Permissibility of re-appreciating findings of fact in set-aside proceedings; claim for damages et al. (Delhi High Court)

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Published on 29 January 2020

G+H Schallschutz GMBH v. M/S. Bharat Heavy Electricals Ltd.

Court: Delhi High Court | **Case Number**: OMP (COMM) 158 of 2019 | **Citation**: 2020 SCC OnLine Del 19 | **Bench**: Sanjeev Narula J | **Date**: 07 January 2020

A. The dispute

Bharat Heavy Electricals Limited ("BHEL") signed a contract with the Public Electric Company, Yemen, to construct a power plant. For manufacture of some equipments required in the power plant, BHEL selected the petitioner 'G+H Schallschutz Gmbh' and issued a Purchase Order in its favour. The equipment had to be supplied in two lots and delivered to the Hodeiadah seaport in Yemen. A dispute arose when BHEL put on hold the delivery of the second lot, contending that the Government of India had put a travel advisory asking Indians to leave Yemen and avoid all travel due to the political situation. Force majeure was declared.

Clause 25 of the Purchase Order provided that in the event of any hold/force majeure condition, Schallschutz will keep material in their custody for six months without any storage charges to BHEL and if it was not possible to make the shipment to Yemen even after six months, then to dispatch the material to Mumbai / Haridwar in India and claim payment.
Schallschutz stored the supplies for six months. BHEL claimed the force majeure condition subsisted and requested for an extension. Schallschutz rejected BHEL's request and invoked the arbitration clause.

B. The partial final award

The arbitral tribunal first delivered a Partial Final Award ("PFA") on liability. It held that Clause 25 of the Purchase Order brought the contract between BHEL and Schallschutz within the exception identified in the *Ghose*[1] case (AIR 1954 SC 44). The tribunal concluded that despite the war in Yemen, which rendered the contract impossible of performance, the Purchase Order did not stand frustrated. Accordingly, the tribunal concluded that BHEL breached its obligation under Clause 25 in failing to enable Schallschutz to deliver the supplies to India.

The tribunal kept the question of damages open, subject to further submissions.

C. The final award and Schallschutz' challenge in set-aside proceedings

[1] *Ghose*, Para 17– "it must be pointed out here that if the parties do contemplate the possibility of an intervening circumstance which might affect the performance of the contract, but expressly stipulate that the contract would stand despite such circumstance, there can be no case of frustration because the basis of the contract being to demand performance despite the happening of a particular event, it cannot disappear when the event happens."

In the Final Award, the tribunal declined Schallschutz' claim for damages, which was challenged in the High Court under Section 34 of the Arbitration and Conciliation Act, 1996 ("ACA") on the ground that it was contrary to public policy and patently illegal. The court rejected the challenge.
The court held that there was no conflict between the PFA and the final award. Its reasons were: –

(a) The two awards, arising out of the same cause of action, dealt with different aspects altogether. In the PFA, the tribunal determined liability and in the final award the claim for damages (a wholly distinct question that was not decided in the PFA).

(b) Even though BHEL was held guilty of a breach, it did not necessarily mean Schallschutz was entitled to damages. Schallschutz had to inevitably produce material and adduce evidence before the tribunal to establish its claim for damages.

(c) *National Highway Authority of India* v. *Progressive-MVR (JV)*, (2018) 14 SCC 688, cited for the proposition that in case of conflicting awards, courts can interfere with the findings of the tribunal, did not apply because there was no conflict.

Then the court specifically addressed the claim for damages:-

(a) It first prefaced its holding by noting the law on damages. It said that ordinarily, a finding of breach would be followed with the award of damages, in view of the principle that the court ought to put the injured party in the same position as if the contract had been performed. However, in order to succeed, the non- breaching party is required to strictly adhere to terms of the contract. Further, the court said, the award of damages has to be in terms of Section 73 and 74 of the Indian Contract Act, whereby the non-breaching party is bound to prove the loss in order to be entitled to damages.

(b) The court then examined the facts and the award and concluded that the claim was not maintainable because Schallschutz itself failed to comply with some contractual pre-conditions (which had required it to ship the material to India and then claim payment) and also establish loss. The court said, "since Petitioner failed to adduce evidence, AT was confronted with no choice, but to deny relief, except to the extent it was sustainable."

(c) The court found it profitable to refer to the settled position of law in relation to interpretation of contract, as laid down in several decisions of the Supreme Court, that when a binding contract stipulates a particular thing to be done in a particular manner, it should be done in that manner alone or not at all [citing *Bishambhar Nath Agarwal* v. *Kishan Chand*, 1989 SCC OnLine All 426, and *Raman & Raman Automobiles Ltd.* v. *Mahendra & Mahendra Ltd.*, 2015 SCC OnLine Mad 10186].

As to the tribunal's findings of fact and the scope to deal with them in a set-aside proceeding, the court held:-

(a) Findings of fact cannot be examined under Section 34 ACA, more so, since the tribunal interpreted the clause in consonance with the understanding between the parties (discernible by referring to other pre-conditions of the Purchase Order).

(b) The aforesaid interpretation does not call for any interference and cannot under any circumstances be held to be perverse or unreasonable that no reasonable person could have reached that interpretation.

(c) Interpretation of the contract based on factual aspects relating to the compliance of the contract "cannot be interpreted under Section 34 ACA."

(d) There are several judgments of the Supreme Court and of this court holding that the interpretation of a contract is purely the dominion of the arbitrator, and the court would not interfere with the same, only because different interpretations are possible [citing *State of UP* v. *Allied Constructions*, (2003) 7 SCC 396].

(e) The court then held that the scope of interference in international commercial arbitrations has been further narrowed by the 2015 Amendments and patent illegality is no longer a ground for challenging international commercial arbitration awards in India [citing *Ssangyong Engineering & Construction Co. Ltd.* v *NHAI*, 2019 SCC OnLine SC 677].

Then, lastly, the court found that the award was not violative of the Sale of Goods Act. It held that the tribunal's findings on refusal and unwillingness to accept the goods were factual and could not be evaluated in set-aside proceedings.