment .doc

by the learned sole Arbitrator in A.C.No.8/2009 on

following grounds:

9. That the findings given, conclusion arrived at, decision taken and the very award of the sole Arbitrator, allowing the claim petition, are totally arbitrary, erroneous and totally not sustainable in law. The award cannot stand the test of the requirements contemplated U/S.34 of the Arbitration & Conciliation Act, 1996.

Therefore, the present application/ appeal is bound to be entertained by this court, in the matter of the said issue in question.

10. The findings, conclusions and the very Arbitral Award dt. 31/1/2012 passed by the sole Arbitrator are totally arbitrary, erroneous and opposed to law.

The

findings and the very award are violative of Section 34 of the Arbitration Act and the very Arbitral Award is bound to be set aside/ quashed in view of the law contemplated U/S.34 of Act.

12

CT 1390_Com.A.S.45-2012_Judgment .doc

11. The MOU dt. 5/3/2005 entered into between the parties which is marked as Ex.P.1 is the basic document which clinches the issue in this case. But, unfortunately, the Arbitral Tribunal has crept into serious jurisdictional error in not properly understanding and appreciating the said document MOU and therefore there is an error apparent on the face of the record and on this ground alone the Award passed by the Arbitrator needs to be set aside and the present application/ appeal is bound to be allowed in law.

12. In as much as, the entire payments have been made by the 1st respondent institution at the instance and as per the statement and NOC given by the agency appointed by the purchaser M/s. United Commercial Company, the respondent cannot be found fault with in the transaction. Therefore the claim ought to have been dismissed by the Arbitrator.

13. The legal position of the buyer and seller of SCCO has been totally misunderstood and

13

CT 1390_Com.A.S.45-2012_Judgment .doc

M/S. Karnataka State Co-Operative vs M/S. United Commercial Company on 30 January, 2020
misinterpreted by the Arbitrator in the case and therefore
the award cannot stand in law.

14. That several correspondences have been taken place between the buyer and the supplier which correspondences clearly show that the transaction has taken place. Therefore, the claim ought to have been rejected by the arbitrator.

15. In as much as the payments have been made as per the instructions of the agent appointed by the claimant, the applicant cannot be found at fault with the transaction, which the Hon'ble Arbitrator has failed to appreciate.

16. That the MOU, Ex.P.1 entered into between the parties has not been scrupulously and appropriately appreciated by the Hon'ble Arbitrator. At one stage the Arbitrator has also culled about a portion of MOU and appears to have gone into minute details, but, the sum and substance of the MOU has not been appreciated by the Arbitrator.

14
CT 1390_Com.A.S.45-2012_Judgment .doc

17. In the cross examination elicited on behalf of the claimant to Sri. K.P.Ithal, some questions have been put to him asking regarding the dates of the affidavits for which, Mr. Ithal has answered that documents are already produced and therefore, dates of documents ought to have been enough. This would not amount to

any vital admission, which the Arbitrator has failed to appreciate. There is no proper appreciation of evidence and material and record by the Hon'ble Arbitrator.

18. Hon'ble Arbitrator has not properly considered all the terms of the agreement (MOU) in the context of admissions given by the witnesses for the claimant.

19. There is vital error by the Hon'ble Arbitrator in not understanding and appreciating the mandatory provisions of Indian Evidence Act and also has not followed the mandatory procedure contemplated under Sections 24, 28 and 31(3) of the Arbitration & Conciliation Act, 1996. The learned Arbitrator has miserably failed to apply the substantive law while

15

CT 1390_Com.A.S.45-2012_Judgment .doc

interpreting the agreements which has resulted in misreading and misinterpretation of terms of contract in various documents. Further, the learned Arbitrator ought to have decided the dispute in accordance with the terms of the contract and taking into consideration the usages of the trade between the parties.

20. Some portion of the evidence let in by the claimant are beyond the pleadings and no amount of evidence can be allowed in the absence of the pleadings. Therefore this also is a vital defect in the order passed by the Honorary Arbitrator.

21. The bunch of documents produced and marked

by Sri. Ithal on behalf of the applicant herein has not been appreciated and weighed appropriately by the Hon'ble Arbitrator.

22. As regards the issues framed by the Hon'ble Arbitrator, the issue in respect of item No.3 pertaining to the compliance, the strict terms and conditions of MOU have not complied with by the claimant, and this has not

16

CT 1390_Com.A.S.45-2012_Judgment .doc

been considered by the Arbitrator though pointed out by the applicant herein.

23. The applicant herein who was the respondent before the Arbitral tribunal, has proved beyond doubt that it is neither responsible nor the accountable for the accounts of the claimant beyond all the reasonable doubt in respect of transactions between them as framed in MOU, and as such, he has been absolved of the responsibility. The reasons assigned by the Hon'ble Arbitrator to negative the issue are not cogent and satisfactory.

24. As regards the proof of Rs.3.83 crores to the applicant herein, the claimant has failed to show that the payments have been made to the applicant. Unfortunately, the Hon'ble Arbitrator has held that all that payments are proved by the claimant and that, the applicant has to account for the same.

25. As regards SCCO also, the Hon'ble Arbitrator

received from the claimant with regard to the short supply of sugar by SCCO, Nagpur with high rate of 24% interest.

26. There is no clarity about the vital transactions, terms of MOU and interpretation regarding the payment and liability. Therefore, on this ground also the Arbitrator's Award is liable to be set aside.

27. In respect of some of the documents, the applicant had got xerox copy/ true copy of the same, and sought to produce before the Arbitrator, but the Hon'ble Arbitrator refused the documents on the ground that the same are not authenticated, original or certified copies and as such, the same could not have been marked. The production was totally denied. This has prejudiced case of the respondent in the arbitration and rejection of the documents has weighed with the Hon'ble Judge.

28. It is submitted that the Hon'ble Arbitrator has gone into serious jurisdictional error in disallowing the I.A filed by the respondent before the Arbitrator seeking

one for implementing of the supplier viz. M/s. Super Commercial Company, Nagpur (SCCO), as a vital party to the proceedings. It is submitted that, in as much as the said SCCO played vital role in the transactions and led

the respondent in the proceeding for the purpose of the transactions the said party viz. SCCO was very proper and necessary party to be brought before the Arbitrator for effectively proving this defense before the Hon'ble Arbitrator. If only the said SCCO was to be brought on record as a party to the proceedings, the conclusion of the Arbitrator would have been otherwise.

29. The said award is contrary to several judgments of Hon'ble Supreme Court of India, including ONGC Ltd. v. Saw Pipes Ltd., reported in AIR 2003 SC 2629, AIR SCW 2010 page 5027 and AIR SCW 2010 page 5326. The said award is erroneous on the basis of record with regard to material propositions of law and their interpretation. The award conflicts with the substantive law and the terms of the agreement governing the parties.

19

CT 1390_Com.A.S.45-2012_Judgment .doc

The said award is wholly unfair to the applicants and is unreasonable and shocks the conscience of the Court, being violative of public policy. The said award is opposed to the law of the land and in violation of various judgments of the Hon'ble Supreme Court of India, as well as the respective High Courts. As such the said award is liable to be interfered with.

30. On a bare perusal of the award passed by the Arbitration Tribunal it will be clear that there are grave and patent errors in the said award and grave prejudice

has been done to the applicants herein. The award passed by the arbitration tribunal is completely biased and is liable to be set aside on this ground alone.

31. That the Hon'ble Arbitrator has totally erred in allowing the claim petition made by the claimant before the Arbitrator and in directing the applicant herein to make good a sum of Rs.1,20,55,000/- calling it as the balance amount payable to the claimant along with

20

CT 1390_Com.A.S.45-2012_Judgment .doc

interest at 24% interest per annum, from 13/4/2005 till the date of the claim (15/1/2010).

32. That the Hon'ble Arbitrator has totally erred in coming to the conclusion that the applicant herein has totally failed to produce effective evidence to prove his defense in the said regard, relating to the very disputed documents and MOU.

33. That the Hon'ble Arbitrator has totally erred in imposing a cost of Rs.3,20,000/- against the applicant herein without there being any legal basis for the same.

34. The learned Arbitrator has totally failed to understand and interpret the purport and the very object of the MOU entered into between the parties and the true intent of the same.

35. The impugned award also suffers from various other legal infirmities which will be pointed out at the time of final hearing of the arguments.

36. In response to the court notice, the 1st respondent appeared before the court and contested the
21
CT 1390_Com.A.S.45-2012_Judgment .doc

petition by filing objections statement by denying the entire grounds alleged by the petitioner in challenging the impugned order and sought for dismissal of the petition.

37. Based on the contents of the petition and objections filed to it, the points that arise for consideration of this court are :

1) Whether the petitioner proves that the impugned award dated 31/1/2012 passed in A.C.No.8/2009 by the Hon'ble sole Arbitrator is illegal, erroneous and opposed to public policy and liable to be set aside as alleged by the petitioner?

2) What order?

38. In the present case, initially no oral arguments were addressed by both the counsels before the court and no written arguments were also filed. When the case was posted for judgment, both the counsels got the case advanced and filed their respective written arguments. Along with the written arguments filed by the petitioner's counsel, he has relied on the decisions reported in AIR 1983 SC 1143, AIR 1990 SC 405, AIR 2003 SC 2629,

22
CT 1390_Com.A.S.45-2012_Judgment .doc

2010 AIR SCW 5326 & 2010 AIR SCW 5027. On the other hand, along with the written arguments, the counsel for respondent No.1 has relied on the decisions reported in 2015 (5) SCC 899, 2009 (5) SCC 142 & (2015)

3 SCC 49.

39. Perused the materials placed on record.

40. My findings on the above mentioned points are

as under:

POINT NO.1 : In the negative.

POINT No.2 : As per final order for the following:

41. POINT NO.1 : A perusal of the materials on record discloses that there are certain undisputed facts between the parties to the petition. The fact that the 1st respondent -M/s. United Commercial Company, a partnership firm trading in sugar entered into memorandum of understanding dated 5/3/2005 with the petitioner M/s. Karnataka State Co-operative Marketing
23
CT 1390_Com.A.S.45-2012_Judgment .doc

Federation Limited, agreeing to purchase 2325 metric tons of premium quality granulated white sugar @ Rs.16,550/- per metric ton is not in dispute. Further fact that the above mentioned memorandum of understanding was followed by addendum dated 15/3/2005 issued by the petitioner is also not in dispute. Further fact that in the memorandum of understanding, the petitioner is shown as a seller and respondent No.1 is shown as the buyer and M/s. Astral Exim International is shown as the facilitator is also not in dispute. It is also not in dispute that in the memorandum of understanding

it was agreed that proportionate to the payment released by the buyer - 1st respondent to the seller-petitioner after inspection of clearance of stock, the buyer has to issue NOC to the seller, so that, the amount would be released to M/s. Super Commercial Company (SCCO) the associate agency of the seller - petitioner. Further fact that the 1st respondent has not entered into any agreement with M/s. SCCO the associate agency of the

24

CT 1390_Com.A.S.45-2012_Judgment .doc

petitioner is also not in dispute. Further fact that the 1st respondent buyer has totally paid a sum of Rs.3,83,00,000/- to the petitioner - seller through Demand Drafts with regard to purchase of the sugar is also not in dispute. Further fact that the 1st respondent out of 2325 metric tons of sugar agreed to purchase had received only 1600 metric tons of sugar and balance quantity of 727 metric tons of sugar was not supplied to the 1st respondent purchaser is also not in dispute. Since dispute arose between the 1st respondent purchaser and petitioner-seller with regard to the memorandum of understanding dated 5/3/2005 with regard to short supply of sugar and refund of balance amount of Rs.1,20,55,000/- alleged to be due by the petitioner -supplier to the 1st respondent - purchaser, the 1st respondent purchaser has approached the Hon'ble High Court of Karnataka in CMP 21/2009 seeking

M/S. Karnataka State Co-Operative vs M/S. United Commercial Company on 30 January, 2020
appointment of arbitrator. The Hon'ble High court of
Karnataka by its order dated 27/8/2009 has appointed
25
CT 1390_Com.A.S.45-2012_Judgment .doc

one of the retired District & Sessions Judge as Arbitrator.
The Arbitrator after entering reference issued notices to
both the parties. Both the parties have put-up their
appearance before the arbitrator through their respective
advocates. The 1st Respondent of the present petition who
was the claimant before the arbitrator has filed his claim
statement seeking recovery of a sum of Rs. 1,20,55,000/-
with interest @ 24% per annum against the present
petitioner, who was the respondent before the arbitrator.
The present petitioner who was the respondent before the
arbitrator has filed objections by way of defence
statement resisting the claim petition. On the basis of the
respective pleadings of the parties, the arbitrator had
framed 10 issues and on the basis of the oral and
documentary evidence lead by the parties before him,
the arbitrator by his order dated 31/1/2012 has allowed
the claim petition and passed the impugned arbitral
award, directing the present petitioner who was the 1 st
respondent before the arbitrator to make payment of Rs.

26
CT 1390_Com.A.S.45-2012_Judgment .doc
1,20,55,000/- to the 1st respondent of the present
petition who was the claimant before the arbitrator along
with interest @ 24% per annum from 13/4/2005 till the

date of filing of the claim petition and further restricted the future interest @ 12% per annum from the date of claim petition till the date of realization of the entire award amount.

42. Being aggrieved by the impugned award passed by the Hon'ble Arbitrator- the present petitioner who was the respondent before the arbitrator has filed the present petition U/s. 34 of the Arbitration & conciliation Act.

43. It is pertinent to note that an arbitral award may be set aside by the court only on the ground mentioned U/S.34 of the Arbitration & Conciliation Act 1996. U/S.34(2) of the Act an arbitral award may be set aside by the court only if -

a) the party making the application furnishes proof that -

i) a party was under some incapacity; or

27

CT 1390_Com.A.S.45-2012_Judgment .doc

ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

v) the composition of the arbitral tribunal or the

arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this part; or

b) the Court finds that –

28

CT 1390_Com.A.S.45-2012_Judgment .doc

I) the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

ii) the arbitral award is in conflict with the public policy of India.

44. A perusal of the grounds urged by the petitioner in the present petition discloses that the petitioner has challenged the impugned award U/s. 34 (2) (5) (ii) of the Arbitration & Conciliation Act on the ground that the impugned award is in conflict with public policy of India.

45. At this stage, it is relevant to go through the decision of Apex Court of the land on the aspect of considering the legality and validity of the arbitration award U/S.34 of the Arbitration & Conciliation Act 1996. In the decision reported between Puri Constructions Private Limited v. Union of India reported in (1989) 1 Supreme Court Cases 411, wherein, the Apex Court of the Land has held that when a court is called upon to decide the objection raised by a party against an arbitration award, the jurisdiction of the court is limited

29

CT 1390_Com.A.S.45-2012_Judgment .doc

as expressly indicated in the arbitration act and it has no jurisdiction to sit in appeal and examine the correctness of the award on merits with reference to the materials

produced before the arbitrator. The court cannot sit in appeal over the view of the arbitrator by re-examining and re-assessing materials.

46. Further, in a decision reported in *associate builders v. Delhi Development Authority* reported in (2015) 3 Supreme court cases 49, the Apex court while considering the scope of interference by court with findings of fact in arbitral tribunal has indicate that the arbitrator is the sole judge of quantity and quality of evidence when he deliver arbitral award. It was further held that the award based on little evidence or no evidence which does not measure up any quality to a trained legal mind cannot be held invalid. It is further held that once it is found that arbitrator approach is neither arbitrary nor capricious then no interference is call for on facts.

30

CT 1390_Com.A.S.45-2012_Judgment .doc

47. In light of the above mentioned settled legal position a perusal of the materials on record discloses that the first ground on which the impugned award was challenged by the petitioner is that the petitioner-Karnataka State Co-operative Marketing Federation Limited is not the seller but only seller representative and in the memorandum of understanding, the petitioner is wrongly quoted as seller and also functioning as Seller representative which the arbitrator has not understood

and appreciated. It is further alleged that the petitioner -Karnataka State Co-operative Marketing Federation Limited is not a dealer in sugar. At no point of time it has acted as an agent to join seller on the one hand and purchaser on the other hand and the learned Arbitrator has not considered this aspect properly. It is further alleged that the word "seller" is loosely worded by the petitioner -Karnataka State Co-operative Marketing Federation Limited in the memorandum of understanding and other documents which could have been corrected by

31

CT 1390_Com.A.S.45-2012_Judgment .doc

the 1st respondent, but the 1st respondent did not corrected the same and accepted the same and arbitrator has erred in not considering the correct relationship of the petitioner and respondent in connection with the memorandum of understanding executed between them.

48. However, a perusal of the impugned award discloses that the learned Arbitrator while considering issue No. 1 pertaining to the existence of relationship of the seller and buyer between the petitioner and 1st respondent has laboriously gone through the oral and documentary evidence produced on record.

49. A perusal of the finding of the learned Arbitrator on issue No. 1 discloses that the Arbitrator has considered the contents of Ex.P1 memorandum of understanding entered between the petitioner and 1 st

respondent to come to the conclusion that there exist a relationship of seller and buyer between the petitioner and the 1st respondent with regard to the purchase of the sugar by the 1st respondent from the petitioner. The

32

CT 1390_Com.A.S.45-2012_Judgment .doc

learned Arbitrator has considered the contents of Ex.P1 memorandum of understanding, wherein, the price of sugar was agreed to be sold to be paid into the hands of the petitioner by the respondent and further considering Ex.P4 to P6 receipts given by the petitioner to the 1st respondent with regard to the receipt of total amount of Rs. 3,83,00,000/- as the sale consideration for supply of sugar and further considering the fact that except the 1st respondent and petitioner no other third person was involved in Ex.P1 sale of sugar by the petitioner to the 1st respondent has given a finding with regard to the existence of the relationship of seller and buyer of sugar under Ex.P1 memorandum of understanding between the petitioner and 1st respondent. In Ex.P1 memorandum of understanding though the petitioner was termed as seller representative, the arbitrator has analyzed the said aspect and come to the conclusion that to understand the terms of a document and the relationship between the parties to the transaction, the entire document has to be read.

33

CT 1390_Com.A.S.45-2012_Judgment .doc

The Arbitrator has held that since there was no other seller named in Ex.P1 Memorandum of understanding, apart from the petitioner and since there was no privity of contract between the 1st respondent- purchaser and any other person other than the petitioner, the relationship of seller and buyer exist between the petitioner and 1 st respondent. Further, the arbitrator has also considered Ex.P30 the contract entered between the petitioner with that of M/s. super commercial company for selling and buying of sugar. Considering the fact that in Ex.P1 memorandum of understanding, the petitioner has shoulder the responsibility and liability to sell the sugar to 1st respondent and in Ex.P30 contract the SCCO has shoulder the responsibility and liability to sell the sugar to the petitioner, the Arbitrator came to conclusion that the relationship of the seller and buyer existed between the petitioner and respondent under Ex.P1 and the petitioner was not the seller representative with respect to the 1st respondent in the transaction of sell of sugar.

34

CT 1390_Com.A.S.45-2012_Judgment .doc

While arriving at a conclusion that the relationship of the seller and buyer was existence between the petitioner and 1st respondent, the learned Arbitrator has also placed reliance of Ex.P2 addendum dated 15/3/2005 entered between the petitioner and 1st respondent, wherein also there was no involvement of third party and even in

Ex.P2 document the relationship between the petitioner and 1st respondent was clearly stated as the relationship of seller and buyer. The learned Arbitrator by analyzing the contents of Ex.P1 memorandum of understanding entered between the petitioner and 1st respondent and Ex.P30 agreement entered between the petitioner and SCCO has come to the conclusion that these two documents are separate documents of contract and Ex.P1 was the contract between the petitioner and 1st respondent and Ex.P30 was the contract between the petitioner and SCCO and the relationship of seller and buyer was in existence between the petitioner and respondent under Ex.P1 memorandum of understanding

35

CT 1390_Com.A.S.45-2012_Judgment .doc

and the relationship of seller and buyer was in existence between SCCO and 1st respondent under Ex.P30 agreement and perhaps due to the above mentioned relationships the word "representative" after the word "Seller" was mistakenly written in Ex.P1 by hand while describing the petitioner as the representative of the seller.

50. Apart from the above mentioned oral and documentary evidence relied on by the learned arbitrator, he has also considered Ex.P3 letter dated 29/1/2005 written by the petitioner to M/s. Astral Exim International who is shown to be the facilitator of the 1st

respondent in Ex.P1 stating that it is willing to arrange sugar for local sale through its associate agency. This letter was also considered as a piece of document by the learned arbitrator to come to the conclusion that the relationship of seller and buyer existed between the petitioner and 1st respondent. The arbitrator has also considered the correspondence that took place between

36

CT 1390_Com.A.S.45-2012_Judgment .doc

the petitioner and 1st respondent in the form of Ex.P8 letter to determine the relationship of the seller and buyer between the petitioner and respondent.

51. A perusal of the impugned award discloses that the finding given by the learned Arbitrator holding that there exist a relationship of buyer and seller between the petitioner and 1st respondent in respect of subject matter of transaction involved in the claim is based on the appreciation of oral and documentary evidence by the arbitrator. This approach of the arbitrator arriving to a conclusion with regard to the existence of relationship of buyer and seller between the parties is neither arbitrary nor capricious.

52. The next ground on which the impugned award is challenged by the petitioner is that M/s. SCCO is necessary party to the arbitration proceedings. Since the 1st respondent/claimant had not impleaded to M/s. SCCO as necessary party, the claim of 1st respondent/

claimant was liable to be rejected for non-joinder of

37

CT 1390_Com.A.S.45-2012_Judgment .doc

necessary and proper parties and the learned arbitrator has erred in not considering the said aspect and erred in allowing the claim petition in the absence of joining of a necessary and proper party.

53. However, a perusal of the impugned award discloses that in issue no. 2 arbitrator has dealt with the objections of the petitioner pertaining to non-joinder of M/s. Super commercial Company as a party to the arbitration proceedings. A perusal of the findings of the arbitrator on issue no. 2 discloses that by considering the Ex.P1 Memorandum of understanding, Ex.P2 Addendum and Ex.P30 agreement entered between the petitioner and SCCO, the arbitrator has held that SCCO is neither a necessary nor a proper party to the arbitration proceedings and the learned arbitrator by his order dated 17/1/2011 has dismissed IA No. 3 filed by the present petitioner U/o. 1 Rule 10 of CPC to implead SCCO. The findings of the learned Arbitrator that SCCO was not a necessary and proper party to the arbitration proceedings

38

CT 1390_Com.A.S.45-2012_Judgment .doc

was based on the reasoning that SCCO was neither a party in Ex.P1 memorandum of understanding nor a party in Ex.P2 addendum entered between the petitioner and 1st respondent. That there was a separate and

distinct agreement between the petitioner and SCCO which binds them together without involving the 1st respondent/claimant. This finding of the learned arbitrator that the SCCO is not a necessary or proper party to the arbitration proceedings is based on the arbitrator appreciation of oral and documentary evidence and this arbitrator approach is neither arbitrarily nor capricious in nature.

54. One of the ground on which the impugned award was challenged by the petitioner is that the article -9(a) to (f) of Ex.P1 memorandum of understanding dated 05/3/2005 executed between the petitioner and 1st respondent made some clauses mandatory to be followed by the 1st respondent and since the 1st respondent has not followed the same, the claim of the 1st respondent

39

CT 1390_Com.A.S.45-2012_Judgment .doc

was required to be dismissed and arbitrator has erred in not considering the same.

55. However, a perusal of the impugned award discloses that while answering issue No. 3, the learned arbitrator has considered this allegation of the petitioner with regard to failure on the part of the 1st respondent to observe the terms and conditions of Ex.P1 memorandum of understanding dated 05/3/2005.

56. A perusal of the reasoning given by the arbitrator on issue No. 3 discloses that the main

allegation of the petitioner against the 1st respondent was that the petitioner by making full payment to SCCO, with consent of 1st respondent, the 1st respondent has committed breach of terms and conditions of memorandum of understanding dated 05/3/2005 and the terms of Ex.P2 addendum.

57. However a perusal of the materials on record discloses that the arbitrator considering the contents of Ex.P3 letter dated 29/1/2005 written by the present
40
CT 1390_Com.A.S.45-2012_Judgment .doc

petitioner to the 1st respondent seeking immediate full payment of the price of the sugar to be sold has compelled the 1st respondent to give consent for making of the payment of entire money. By considering the contents of Ex.P3 and Ex.D6 correspondences exchange between the parties, the learned arbitrator has also come to the conclusion that there was no breach of the terms of the contract by the 1st respondent in making full payment of money to the petitioner for supply of the sugar. This finding of the arbitrator is based on his appreciation of oral and documentary evidence produced before him and this finding of the arbitrator cannot be considered as perverse and capricious finding.

58. Another ground on which the impugned award was challenged by the petitioner is that in Ex.P2 addendum dated 15/3/2005 the responsibility of the

petitioner ceases once the 1st respondent and SCCO have come together for business and thereafter the petitioner is not responsible to the 1st respondent. When the goods

41

CT 1390_Com.A.S.45-2012_Judgment .doc

are not delivered as per the agreement, the SCCO has to be blamed for the same and not the petitioner and the learned arbitrator has failed to consider the same.

59. A perusal of the impugned award discloses that while answering issue No. 4, the learned arbitrator has considered the aspect of absolvment of the responsibility of the petitioner under the memorandum of understanding and addendum once the payment for supply of sugar was made by the 1st respondent to the SCCO.

60. A perusal of the finding of the arbitrator on issue no. 4 discloses that by considering the oral and documentary evidence produced on record, the learned arbitrator has come to the conclusion that though in Ex.P2 there is an agreement to the effect that the responsibility of the present petitioner was ceased once the payment is made to the seller based on the clearance of the buyer, but the present petitioner has clearly exhibited its responsibility and liability by insisting SCCO

42

CT 1390_Com.A.S.45-2012_Judgment .doc

the seller of the petitioner under Ex.P30 agreement either

to send the remaining quantity of sugar or to repay the balance amount to the 1st respondent. To arrive at the above mentioned conclusion, a learned arbitrator has relied on the Ex.P11 letter dated 17/5/2005 written by the petitioner to SCCO seeking for arrangement of dispatch of balance quantity of sugar of 725 metric tons to the claimant/1st respondent. The learned arbitrator has also relied on Ex.P23 letter dated 18/8/2005 written by the petitioner to SCCO expressing concern about non supply of the remaining sugar to the 1st respondent/claimant and requesting the SCCO to refund the balance amount immediately to the 1st respondent.

61. By considering the oral and documentary evidence produced on record, the learned arbitrator has come to the conclusion that merely because in Ex.P2 addendum it was agreed that the responsibility of the present petitioner towards funds will cease after sending of the total amount to SCCO with consent or no

43

CT 1390_Com.A.S.45-2012_Judgment .doc

objections of the 1st respondent/claimant, it cannot be said that respondent had no liability or responsibility to see that required and agreed quantity of sugar was delivered to the claimant / 1st respondent or in case of failure to do so, the money paid by the 1st respondent /claimant in excess of the value of the sugar already supplied to them was repaid to the 1st

M/S. Karnataka State Co-Operative vs M/S. United Commercial Company on 30 January, 2020
respondent/claimant. This finding of the arbitrator is
based on his appreciation of oral and documentary
evidence which cannot be considered as perverse and
capricious finding.

62. Another ground on which the impugned award
is challenged by the petitioner is that the SCCO has
breached the contract and not the petitioner. Payment is
made by the 1st respondent to the SCCO and SCCO is
liable for the amount due to the 1st respondent and not
the petitioner. It is further alleged that the cheques of Rs.
1,06,55,000/- received by the petitioner from SCCO are
in the form of security and they are to be returned to the

44

CT 1390_Com.A.S.45-2012_Judgment .doc

SCCO or payment of dues and the petitioner cannot be
held liable for the cheques received from the SCCO and
the petitioner is not liable to pay the suit claim to the 1st
respondent and the learned arbitrator has not considered
the said aspect and erred in allowing the claim of the 1st
respondent against the petitioner.

63. However, a perusal of the impugned award
discloses that while answering issues No. 5 to 7, the
learned arbitrator has considered the above mentioned
allegations made by the petitioner seeking absolution of
its liability to make any payment to the 1st
respondent/claimant.

64. However, a perusal of the finding given by the

learned arbitrator on issues no. 5 to 7 discloses that by considering the oral and documentary evidence produced on record, a learned arbitrator has come to the conclusion that since the petitioner has sold only 1,600 metric tons of sugar instead of agreed quantity of 2325 metric tons of sugar agreed to be sold under Ex.P1

45

CT 1390_Com.A.S.45-2012_Judgment .doc

memorandum of understanding and since the petitioner had received the entire sale consideration of the Rs. 3,83,00,000/- from the 1st respondent, it is liable to make good the short fall of sugar of remaining 725 metric tons and the petitioner cannot seek obsolvence of its liability. Further, by perusing the oral and documentary evidence produced before him, the learned arbitrator has come to the conclusion that Ex.P14(a) three cheques for a sum of Rs. 1,66,55,000/- received by the petitioner from SCCO was towards the amount paid by the 1st respondent to the SCCO for supply of the sugar. On receipt of the cheques from SCCO a duty was cast on the petitioner to realize the amount shown in the post dated cheques. The learned arbitrator by considering the materials placed on record has come to the conclusion that on receipt of cheques by the petitioner from SCCO there was a fresh contract and promise by the petitioner to pay the balance money to the 1st respondent and the petitioner is not entitled to take a stand on the ground that it was only a

46

mediator in the transaction and once the payment was made to the sender SCCO on the advice of the 1st respondent, the responsibility of the petitioner was ceased. This finding of the learned arbitrator is based on his appreciation of oral and documentary evidence and this finding cannot be considered as perverse and capricious finding.

65. One of the ground on which the impugned award was challenged by the petitioner is that the present suit was filed by the petitioner on 26/4/2012 challenging the impugned award dated 31/1/2012. The amendment Act of 2015 amending section 34 of Arbitration & Conciliation Act 1996 making section 34 narrow was notified on 23/10/2015 and in the said notification it was clearly stated that act will come to effect from the date of notification and the amendment act cannot be applied retrospectively to the case in hand and in the case in hand there is no bar for re-appreciation of evidence by the court.

47

CT 1390_Com.A.S.45-2012_Judgment .doc

66. In support of this argument, the learned counsel for the petitioner has relied on a decision of the Apex Court of the Land reported in AIR 1983 SC 1143 and AIR 1950 SC 405. A perusal of the ratio of the above two decisions discloses that the same was not rendered

pertaining to the interpretation of section 34 of Arbitration & Conciliation Act in light of amendment effected in section 34 of the Act in the year 2015. Hence, the ratio of the above cited decisions is not helpful for the petitioner.

67. It is pertinent to note that prior to the amendment act 2015 with respect to scope of section 34 of the act, even as earlier in the year 1984, the Apex Court of the Land in the decision between Puri Construction Private Limited v. Union of India reported in (1989) 1 SCC 4111 has held that while dealing with an application U/s. 34 of the Arbitration & Conciliation Act challenging the impugned award court cannot sit in

48

CT 1390_Com.A.S.45-2012_Judgment .doc

appeal over the view of the arbitrator by re-examining and re-assessing the evidence.

68. Considering the fact that there is bar for re-appreciation of evidence of the arbitrator on factual aspects the arguments of the learned counsel for the petitioner that the present suit is filed in the year 2012 by the petitioner which is prior to enactment of Amendment Act of 2015, hence there is no bar for re-appreciation of the evidence placed before the arbitrator cannot be accepted.

69. A perusal of the present petition filed by the petitioner U/s. 34 of the Arbitration & Conciliation Act

discloses that mainly on the ground that the impugned award is in conflict with public policy of India the award is challenged.

70. In the decision reported between Associate Builders v. Delhi Development Authority reported in (2015) 3 SCC 49, the Apex Court of the Land has held that the merits of the arbitral award are assessable

49

CT 1390_Com.A.S.45-2012_Judgment .doc

before the court U/S.34 of the Arbitration & Conciliation Act only when award is in conflict with public policy of India. In the said decision the Apex Court of the Land has explained in detail the heads under which public police of India may be violated, enumerated and elucidated. In the said decision the Apex Court of the Land has given caution on and limits of power of court to interfere with arbitral award under the various heads of public policy. It was further held that none of the grounds mentioned in Section 34 (2)(a) deal with the merits of the decision rendered by the arbitral award. It is only when the arbitral award is in conflict with public policy of India as per Section 34(2)(b)(ii) the merits of the arbitral award or to be looked into under certain specified circumstances. In the said decision, the Apex Court of the Land has stated the heads of the public policy of India are :

"I Fundamental policy of Indian Law: (I) Compliance

with statutes and judicial precedents; (ii) Need for judicial

50

CT 1390_Com.A.S.45-2012_Judgment .doc

approach; (iii) Natural Justice compliance; (iv) Wednesbury reasonableness;

II. Interest of India:

III. Justice or Morality; and

IV. Patent Illegality: (I) Contravention of substantive law of India; (ii) Contravention of A & C Act, 1996; (iii) contravention of the terms of the contract."

71. The Apex Court of the Land has further held

that when any of the heads/sub heads of test of public

policy is applied to an arbitral award, the court does not

act as court of appeal. Interference of the court is

permissible only when findings of the arbitrator are

arbitrary, capricious or perverse or when the conscience of

court is shocked, or when illegality is not trivial but goes

to the root of the matter. It was further held that the

interference of the court is not permissible when merely

another view is possible. It was further held that

arbitrator being ultimate master of quantity and quality

of evidence while drawing arbitral award, award based on

little evidence or on evidence which does not measure up

51

CT 1390_Com.A.S.45-2012_Judgment .doc

in quality to a trained legal mind cannot be held invalid.

It was further held that once it is found that arbitrator's

approach is neither arbitrary nor capricious, no

interference is called for on facts.

72. In the light of the ratio of the above cited

decision, a perusal of the impugned award discloses that

none of the findings given by the arbitrator in the impugned award are in conflict with public policy of India with regard to the circumstances mentioned in the above cited decision. Hence, the contention of the petitioner that the finding given in the impugned award by the learned arbitrator is in conflict with public policy of India cannot be accepted.

73. The learned counsel for the petitioner in his written arguments has relied on the decision reported in AIR SCW 5326, wherein the Apex Court of the Land has held that when under the agreement parties had agreed not to claim interest arbitral tribunal cannot award

52

CT 1390_Com.A.S.45-2012_Judgment .doc

interest from the date of cause of action to the date of award.

74. I have perused the ratio of the above cited decision. However, a perusal of the impugned award discloses that unlike cited decision in the present case in hand under Ex.P1 contract there is an agreement for claiming interest on unpaid purchase money @ 24% per annum. By considering the clause in Ex.P1 agreement, the arbitrator has awarded interest @ 24% per annum which is neither perverse nor capricious. Hence, the ratio of the above cited decision is not helpful for the petitioner.

75. The learned counsel for the petitioner in his

written arguments has also relied on a decision of Apex

Court of the Land reported in 2010 AIR SCCW 5027,

wherein, the Apex Court of the Land has held that when

the award is in conflict with public policy, when the same

is induced by fraud or coercion the same required to be

53

CT 1390_Com.A.S.45-2012_Judgment .doc

set-aside under section 34 of the Arbitration &
Conciliation Act.

76. I have perused the ratio of the above cited decision. However, unlike cited decision in the present case in hand, the petitioner has failed to prove that the impugned award is induced by fraud or coercion and the same is conflict with public policy. Hence, the ratio of the above cited decision is also not helpful for the petitioner.

77. The learned counsel for the petitioner has relied on another decision reported in AIR 2003 SC 2629, wherein, the Apex Court of the Land has held that award contrary to provisions of the substantive law or Act or terms of contract can be set-aside.

78. I have perused the ratio of the above cited decision. However, unlike cited decision in the present case in hand, the petitioner has failed to prove that the impugned award is contrary to provision of substantive law or act or terms of contract. Hence, the ratio of the above cited decision is also not helpful for the petitioner.

54

CT 1390_Com.A.S.45-2012_Judgment .doc

79. It is pertinent to note that the court dealing with an application to set aside an arbitral award U/S.34 of Arbitration & Conciliation Act 1996 has not to consider whether the view of the arbitrator on evidence is justified. The Arbitrator adjudication is generally considered binding between the parties as tribunal is selected by the parties and the power of the court to set aside the award is restricted to cases set out in Section 34 of the Arbitration & Conciliation Act 1996. Statute has restricted challenge to arbitral award only on certain grounds mentioned in Section 34 of the Act. Any grounds of challenge to an arbitral award could be succeed only if its find support from any of grounds of challenge mentioned in Section 34 and not otherwise. The challenge of award on factual aspect is not maintainable.

80. By going through the contents of the petition filed by the petitioner U/S.34 of the Act challenging the impugned award, this court is of the opinion that none of

55

CT 1390_Com.A.S.45-2012_Judgment .doc

the grounds mentioned in Section 34 of Arbitration & Conciliation Act 1996 have been made out by the petitioner to set aside the impugned award. All the grounds agitated by the petitioner are the grounds warranting re-appreciation of materials submitted before and relied upon by the Hon'ble Arbitrator. This court is

not empower to re-examine the evidence or to interfere in the findings of the fact arrived by the Hon'ble Arbitrator.

81. By perusing the materials produced on record, this court is of the opinion that the petitioner has not shown any grounds U/S.34 of the Arbitration & Conciliation Act 1996 to interfere with the impugned award passed by the Hon'ble Arbitrator. With these observations, I answer point No.1 in the negative.

82. POINT No.2 : In view of my findings on point No.1 and for the reasons assigned thereon, I proceed to pass the following:

56
CT 1390_Com.A.S.45-2012_Judgment .doc

ORDER

The petition filed by the petitioner U/S.34 of the Arbitration & Conciliation Act is dismissed.

Parties are directed to bear their costs.

[Dictated to the Judgment Writer; transcript thereof corrected, initialed and then pronounced by me, in the Open Court on this the 30th day of January, 2020] [S.A.Hidayathulla Shariff] LXXXIII
Additional City Civil Judge.

BENGALURU.