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

Reserved on: 26th November, 2019
Pronounced on: 6th January, 2020

\+ **OMP (ENF.) (COMM.) 182/2019 & EX.APPL.(OS)706/2019**

GIAN GUPTA PROP. OF
M/S. GEE GEE INTERNATIONAL ..... Decree Holder

versus

MMTC LTD. ..... Judgement Debtor

\+ **O.M.P. (COMM) 355/2016**

MMTC LTD ..... Petitioner

versus

GIAN GUPTA ..... Respondent

Present: Mr.Ravi Gupta, Sr. Advocate with Mr.Akhil Sachar, Mr.Sunanda Tulsyan, Mr.Japneet Singh Chhabra, Mr.Sachin Jain & Ms.Diya Kapoor, Advocates for MMTC Ltd.

Mr.Ajay Kohli & Ms.Astha Garg, Advocates for Gian Gupta

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CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

J U D G M E N T

1. The petitioner in O.M.P.(COMM) 355/2016, MMTC Ltd. (hereinafter referred to as "MMTC") seeks setting aside of an arbitral award dated 20.12.2013 by which an amount of ₹98,07,671/- (and interest thereupon) was awarded against it and in favour of the respondent, Gian Gupta, proprietor of Gee Gee International

(hereinafter referred to as "GG"). O.M.P.(ENF)(COMM) 182/2019 is instituted by GG for enforcement of the same award.

2. The impugned award was rendered by a three-member tribunal on a claim filed by GG. The transaction between the parties arose out of a tender floated by MMTC for supply of 20,000 MT of wheat of the 1996 crop for export. GG was successful in the tender and was awarded the contract dated 10.05.1996. The arbitration clause was invoked by GG contending that the balance of approximately ₹1.3 crores was due from MMTC. The claim was defended on various grounds including limitation. The Arbitral Tribunal framed 25 issues. It appears that the tribunal was reconstituted once and the award was finally rendered on 20.12.2013 by a majority. The third arbitrator made a separate award (which bears the date 01.08.2013) holding that the invocation of arbitration was barred by limitation.

3. In support of this petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as the "Act"), Mr. Ravi Gupta, learned Senior Counsel, submitted that the award is vitiated by inordinate delay in its pronouncement. He argued that the award was reserved on 27.11.2007 but pronounced only on 20.12.2013. Although a communication had been sent to the parties for clarification of certain aspects, the hearing fixed for this purpose on 03.10.2011 (and thereafter adjourned to 15.10.2011) was never held. Mr. Gupta relied upon the judgments of a learned Single Judge in *Harji Engineering Works Pvt. Ltd.* vs. *BHEL* 153 (2008) DLT 489 and of the Division Bench in *BWL Limited* vs. *Union of India* 2012

SCC Online Del 5873 [FAO(OS) 398/2012, decided on 26.11.2012] to submit that the delay itself required the award to be set aside.

4. Mr. Ajay Kohli, learned counsel for GG did not dispute the factual position, but argued that an award is not liable to be set aside merely on the ground of delay. He referred to the decisions in *Peak Chemical Corporation Inc.* vs. *National Aluminium Co. Ltd.* 188 (2012) DLT 680 and *Union of India* vs. *Niko Resources Ltd. & Ors.* 191 (2012) DLT 668 to urge that even in the face of delay in making of an award, the Court must consider whether the award is otherwise susceptible to a Section 34 challenge on the ground of patent illegality. He further submitted that MMTC ought to have exhausted the remedy of Section 14 of the Act and having failed to do so, could not challenge the award on this ground, as laid down in paragraph 48 of *Niko Resources* (supra).

5. In rejoinder, Mr. Gupta submitted that the Division Bench judgment in *BWL Ltd.* (supra) reversed the order of a learned Single Judge in which *Peak Chemicals* (supra) [cited by Mr. Kohli] was followed. He contended that this Court was therefore bound by the view taken in *BWL Ltd.* wherein the contrary decision in *Peak Chemicals* had not found favour. He also cited the judgment of learned Single Judge in *Satya Prakash* vs. *North Delhi Municipal Corp.* (2017) 161 DRJ 99 to contend that a Section 14 challenge is not a prerequisite to a petition for setting aside an award under Section 34 of the Act.

6. The undisputed facts discernible from the record are as follows:-

a) The minutes of the 69th arbitration proceedings held on 27.11.2007, read as follows:-

> *"Clarification given.*
> *Award reserved.*
> *For reading fee and preparation of Award, the parties to deposit fee equivalent to 5 sittings with each Arbitrator within 2 weeks.*
> *Respondent M.M.T.C. Ltd., also to pay the balance."*

b) By a communication dated 23.09.2011, the parties were directed to appear before the Tribunal on 03.10.2011 for clarification of certain issues.

c) On 03.10.2011, at the request of GG, proceedings were adjourned to 15.10.2011.

d) The parties are *ad idem* that no hearing was in fact held on 15.10.2011. There is also no material on record to show that a sitting was held on that date.

e) The majority award (signed by two learned arbitrators) was made on 20.12.2013. It is typed on a stamp paper of ₹35,000/- which bears the date 22.01.2013. As far as delay is concerned, the last few paragraphs of the majority award state as follows:-

> *"As after repeated telephone calls by presiding arbitrator and arbitrator Mr. R.P. Gupta the claimant had failed to supply the requisite stamp paper, until 22th January 2013 is being prepared on a non-judicial stamp paper of Rs.35000/-.*
> *Claimant had failed to pay arbitrators' fee for severed hearings. This case has already been delayed for this reason. The Arbitrators and*

> *decided to pronounce the award without waiting any further for their respective payments.*
>
> *This award is made this 20th day of December, 2013 at New Delhi."*

f) The majority award was accompanied by a "Dissenting Note", signed by the third member of the Tribunal and dated 01.08.2013. The opening paragraph of the dissenting note is reproduced below:-

> "*I have the benefit of reading the Award (duly stamped but not signed and not discussed with me) prepared by Justice J.K. Mehra the Learned Presiding Arbitrator and Justice R.P. Gupta, Learned Arbitrator. I am in respectful disagreement with the findings given with regard to the issue of limitation. I am hereby giving my answers to the question of limitation with reasons thereof……*"

7. It is evident from the above that the award was in fact made more than six years after the conclusion of hearings. Further, although the Tribunal felt the necessity of clarification and scheduled a hearing for this purpose, the award was rendered without any clarification having been made or further hearing having being held. Even between the scheduled clarification hearing and the award, two years passed.

8. It is in the light of these facts that the judgments cited by learned counsel on both sides must be considered.

9. In *Harji Engineering* (supra), a delay of three years between the last effective hearing and the making of the award was held sufficient to set aside the award in question. This Court relied *inter alia* upon the judgment of the Bombay High Court in *Bhogilal Purushottam Shah* vs. *Chimanlal Amritlal Shah & Ors.* AIR (1928) Bom 49 and the

UNCITRAL Model Law to emphasis the importance of expedition in conclusion of arbitration proceedings. The Court's reasoning in this regard is reproduced below:-

> *"17. Section 28 of the Arbitration Act, 1940 is not incorporated in the Act.* ***The Act does not prescribe specific period for making and publishing the award but the underlying principle and policy of law that arbitration proceedings should not unduly prolonged and delayed, remains intact and embodied.*** *Section 14 of the Act stipulates that mandate of an arbitrator would terminate if he de juro or de facto is unable to perform his functions or for other reasons fails to act without undue delay. An arbitrator must use reasonable dispatch in conducting the proceedings and making an award. Undue delay leads to termination of the mandate of the arbitrator.*
>
> *xxxx xxxx xxxx*
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> *20. It is natural and normal for any arbitrator to forget contentions and pleas raised by the parties during the course of arguments, if there is a huge gap between the last date of hearing and the date on which the award is made. An arbitrator should make and publish an award within a reasonable time. What is reasonable time is flexible and depends upon facts and circumstances of each case. Is case there is delay, it should be explained.* ***Abnormal delay without satisfactory explanation is undue delay and causes prejudice.*** *Each case has an element of public policy in it. Arbitration proceedings to be effective, just and fair, must be concluded expeditiously. Counsel for the respondent had submitted that this Court should examine and go into merits and demerits of the claims and counter claims with reference to the written submissions, claim petition, reply, document etc. for deciding whether the award is justified. In other words,* ***counsel for the respondent wanted the Court to step into the shoes of the Arbitrator or as an appellate***

court decide the present objections under Section 34 of the Act with reference to the said documents. This should not be permitted and allowed as it will defeat the very purpose of arbitration and would result into full fledged hearing or trial before the Court, while adjudicating objections under Section 34 of the Act. *Objections are required to be decided on entirely different principles and an award is not a judgment. Under the Act, an Arbitrator is supposed to be sole judge of facts and law. Courts have limited power to set aside an award as provided in Section 34 of the Act.* ***The Act, therefore, imposes additional responsibility and obligation upon an Arbitrator to make and publish an award within a reasonable time and without undue delay.*** *Arbitrators are not required to give detailed judgments but only indicate grounds or reasons for rejecting or accepting claims. A party must have satisfaction that the learned Arbitrator was conscious and had taken into consideration their contention and pleas before rejecting or partly rejecting their claims. This is a right of a party before an Arbitrator and the same should not be denied.* ***An award which is passed after a period of three years from the date of last effective hearing, without satisfactory explanation for the delay, will be contrary to justice and would defeat justice. It defeats the very purpose and the fundamental basis for alternative dispute redressal. Delay which is patently bad and unexplained, constitutes undue delay and therefore unjust.***

21. Moreover in the present case learned Arbitrator has proceeded to make and pronounce the award even without finally concluding the hearings. Order-sheets reveal that hearings and argument had not concluded on 14.11.2002 and thereafter no further arguments were addressed but the matter was adjourned to be heard. Ld. Arbitrator was to fix a date for the said purpose and notify parties. No substantial hearing took place on 2.12.2003 and the Arbitrator also did not close the hearing. Learned

> *Arbitrator on 2.12.2003 had stated that he would inform parties about the next date of hearing. Thereafter no date was fixed and no hearing was held. Learned Arbitrator proceeded and has made and published his award. It is apparent that the ld. Arbitrator was in a hurry as he had resigned and had to take up a new employment. The award in question is contrary to principles of fair play and justice. Justice should not only be done but should manifestly be seen to be done."*
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> (Emphasis supplied)

10. In *BWL Ltd.* (supra), the Division Bench was concerned with a lapse of approximately three and a half years between the conclusion of hearings and the clarificatory hearings being scheduled by the arbitrator. After clarifications were obtained, a further two and a half years passed before the award was made. The learned Single Judge had taken the view that delay was not fatal to the award and had decided the petition under Section 34 of the Act on merits. The Division Bench reversed the order of the learned Single Judge, observing that the arbitrator had "evinced his supine negligence and indifference to the matter". The Division Bench further held as follows:-

> *"7. What faith would one have in such an arbitrator? What would be the use to remit a part of the award to the same arbitrator whose past conduct does not inspire confidence of doing speedy justice?*
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> *8. Human memory is short. We are doubtful whether substantive hearings which were concluded on October 06, 2004 and the meager clarificatory hearings which were concluded on February 16,2008 left sufficient imprints on the minds of the learned Arbitrator to have remembered the arguments and pronounce the award(s) on September 21, 2010 and September 23, 2010.*

> *9. Justice should not only be done but should also appear to have been done. Justice delayed is justice denied.*
> *10. This was so observed by the Supreme Court in various decisions. Even when Judges have pronounced judgments after reserving them for more than six months the same have been set aside by the Supreme Court requiring the matter to be heard afresh and re-decided"*

11. The decision in *Harji Engineering* (supra) was expressly approved and the following directions were given:-

> *"15. As per the contract between the parties the authority named to appoint an arbitrator is directed to appoint an arbitrator within four weeks of receipt of this order and other than Mr.A.K. Jain presently worked as Director (HR), BSNL. The arbitrator appointed would hear arguments with reference to the existing pleadings and evidence led before Mr.A.K. Jain and would pronounce the award within six months of entering upon reference."*

12. Although a copy of the order of the Supreme Court is not available, I am informed that the judgment of the Division Bench in *BWL Ltd.* (supra) was challenged unsuccessfully in SLP(C) 4299/2013.

13. The decision in *Peak Chemicals* (supra) cited by Mr.Kohli concerns a four and a half year delay in making of an award. *Harji Engineering* (supra) was cited but distinguished with the following reasoning:-

> "*29. The question whether the delay in the pronouncement of an Award after final arguments have concluded vitiates the Award will depend on the facts and circumstances of each case. The decisions relied upon by*

> *Mr.Ganguli turned on their peculiar facts. No two cases are the same. Significantly, delay has not been specified as one of the grounds under Section 34 of the Act for setting aside an Award. It would be straining the language of that provision to hold that delay the pronouncement of an Award would by itself place it in "conflict with the public policy of India" within the meaning of Section 34 (2) (b) (ii) of the Act. As will be discussed hereafter, the impugned Award sets out comprehensively the facts as pleaded by the parties, the evidence, the submissions of counsel, the analysis of the facts and evidence, the detailed reasons issue-wise. Another factor that requires to be accounted for is that the dispute between the parties has been pending since 1996. It would not be in the interest of justice to set aside the impugned Award only on the ground of delay and remand it for a fresh determination. The learned Arbitrator who passed the impugned Award has since expired. A fresh arbitration before another arbitrator would not be justified considering the time and money already spent in the arbitral proceedings thus far. Therefore, it is not considered expedient to simply set aside the impugned Award on the sole ground of delay in the pronouncement of the Award. This plea is accordingly rejected.*"

14. In *Niko Resources*, although the Court held a similar delay of over four years to be "indeed extraordinary" (paragraph 44), the decision in *Peak Chemicals* was relied upon to hold that the delay does not *per se* vitiate the award. The learned Single Judge held that the remedy of approaching the Court under Section 14 of the Act for termination of the mandate of the arbitrator ought to be invoked prior to a challenge on this ground under Section 34:-

> *"47. Under Section 14(2) of the Act a party can seek the Court's interference to terminate the mandate of the*

> *Arbitrator if the 'controversy' concerning the Tribunal's de jure or de facto inability to perform its functions "remains". Therefore, if after being approached by either party with a prayer to expedite the pronouncement of the Award, the tribunal fails to do so, the Court can be approached in terms of Section 14(2)……..*
>
> *48. Given the scheme of the Act, it might be appropriate to exhaust the above remedy before the stage of challenge to the Award. It hardly needs be stated that delay per se is not identified as one of the grounds under Section 34of the Act. It would have to be shown that the Award suffered from patent illegality on account of such delay. What also should weigh with the Court when faced with a situation where an Award is sought to be challenged on the ground of delay is to consider the costs incurred and the time spend in the arbitral proceedings. If delay alone was to be the factor, then, as is happening not infrequently these days, many an Award would be vulnerable to invalidation on this ground alone. It would be the facts and circumstances of a given case which would determine if the delay is so unconscionable as to vitiate the Award."*

15. With regard to exhaustion of remedies under Section 14 of the Act, I do not read the judgment in *Niko Resources* to provide for a mandatory recourse to Section 14(2) in order to mount a challenge under Section 34 on these grounds. The Court has only elucidated upon an alternative remedy which may appropriately be invoked in these circumstances. In *Satya Prakash* (supra) this Court upheld a challenge under Section 34 on the ground of delay even though an application under Section 14 had been made to the arbitrator and subsequently withdrawn as the award was made in the meanwhile.

16. Having considered the aforesaid judgments, I am firmly of the view that the impugned award in the present case is unsustainable. The

Division Bench decision in *BWL Ltd.* (supra) supports MMTC's position that inordinate delay *per se* vitiates an award. The reasoning elaborated in *Harji Engineering* (supra) has been expressly approved by the Division Bench. As the judgment of the learned Single Judge in *BWL Ltd.* which was under challenge before the Division Bench (judgment dated 04.07.2012 in OMP 771 and 772/2010) relied upon the decision in *Peak Chemicals*, it is evident that the Division Bench was cognizant of the view taken in that judgment. Further, both *Peak Chemicals* (paragraph 29) and *Niko Resources* (paragraph 48) acknowledge that the question of whether an award is vitiated by delay would depend upon the facts and circumstances of each case. In the present case, there is little explanation for the delay of six years. The grounds cited in the last two paragraphs of the majority award (extracted above) do not justify the delay. The award was ultimately published on the stamp paper purchased 11 months prior and could have been pronounced much earlier.

17. I am also drawn to this conclusion on the fact of this case by reason of the infructuous clarificatory hearing. If the Tribunal had scheduled hearings for clarification, it must be assumed that there was some issue on which it required further hearing. The fact that the award was pronounced without clarifications in fact being obtained leaves a doubt in the mind about the procedure adopted. The inevitable conclusion is that the award was pronounced without hearings being conducted to the satisfaction of the Tribunal itself. The Act, in Section 18 vests considerable discretion to the Tribunal in determining its own procedure but subject to each party being given "a full opportunity to

present his case". If the Tribunal called for clarifications but ultimately pronounced the award without giving an opportunity to parties to clarify, the requirements of Section 18 cannot be said to have been fulfilled. As in *Harji Engineering* (paragraph 21), I am of the view that such an award is contrary to the principles of fair play and justice.

18. In view of my findings on this question, I have not considered it necessary to hear the parties on the other grounds of challenge raised in this petition.

19. O.M.P.(COMM)355/2016 is therefore allowed, and the impugned award dated 20.12.2013 is set aside. Following paragraph 15 of *BWL Ltd.*, the proceedings will be conducted before a new Arbitral Tribunal with reference to the existing pleadings and evidence. The parties are directed to nominate one arbitrator each within four weeks from the date of this judgment, and the arbitrators so appointed will appoint the third arbitrator in terms of Section 11 of the Act. The newly constituted Tribunal will hear arguments on the existing pleadings and evidence, and pronounce the award preferably within six months of its constitution.

20. In view of the fact that the award dated 20.12.2013 has been set aside, O.M.P.(ENF)(COMM) 182/2019 is dismissed as infructuous.

21. The above mentioned petitions are disposed of in the terms aforesaid, but without any order as to costs.

PRATEEK JALAN, J.

JANUARY 06, 2020/*'pv'/s*