Update

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Award set aside for perversity by the appellate bench overturning the single judge's order affirming the award (Delhi High Court)

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MMTC Limited v. Anglo American Metallurgical Coal

Court: Delhi High Court | **Case Number**: FAO (OS) 532/2015 | **Citation**: 2020 SCC OnLine Del 1659 | **Bench**: GS Sistani & Anup Jairam Bhambhani JJ | **Date**: 02 March 2020

A bench of two judges of the Delhi High Court set aside, in this case, a domestic award in an appeal under Section 37 ACA. By a majority of 2:1, the arbitral tribunal had ruled against MMTC Limited (an enterprise of the Government of India), and Muralidhar J, sitting singly, had rejected MMTC's set-aside application under Section 34 ACA. On appeal, the 2-judge bench of GS Sistani and Anup Jairam Bhambhani JJ (the latter authoring) set aside the award and the single judge's judgment on the ground that it conflicted with the public policy of India. The case highlights very sharply how different judges can interpret the same material in diametrically opposite fashion and effectively apply the same legal principles to reach the exact opposite conclusions.

A. The Facts

The facts are long-winded, and it is not necessary to narrate them in full. At issue was the interpretation of certain correspondences between the parties and what they meant. Very briefly put, MMTC and Anglo American had a Long Term Contract(LTA) under which MMTC was to purchase coking coal from Anglo American. Theagreed price was USD 300 per metric tonne. Following several intervening eventsand a slump in the industry, there were subsequent agreements and ad hocarrangements between the parties. As a consequence, the parties fixed the price forthe ad hoc lot as USD 128.25 per MT. The obligations under the original agreementalso continued side by side. At one point, MMTC asked for coal, but Angloresponded, saying there was no availability. When Anglo initiated arbitration forbreach of contract by MMTC for not lifting the coal under the original agreement, themain question was whether Anglo had referred to the non-availability under the adhoc arrangement or the original transaction. If it was a reference to the originalagreement, the contract perhaps stood repudiated. If it was a reference to the adhoc arrangement, probably MMTC had breached its obligations under the originalcontract.

B. The tribunal's[1] award, which was upheld by Muralidhar J [1] Mssrs. Peter Leaver (Anglo's nominee), VK Gupta, retired Chief Justice of High Court (MMTC's nominee), and Anthony Houghton, the presiding arbitrator. Show More

On analysing the testimonies and the correspondence, the Tribunal, MMTC's nominee dissenting, concluded that there was no shortage of supply. It found that Anglo's e-mails (of 02 July 2009 and 07 September 2009) referred to the non-availability of coal should be read in the context that MMTC was seeking further deliveries at the ad hoc price and not under the original contract. The tribunal held that MMTC had breached the agreement. It awarded Anglo damages of USD 78,720,414.92 with pendente lite and future interest and cost. Muralidhar J also examined the matter in great detail in MMTC's application under Section 34 ACA to set aside the award. He found no reason to disagree with the tribunal's findings. He held, after a detailed analysis of the facts, that the view taken by the majority of the tribunal was the correct view on the appreciation of the evidence. He also held that the correspondence had to be understood in the proper context. He concluded that Anglo did not repudiate the contract.

C. The judgment of the division bench

The division bench strongly disagreed. It interpreted the correspondences differently and held that there was no justification for the tribunal's conclusion and that it was perverse:-

a. We are conscious of the limitations of our jurisdiction under Section 37 ACA and the fact that there is a majority arbitral award that a single Judge has upheld. However, if the conclusion of the arbitral tribunal is not supported by a plain, objective and clear-eyed reading of documents, this court would not flinch in correcting such conclusion or inference, especially if it goes to the root of the matter.
b. "In this case, we have noticed exactly such position, whereby the Arbitral Tribunal by majority, has chosen to read words into written communications between parties which words do not exist; and to omit to read what is written in plain, simple and uncomplicated English."
c. "The court must read *what is plainly said in* the e-mails, nothing more, nothing

less; and no effort is called for to try and gather *what may have been intended.* " (emphasis in original). A decision based on imaginary evidence would be perverse.

d. There is also no basis for the calculation of damages. The tribunal has calculated damages by taking the difference in the agreed price of coal and the assumed 'market price' at the appropriate time. However, there is no evidence to prove the market price of coal at that time.[2] [2] Muralidhar J had found that the tribunal had given adequate reasons on the issue of quantum of damages. A few other arguments, on limitation and bias, were also advanced before him and were addressed by him. These do not appear to be at issue before the division bench. Show More

The court then found "the legal foundations" of its views in the decision of the Supreme Court in *Associate Builders* v*. DDA,* (2015) 3 SCC 49 (Ranjan Gogoi and Rohinton Fali Nariman JJ):-

a. First, it said that the court in *Associate* has "laid down the following 'third principle' of the fundamental policy of Indian law as to 'perversity' in the decision of an Arbitral Tribunal" and referred to paragraphs 31 and 32 of Associate.[3]. [3] *Associate*, "31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where: (i) a finding is based on no evidence, or (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or (iii) (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse." 32. A good working test of perversity is contained in two judgments. In *Excise and Taxation Officer-cum-Assessing Authority* v*. Gopi Nath & Sons* [1992 Supp (2) SCC 312] , it was held … "It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law." In *Kuldeep Singh* v*. Commr. of Police* [(1999) 2 SCC 10 : 1999 SCC (L&S) 429] , it was held [that] "A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with." Show More

b. Then, the division bench referred to that passage of *Associate* where a reference was made to *ONGC Ltd.* v*. Western Geco International Ltd.*, (2014) 9 SCC 263 "mandating that a court or an authority is bound to adopt a 'judicial approach' in deciding a matter."[4] [4] Paragraph 28 of *Associate*. Show More

c. Then the court referred to paragraph 33 of *Associate* "to express clearly as to why we are of the opinion that the view taken by the majority of arbitrators deserves to be set-aside in spite of the otherwise well-settled position that the arbitrator is the ultimate master of the quality and quantity of evidence." At paragraph 33, the court had held in *Associate* that "it must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts."

d. The division bench then said that "this is a case where the inferences drawn are a non-sequitur to the plain and simple words of the e-

mails/communications read in evidence, which were before the tribunal and which do not support the inferences drawn. In this view of the matter, clearly the approach of the majority of arbitrators is arbitrary and capricious; and therefore, cannot pass judicial muster."

e. Then the division bench cited "in the passing" to *Kamala Devi* v*. Seth Takhatmal and another*, (1964) 2 SCR 152, a case relating to the exclusion of oral evidence by documentary evidence the Indian Evidence Act. A 3-judge bench of K. Subba Rao, Raghubar Dayal and JR Mudholkar JJ discussed in the context of a surety bond the "well settled rule of construction of documents" and held that "when a Court is asked to interpret a document, it looks at its language. If the language is clear and unambiguous and applies accurately to existing facts, it shall accept the ordinary meaning, for the duty of the court is not to delve deep into the intricacies of the human mind to a certain one's undisclosed intention, but only to take the meaning of the words used by him, that is to say, his expressed intentions."
f. Lastly, then the division bench noted that the "inferences drawn" by the tribunal "are a non-sequitur to the plain and simple words of the e-mails/communications" Therefore, the finding of the majority was "arbitrary and capricious", and "cannot pass judicial muster."

D. Editor's comments

The Supreme Court's decision in *Ssangyong Engg. & Construction Co. Ltd.* v*. NHAI*, (2019) 15 SCC 131 (by RF Nariman and Vineet Saran JJ) discusses the law on the public policy of India as that concept applies in arbitration. A 3-judge bench of RF Nariman, Aniruddha Bose and V. Ramasubramanian, JJ cited Ssangyong with approval in *Vijay Karia and others* v*. Prysmian Cavi E Sistemi SRL and others. Ssangyong* summarizes the law before the 2015 Amendments and after that. In the MMTC case, though it was not an issue, clearly the pre-2015 amendment law applied, and that is why the court also relied on paragraph 28 of *We*stern Geco, which is no longer good law.[5] [5] The division bench referred to *Geco* possibly because the Section 34 application was filed before the 2015 amendments. Show More The thing to note more prominently is, however, that what Muralidhar J considered was a reasonable appreciation of evidence by the arbitral tribunal, the division bench thought was wholly arbitrary. For the division bench, the plain text of the e-mails was the sole source to identify the fact situation and what Anglo meant, without regard to the context (which is what the tribunal and the single-judge emphasized).

In my view, it would be a better approach to put that construction to an e-mail or a correspondence that considers the subject, the context, and common sense. It should not be confined to a single, definitive and fixed idea apply the 'plain meaning rule'. A fact situation can exist independent of what an e-mail may say. To not consider that possibility on the ground that the text of the e-mail is plain is to effectively advance a principle that human beings use language *at all times*, even in their daily business correspondence, with surgical precision. This is a wrong approach.

Also, the division bench was aware of the law that the arbitral tribunal is the final authority on findings of facts. Here the tribunal's findings were upheld after a careful analysis. The test, therefore, which the division bench should have applied is whether a possibility existed that Anglo meant to refer to the availability under the ad hoc arrangement? If that possibility existed, the division bench should have stopped

at that inquiry, considering that such a possibility was then rightly explored in detail by the tribunal. If, however, that possibility couldn’t exist in the first place, it would have robbed the tribunal’s enquiry of its foundations, for there could be no validation for the tribunal’s findings one way or the other. Then its conclusions may have been arbitrary. In this case, the possibility existed and that wasthe whole purpose of the tribunal’s examination of the context of the situation.

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