
(2013) 10 DEL CK 0062

In the Delhi High Court

Case No : CM (M) No. 1084 of 2013 and C.M. No. 16013 of 2013 (for stay)

Bharat Heavy Electricals Limited

APPELLANT

Vs

Silor Associates, S.A.

RESPONDENT

Date of Decision : 11-10-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(4), 16, 18, 19(1)

Civil Procedure Code, 1908 (CPC) — Section 151

Constitution of India, 1950 — Article 136, 226, 227

Citation : (2013) 10 DEL CK 0062

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : A.S. Chandhiok, ASG, Mr. Prashant Mehta, Mr. Vidit Gupta, Ms. Harleen Singh and Ms. Priya Pathania, for the Appellant; Alope Kr. Sengupta, Suraj Prakash, Ms. Deblina Sengupta and Mr. Ashish Dixit, for the Respondent

Final Decision : Disposed Off

Judgement

Manmohan Singh, J.—By way of the present petition under Article 227 of the Constitution of India read with Section 151 CPC read with provisions of Arbitration and Conciliation Act, 1996, the petitioner has assailed order dated 21st July 2013 passed by the learned Arbitral Tribunal in a dispute pending between the parties. Brief facts for the purpose of adjudication of the present matter are that the parties entered into an agreement dated 14th February 2003 in respect of a project of 4 X V 92-2 Western Mounted Gas Turbine Power Plant in Libya. As a result of disputes having arisen between the parties, the matter was referred to an Arbitral Tribunal. After completion of the pleadings, the learned Arbitral Tribunal opined that framing of specific issues was not necessary in the matter and accordingly directed the respondent (claimant therein), to file its affidavit by way of evidence and on such affidavit being filed, opportunity was also given to the petitioner (respondent therein) to file its affidavit by way of evidence.

2. While the dates were being fixed, the learned Senior Counsel appearing for the petitioner stated that he was busy on the first two dates being fixed i.e. on 6th and 7th February, 2013 and therefore, the petitioner's witnesses may be cross-examined by the respondent and on the next two dates thereafter fixed, the petitioner would cross-examine the respondent's witnesses.

3. Consequently, the first witness of the petitioner, Mr. R.K. Belapurkar, was examined and his cross-examination continued on both the dates for which the learned Senior Counsel for the petitioner was busy. The cross-examination of the said witness was concluded on 3rd March 2013. It is stated by the petitioner that no request was made for cross-examination of any other witness of the petitioner nor extension of time was sought in regard to any other witness and that though opposed by the petitioner, this request was conceded to by the learned Arbitral Tribunal in the order dated 7th February 2013.

4. The respondent had filed three applications u/s 18 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") for production of documents for which the hearing was fixed for 5th April, 2013. While the next date was fixed for 5th April, 2013, the learned Arbitral Tribunal recorded that on 7th and 8th March, 2013, Mr. Guin, another witness of the petitioner, was not available and the dates were being cancelled.

5. The petitioner filed an application dated 3rd/5th April, 2013, inter alia, stating that unless the petitioner here in a matter admits the facts stated by the respondent herein, as per normal procedure, the respondent/claimant had a right to begin the evidence in support of its case.

6. It was stated that the burden of proof was on the claimant, the arbitral tribunal first directed the respondent to file its affidavit by way of evidence and accordingly although the respondents witness had to be cross-examined by the petitioner, due to the inability expressed by the learned Senior Counsel to appear for such cross-examination on the dates fixed by the learned Arbitral Tribunal, he had agreed that in the next two sittings, the witness of the petitioner, Mr. Belapurkar, be cross-examined. It was stated that after completion of such cross examination of the said witness on the next two sittings, the witness of the respondent was to be examined. It was averred that such agreement about the procedure to be followed was noted in the minutes of the proceedings and is to be followed before the arbitral tribunal was limited to examination and cross-examination of petitioner's witness Mr. Belapurkar before the examination of respondents' witness and cannot be extended to other witnesses of the petitioner.

7. It was stated that arbitral tribunal cannot assume jurisdiction to direct for examination of other witness of the petitioner by adopting the procedure contemplated u/s 19(3) of the Act because such power is circumscribed by Section 19(2) of the Act.

8. The learned senior counsel appearing on behalf of the respondent disputed the

case of the petitioner and stated that the procedure so adopted by the arbitral tribunal to examine petitioner's witnesses was wholly justified in view of agreed procedure and consent given by the petitioner.

9. The learned Arbitral Tribunal vide order dated 21st July 2013, which was sent as a detailed email order dated 14th August 2013, opined that the order of examination of the witnesses of the parties had been agreed by the parties and the arbitral tribunal had also directed Mr. Guin to appear for his deposition on such understanding. Apart from that it was opined that the arbitral tribunal has also the power to evolve and follow a procedure as it may deem just and proper in the facts of the case before it. Such power of the tribunal has not been circumscribed by the procedure agreed between the parties. In addition to that Chapter V allows the Arbitral Tribunal to conduct its proceedings and determination of rules and procedures.

10. It was also opined by the learned Arbitral Tribunal that petitioner by way of a counter claim had claimed a huge amount which is more than the amount under the main claim petition of the respondent. In this aspect, the petitioner also stands to the position of the claimant and has burden of proof to establish its counter claim. Accordingly, it was opined that no prejudice would be caused if other witnesses of the petitioner are examined first, more so when the parties had accepted such course of action and had proceeded on that basis.

11. The petitioner filed an application dated August 22, 2013 to dismiss the claim of the respondent with all consequential orders/award raising therein issues of law and preliminary issues which required no evidence. The said application was preferred stating that the obligations of the respondent had to be performed by it in Libya. However, the fundamental and significant point that arises in the proceedings is that the Libyan Law prohibited such an agreement unless the persons or entities entering into such an agreement were of Libyan nationality. The agreement is also void even as per the Indian law, for it seeks to defeat, inter alia, the provisions of another law. On 24th August 2013, the learned Arbitral Tribunal opined that that issues raised in the application would be heard at the time of the final hearing of the case and therefore deferred the hearing of the application.

12. Aggrieved thereof, the petitioner has filed the present petition.

13. The learned counsel for the respondent in support of his submissions has referred to various orders passed by the learned Arbitral Tribunal including the order dated 24th August, 2013. His main submission is that the impugned order cannot be interfered with as it was an agreed order between the parties and even the petition itself is not maintainable in view of the decision of the Apex Court in the case of S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, which was subsequently followed in the case of S.B.P. and Company Vs. Patel Engineering Ltd. and Another, .

14. Relevant paras 45, 46 and 47 of SBP & Co. (supra) referred to by the learned

counsel for the respondent read as under:

45. It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution of India. We see no warrant for such an approach. Section 37 makes certain orders of the arbitral tribunal appealable. u/s 34, the aggrieved party has an avenue for ventilating his grievances against the award including any in-between orders that might have been passed by the arbitral tribunal acting u/s 16 of the Act. The party aggrieved by any order of the arbitral tribunal, unless has a right of appeal u/s 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The arbitral tribunal is after all, the creature of a contract between the parties, the arbitration agreement, even though if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution of India. Such an intervention by the High Courts is not permissible.

46. The object of minimizing judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 of the Constitution of India or under Article 226 of the Constitution of India against every order made by the arbitral tribunal. therefore, it is necessary to indicate that once the arbitration has commenced in the arbitral tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them u/s 37 of the Act even at an earlier stage.

47. We, therefore, sum up our conclusions as follows:

(vi) Once the matter reaches the arbitral tribunal or the sole arbitrator, the High Court would not interfere with orders passed by the arbitrator or the arbitral tribunal during the course of the arbitration proceedings and the parties could approach the court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.

15. Mr. Chandhiok, learned ASG on the other hand has argued that the present petition is very much maintainable in view of the following decisions referred by him:

i) M.L. Gupta and Associates Vs. H.P. Housing and Urban Development Authority and Others :

(a) A petition under Article 226 of the Constitution is different from a petition under Article 227. The mode of exercise of power by High Court under these two articles is also different.

(b) In any event, a petition under Article 227 cannot be called a writ petition. The history of the conferment of writ jurisdiction on High Courts is substantially different from the history of conferment of the power of Superintendence on the High Courts under Article 227 and have been discussed above.

(e) According to the ratio in *Waryam Singh* (supra), followed in subsequent cases, the High Court in exercise of its jurisdiction of superintendence can interfere in order only to keep the tribunals and Courts subordinate to it, "within the bounds of their authority".

(f) In order to ensure that law is followed by such tribunals and courts by exercising jurisdiction which is vested in them and by not declining to exercise the jurisdiction which is vested in them.

(g) Apart from the situations pointed in (e) and (f), High Court can interfere in exercise of its power of superintendence when there has been a patent perversity in the orders of tribunals and courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.

ii) *Punjab Agro Industries Corpn. Ltd. Vs. Kewal Singh Dhillon*, :

8. We have already noticed that though the order u/s 11(4) is a judicial order, having regard to Section 11(4) relating to finality of such orders, and the absence of any provision for appeal, the order of the Civil Judge was open to challenge in a writ petition under Article 227 of the Constitution. The decision in *SBP* does not bar such a writ petition. The observations of this Court in *SBP* that against an order u/s 11 of the Act, only an appeal under Article 136 of the Constitution would lie, is with reference to orders made by the Chief Justice of a High Court or by the designate Judge of that High Court. The said observations do not apply to a subordinate court functioning as designate of the Chief Justice.

16. I agree with the submissions of the petitioner that in normal matter even though CPC in terms does not apply to arbitration initiated under the Act, however, underling principles based on fundamental jurisprudence ensuring fair play and justice have to be followed by the Arbitral Tribunal despite of scheme of Section 19(1) of the Arbitration and Conciliation Act, 1996 which allows the Arbitral Tribunal not to be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872, unless the claims of the claimant are admitted by the other side and in the absence thereof the claimant had a right to begin the evidence.

17. But the situation and circumstances in the present matter are different. The same are that when the matter was fixed for 8th November, 2012 it was informed by the respondent to the Tribunal that not more than two witnesses will be examined. The petitioner has stated that the petitioner also proposes to examine two witnesses. The direction was passed that by 14th December, 2012 the deposition-in-chief in the form of affidavit should be filed by the respondent

by serving a copy on the other side. The petitioner will also file deposition-in-chief in the form of affidavit by serving a copy on 18th January, 2013.

17.1 By consent of the parties, 6th and 7th February, 2013 were fixed for cross-examination of the witnesses of the petitioner. The parties also agreed that the cross-examination of the witnesses of the respondent would be held on 7th and 8th March, 2013.

17.2 On 7th February, 2013, cross-examination of Mr. R.K. Belapurkar was resumed by the learned counsel for the respondent and it was continued for two sittings. However, the cross-examination could not be concluded and the matter was fixed for 3rd March, 2013 for further cross-examination of Mr. R.K. Belapurkar. On 3rd March, 2013, the cross-examination of Mr. R.K. Belapurkar was concluded.

17.3 The respondent filed two applications u/s 18 of the Arbitration and Conciliation Act, 1996 read with Section 151 CPC for production of documents. The said applications were fixed for hearing on 5th April, 2013 at 10.30 a.m. Time was granted to the petitioner to file the reply, if any, by 30th March, 2013. The hearings fixed on 7th March, 2013 and 8th March, 2013 were cancelled because Mr. D. Guin (the next witness of the petitioner) was not available on the said two dates and it was ordered that the hearing would take place on 5th April, 2013 and 6th April, 2013 and after the disposal of the applications u/s 18, the deposition of the witness No. 2 Mr. D. Guin would commence.

17.4 After the concluding portion of the order on the applications dated 3rd/5th April, 2013 of the petitioner was passed, the application dated 18th July, 2013 filed by the petitioner was taken up for consideration. However, both the parties agreed that the said application would be taken up in the next sitting of the Tribunal. The petitioner sought three weeks time to file the additional/supplementary composite witness statement of Mr. D. Guin in the form of affidavit by 12th August, 2013. With the consent of the parties, the next sitting of the Tribunal was fixed on 24th August, 2013.

17.5 On 24th August, 2013, it was recorded by the Tribunal that the petitioner intends to examine Mr. C. Venkat Rao as a witness for the petitioner and for that purpose, the petitioner may file his statement of evidence before the Tribunal. The prayer of the petitioner was not opposed by the respondent. The application filed by the petitioner was disposed of, by directing that Mr. C. Venkat Rao may file his statement of evidence in the form of affidavit and the CVO of the petitioner would direct Mr. Rao to file such statement of evidence by way of sworn affidavit. In the said order, the application filed by the petitioner dated 22nd August, 2013 was also disposed of, in which the following prayers were made:-

1. the present Application may be heard and adjudicated upon on the preliminary issues and objections raised by the respondent;

2. the application be allowed and the Claim Petition be dismissed on all or any of the grounds mentioned in the present application;
3. all consequential orders including the order allowing the counter claims of the respondent be allowed and award passed in its favour;
4. costs be awarded to the respondent; and
5. such other or further order(s) as may be deemed fit and proper in facts and circumstances of the present case be passed.

17.6 The learned Arbitral Tribunal while considering the said prayers held that issues raised in the application were open to be argued on merit at the time of final hearing of the respective claim of the parties. Therefore, the said application stood adjourned. It was also observed that in the order dated 22nd August, 2013 that Mr. D. Guin had not yet filed the supplementary/composite deposition. Time for the said purpose was granted by the learned Arbitral Tribunal upto 16th October, 2013 by serving a copy on the other side. Further liberty was also granted to Mr. C. Venkat Rao to file the proposed deposition-in-chief within three weeks from the date of serving the order on the CVO. The said responsibility was given to the petitioner to serve the copy of the order dated 24th August, 2013 within two weeks.

18. Without deciding the controversy, as to whether the petition under Article 227 of the Constitution of India in the present circumstances is maintainable or not, this Court is otherwise not inclined to interfere with the order passed by the learned Arbitral Tribunal due to the following reasons:-

- i.) Once the procedure agreed by the parties which is also accepted by the learned Arbitral Tribunal, the same be not interfered in midway when part of the evidence of the petitioner has already been recorded and the directions with the consent of the parties were issued to file the additional/supplementary composite deposition-in-chief by Mr. D. Guin in the form of affidavit by 16th October, 2013.
- ii.) Not only that, even in the order dated 24th August, 2013, the application of the petitioner was allowed who intended to examine Mr. C. Venkat Rao as a witness and seek time to file short statement of witness before the Arbitral Tribunal and direction was issued to the petitioner to serve the order within two days on the CVO and simultaneously, it was recorded in the order that Mr. D. Guin has not filed the supplementary/composite deposition-in-chief.
- iii.) It appears from the record that the learned counsel for the petitioner had earlier given his consent to record the evidence of the petitioner at the first instance due to the reason that he was busy on the particular days in the month of February, 2013. The record also reveals that even on subsequent dates, the said arrangement between the parties was continued. It is evident that at that time, while giving the consent, the counsel was fully aware about the consequences of the said arrangement between the parties.

iv.) It can also not be denied that the petitioner who has a claim of huge amount by way of counter-claim which is more than the amount under the claim petition filed by the respondent, in that regard burden of proof lies with the petitioner.

19 In the abovementioned scenario and facts and circumstances of the present case, this Court is of the view that at this stage, the petitioner cannot be allowed to change its stand by giving an excuse that the said consent/concession given by the learned counsel for the petitioner was made only for a particular period, as it appears that the said agreed procedure was acted upon in the subsequent hearing of the proceedings also. The learned Arbitral Tribunal has accepted the procedure agreed by the parties.

20 From the entire gamut of the matter and on reading of the subsequent orders passed by the learned Arbitral Tribunal, it appears to the Court that the petitioner was fully aware about all the facts and consequences about the agreed procedure. Further, in view of the settled law, the finding arrived in the application dated 22nd August, 2013 filed by the petitioner cannot be interfered with, as this Court is also of the same view that the issues raised in the application be decided at the final stage. Even otherwise, no serious submissions were addressed by either side on this aspect at the time of hearing.

21 Thus, in view of the above said reasons and circumstances, I am not inclined to interfere with the order passed by the learned Arbitral Tribunal, though I agree with the argument of Mr. Chandhiok, learned ASG, that in a normal case it was the respondent who ought to have begun its evidence as burden of proof of his claim lies upon him and normal procedure is legally correct and valid as the same curtails the evidence, time and cost of the parties and in routine matter, the same should not be ignored. However, due to peculiar facts and circumstances of the present case, the said arrangement at this stage cannot be disturbed. In the interest of justice, from today, the petitioner is granted three weeks" further time to produce its evidence by way of affidavits and the learned Arbitral Tribunal is requested to fix another date for the purpose of filing supplementary/composite deposition/affidavits and for the purpose of cross-examination of the petitioner's witnesses.

22 With the above said observations, the present petition is disposed of. Dasti, under the signatures of the Court Master.