REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3776 OF 2018
(Arising out of Special Leave Petition (C) No. 558 OF 2014)

M/s Oswal Woollen Mills Ltd. .... Appellant(s)

Versus

M/s Oswal Agro Mills Ltd. .... Respondent(s)

J U D G M E N T

R.K. Agrawal, J.

1) Leave granted.

2) The present appeal is directed against the final judgment and order dated 22.10.2013 passed by the High Court of Delhi at New Delhi in FAO (OS) No. 211 of 2007 whereby a Division Bench of the High Court dismissed the appeal filed by the appellant herein while upholding the order dated 17.04.2007 passed by learned single Judge of the High Court.

3) **Brief facts**:

(a) The appellant Company-M/s Oswal Woolen Mills Ltd. and the respondent Company-M/s Oswal Agro Mills Limited are Companies incorporated under the Companies Act and are carrying on the business of manufacturing and trading of vegetable oils, soaps, chemicals, petrochemicals, woolen and related products.

(b) Both the parties entered into an agreement dated 30.03.1982 in terms whereof the appellant Company appointed the respondent Company as its agent in accordance with the Handbook of Import Export Procedure, 1981-82 in order to advice, assist and guide the appellant Company to import materials under the REP licences for a CIF value of Rs. 1,85,95,100/- only with remuneration at the rate of 5% (per cent) of the CIF value of the goods imported along with all costs/expenditure incurred.

(c) Out of the total value of the materials to be imported under the licences, the materials to the value of Rs. 1,16,00,800/- only could be imported and the material CIF

value of Rs. 69,94,300/- could not be imported by the respondent-Company in the absence of the REP licences of the said value which resulted in breach of contract.

(d) Both the parties took legal recourse and the High Court, on an application under Section 20 of the Arbitration and Conciliation Act, 1940 (in short 'the Act') referred the dispute to Arbitration of two Arbitrators. After completion of the arbitration proceedings before the Arbitrators, the arbitrators, could not reach to a consensus on the Award in terms of the Minutes of the Meeting held on 19.02.1999 and the matter was referred to the Umpire.

(e) The appellant-Company moved an application dated 29.01.2000 before the Umpire seeking commencement of *de novo* proceedings. On 31.01.2000, the said application was dismissed as untenable. Learned Umpire, passed an award dated 21.02.2000, in favour of the respondent-Company to the tune of Rs. 64,65,782/- along with the interest at the rate of 18% (per cent) with effect from 01.11.1991 till the date of realization.

(f) Being aggrieved by the Award dated 21.02.2000, the appellant Company filed objections before the High Court under Sections 30 and 33 of the Act which was registered as IA No. 803 of 2001 in CS (OS) No. 795-A/2000. Learned single Judge of the High Court, vide judgment and order dated 17.04.2007, substantially rejected the objections to the Award and made a Rule of the Court with slight modifications. Learned single Judge also observed that the appellant-Company failed to satisfy that there was any serious endeavour for getting the evidence recorded again before the Umpire and waived the right of *de novo* trial by conduct.

(g) Aggrieved by the judgment and order passed by learned single Judge of the High Court, the appellant-Company preferred an appeal being FAO (OS) No. 211 of 2007 before a Division Bench of the High Court. The Division Bench, vide judgment and order dated 22.10.2013, dismissed the appeal.

(h) Aggrieved by the judgment and order dated 22.10.2013, the appellant-Company has preferred this appeal by way of special leave before this Court.

4) Heard Mr. Basava Prabhu S. Patil, learned senior counsel for the appellant-Company and Mr. Dhruv Mehta, learned senior counsel for respondent-Company and perused the records.

Point(s) for consideration:-

5) The only point for consideration before this Court is whether an Umpire has to hear the matter *de novo* on a Reference or from the stage of disagreement between the Arbitrators?

Rival contentions:-

6) Learned senior counsel for the appellant-Company contended that the Division Bench erred in interpreting the scope of Article 4 to Schedule 1 of the Act to mean that the Umpire has to hear the Reference only from the stage at which the Arbitrators disagreed and not *de novo*. Learned senior counsel while relying upon Article 4 to Schedule I of the Act contended that *de novo* proceedings are essential when the Arbitrators have disagreed and the Umpire is appointed to decide the dispute. He further contended that when Umpire enters into Reference "in lieu of Arbitrators" he steps in the

shoes of the Arbitrators and has the same duties as that of Arbitrators. Accordingly, the Umpire cannot depart from the requirement that an arbitrator should personally record the evidence on which he is to rely for the purpose of giving his decision. The Umpire cannot refuse to hear the witness again; and if on request of a party for the same, fails to do so, the Award would be bad for misconduct.

7) Learned senior counsel further contended that the Division Bench has simply affirmed the findings of learned single Judge on the question of waiver, damages ought to be awarded, without appreciating the contentions advanced especially when it was established from the documents on record that the appellant-Company had never waived its right of *de novo* hearing but had been insisted throughout before the Umpire to start proceedings *de novo*. For the purpose, the appellant-Company placed reliance on communication dated 24.05.1999 and 12.01.2000 addressed to the Umpire and the application dated 29.01.2000 filed for *de novo* hearing of the matter.

8) Arguing next with respect to damages granted to the respondent-Company, it was contended by learned senior counsel that under the first agreement, goods were to be imported and 5% commission was to be paid. Therefore, to award damages for the goods not processed and not delivered because the same were not imported under the first agreement is untenable. Learned senior counsel finally contended that learned single Judge as well as the Division Bench erred in law and interference by this Court is sought for in the matter.

9) *Per contra*, learned senior counsel for the respondent-Company strenuously submitted that the application filed by the appellant-Company is misconceived, not maintainable and the relief sought is vague. The application was moved when the hearing before the Umpire had already started and the claimant had concluded his arguments. The very first application for the same was filed on 29.01.2000 in spite of the fact that the first hearing before the Umpire took place on 24.04.1999 which got dismissed by a detailed order categorically recording that the Umpire cannot sit over or review the order of the Arbitrators which was

unanimous and the application was a belated application with *mala fide* intentions.

10) Learned senior counsel further submitted that the understanding and interpretation of Article 4 has to be in consonance with reason and logic, meaning thereby, the stage at which the Arbitrators disagree would be the stage at which the Umpire commences upon and proceeds with the reference. Therefore, the Umpire is not duty bound to record the same evidence all over again, more so, when both the parties were given ample opportunities for presenting their case. Learned senior counsel further submitted that the Umpire, vide Award dated 21.02.2000, has categorically noted that the appellant-Company unduly delayed the proceedings and has specifically mentioned the dates wherein no appearance was put in by the other side which resulted in waiver by conduct. Therefore, the plea of *de novo* proceedings is erroneous and against the settled legal proposition of law. Learned senior counsel finally submitted that there was no irregularity in the reasoned orders passed by learned single Judge and the

Division Bench of the High Court and no interference is sought for by this Court in the matter.

Discussion:-

11) The first and the foremost point that arises for consideration is whether in a case where the matter has been referred to the Umpire owing to disagreement between the Arbitrators, the Umpire has to confine himself only to hear the issues on which the arbitrators disagreed or he has to hear the matter afresh. Further, what does the word *de novo* hearing means? By virtue of Section 3 of the Act, unless otherwise agreed, the provisions of the First Schedule are deemed to be incorporated in the arbitration agreement. In this view of the matter, it is necessary to scrutinize Article 4 of the First Schedule of the Act as the same relates to the matter in controversy which reads as under:-

> "4. If the arbitrators have allowed their time to expire without making an award or have delivered to any party to the arbitration agreement or to the umpire a notice in writing stating that they cannot agree, the, umpire shall forthwith enter on the reference in lieu of the arbitrators."

12) From a bare perusal of the above, it is clear that an Umpire enters on a Reference "in lieu of the Arbitrators" and the Act does not contemplate any distinction with regard to the conduct of proceedings by the Arbitrators or the Umpire. It is an undeniable fact that on reference of the matter to the Umpire, the Arbitrators become *functus officio*. The Umpire takes upon himself the exclusive authority of determining the disputes. He takes the place of Arbitrators, as the expression "in lieu of the Arbitrators" conveys. Unless there is an agreement to the contrary, defining or demarcating the powers of the Umpire, he is expected to discharge the same functions as Arbitrators with all the attendant powers, duties and obligations.

13) Either going by the very nature of functions entrusted to the Umpire or by the provisions of the First Schedule, it is crystal clear that there is no qualitative difference between the Arbitrators and the Umpire with regard to the methodology and modalities to be adopted for reaching a just and fair conclusion. It is trite to say that an Arbitrator is bound to observe the principles of natural justice and conform to the

fundamentals of judicial procedure. It is his duty to afford a reasonable opportunity to the parties concerned. However, it would also be illogical to contend that the Umpire has to start *de novo ipso facto*. The very essence of the law of arbitration is to settle the matter efficiently in a time bound manner. Hence, when the Umpire enters upon a Reference and replaces the arbitrators, he is needed to review the evidence and submissions only on those matters about which the arbitrators have disagreed unless either party applies for the rehearing of the evidence of the parties or their witnesses. The Umpire can surely go through the evidence recorded by the previous arbitrators but without being influenced by the opinion expressed by them in that regard and even the notes taken by previous arbitrators can be relied if there exist special provisions in the agreement permitting him to do so. However, if the party makes an application for *de novo* hearing, the Umpire is bound to allow the same, subject to the condition that the application is made at the earliest and the applicant is not using it as last armory to turn the case around. An objection on the ground that the Umpire has not

reheard the evidence may be waived by the conduct of the parties; the evidence already recorded before the previous arbitrator would remain valid and it would not be open for the parties to get the same recorded afresh later on. It is a well settled proposition that where a party seeking to impeach an Award has made no application to the Umpire for rehearing of the evidence, the same would generally operate as a waiver by conduct.

14) Having said that the Umpire is bound to hear the matter *de novo* on an application filed by the parties, subject to the satisfaction of other necessary conditions in accordance with the law of arbitration and before examining whether the conduct of the appellant-Company amounts to waiver or not, it is necessary to examine the meaning of the word *de novo* hearing before the Umpire to whom the matter is referred in case of disagreement between the Arbitrators. Learned senior counsel for the appellant-Company contends that hearing a matter *de novo* means the matter is to be started afresh i.e., from the very point from where the arbitrators had started. In other words, it would mean that the matter brought on record:

pleadings, evidence; before the arbitrators at the first instance would become nullity i.e., the proceedings including statements of claim, reply to claims and counter claims, statements and cross-examinations of witnesses before the Arbitrators have no significance. The ascertained point in dispute and the well known position of the parties would go in vain and the Umpire should start again with the same process. An inevitable outcome of the same is that a party is allowed to overcome the *lacuna* in the evidence already recorded before the previous arbitrators. Further, it would give an unnecessary option to the dishonest litigant to obliterate the evidence already recorded which would have adverse effect on them. Further, the witnesses to be examined afresh is a glaring anomaly that would ensue that the witnesses may not be available or might give a totally different version or a version inconsistent with their previous version, owing to the fact of faded memories. Such an interpretation of the word *de novo* trial would result in undue hardship to the parties and will defeat the very purpose of the Act and render arbitration ineffective.

15) Hence, firstly, the word *de novo* hearing should be given a purposive interpretation and it should be understood as a fresh hearing of the matter on the basis of pleadings, evidence and documents on record. If the party wants to re-examine a witness or objects to the documents admitted, the Umpire is to hear the parties and decide the application in the interest of justice.

16) Having held that the a party do have a right to call for *de novo* hearing subject to the waiver of the same by conduct, now comes the question whether in fact and circumstances of the present case the conduct of the appellant-Company amounts to waiver or not. It was contended that the appellant-Company has from the very beginning of the hearing before the Umpire had demanded *de novo* trial of the matter and in support of that it relied upon the communication dated 24.05.1999, 12.01.2000 addressed to the Umpire and application dated 29.01.2000 filed for *de novo* hearing of the matter.

17) However, having perused the records, it was found that the very first communication dated 24.05.1999, on which the appellant-Company has relied upon is a letter written to the Umpire with regard to the pending proceedings in the said matter before the High Court and the application that is filed before the High Court to which the appellant-Company was referring to in the said letter was an application filed under Section 5 of the Act for the dispute relating to quantum of fee of the Umpire. Though the appellant-Company in the said letter made a note with regard to the *de novo* hearing of the matter but the same seems to be an additional armory that the appellant is putting behind its back as it hasn't demanded *de novo* trial of the said matter neither in the communication nor thereafter in the proceedings. The appellant-Company next referred to communication dated 12.01.2000 but the same is also with regard to the pending proceedings before the High Court. It is only on 29.01.2000 that the appellant-Company has filed an application for *de novo* hearing of the case i.e., at a stage where the final arguments on the side of the respondent-Company have been finished and the date was

fixed for final argument from the side of appellant-Company. If the appellant-Company was serious in its endeavor that it should get an opportunity to get the evidence recorded afresh, an application could easily have been filed before starting the proceedings before the Umpire. It is only from oblique references that the appellant-Company seeks to derive such intent. This aspect is clearly an afterthought which arose during the culmination of the proceedings before the Umpire. Further, even the sum and substance of the highly belated application dated 29.01.2000 for commencement of proceedings *de novo* clearly shows that it was not asking for re-hearing/re-recording of the evidence but was actually requesting for review of the order of the two Arbitrators especially for re-examination of Shri K.L. Jain. It is the case of the appellant-Company that the Arbitrators were wrong in permitting production of some other witness, by name, Shri Vijay Gupta instead of Shri K.L Jain. From the above, there is no doubt that the conduct of the appellant-Company amounts to waiver and the application filled on 29.01.2000 is nothing

but trying a last armory to turn the case around. The Umpire was right in dismissing the said application.

18) Learned senior counsel for the appellant-Company contended on merits of the case, however, the law is well settled with regard to the scope and ambit of the jurisdiction of the courts to interfere with an arbitration award as has been settled in a catena of judgments of this Court and it would be sufficient to quote ***Ravindra Kumar Gupta and Company*** vs. ***Union of India*** (2010) 1 SCC 409 wherein it was held as under:-

> **"9.** The law with regard to scope and ambit of the jurisdiction of the courts to interfere with an arbitration award has been settled in a catena of judgments of this Court. We may make a reference here only to some of the judgments. In State of Rajasthan v. Puri Construction Co. Ltd. this Court observed as follows:
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> "26. The arbitrator is the final arbiter for the dispute between the parties and it is not open to challenge the award on the ground that the arbitrator has drawn his own conclusion or has failed to appreciate the facts. In Sudarsan Trading Co. v. Govt. of Kerala it has been held by this Court that there is a distinction between disputes as to the jurisdiction of the arbitrator and the disputes as to in what way that jurisdiction should be exercised. There may be a conflict as to the power of the arbitrator to grant a particular remedy. One has to determine the distinction between an error within the jurisdiction and an error in excess of the jurisdiction. Court cannot substitute its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. (emphasis in original) Whether a particular amount was liable to be paid is a decision within the competency of the arbitrator. By purporting to construe the contract the court cannot take upon itself the

> burden of saying that this was contrary to the contract and as such beyond jurisdiction. If on a view taken of a contract, the decision of the arbitrator on certain amounts awarded is a possible view though perhaps not the only correct view, the award cannot be examined by the court. Where the reasons have been given by the arbitrator in making the award the court cannot examine the reasonableness of the reasons. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisement of evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the court to take upon itself the task of being a Judge on the evidence before the arbitrator."

19) In ***Municipal Corporation of Delhi*** vs. ***Jagan Nath Ashok Kumar and Another*** (1987) 4 SCC 497, it was held by this Court that appraisement of evidence by the arbitrator is ordinarily never a matter which the court questions and considers. It may be possible that on the same evidence, the court may arrive at a different conclusion than the one arrived at by the arbitrator but that by itself is no ground for setting aside the award.

20) Following the above judgments, we are of the opinion that the question of whether the claims were tenable or not are based on the contract and which of them had to be granted were within the exclusive domain of the Arbitrators. In this case, the Award considered the totality of circumstances, and weighed the relevant facts on balance while proceeding to

award damages. The award does not disclose a manifestly erroneous approach; nor does it omit to consider and apply legal principles to the facts presented before the Arbitrators.

21) In view of the above discussion, we do not find any infirmity or error in the approach and judgments passed by the courts below. There is no merit in this appeal and the appeal is, therefore, dismissed with no order as to costs.

.....J.
(R.K. AGRAWAL)

.....J.
(R. BANUMATHI)

NEW DELHI;
APRIL 13, 2018.