

(2019) 01 DEL CK 0234

In the Delhi High Court

Case No : Civil Misc.(Main) No. 44 Of 2019, Civil Miscellaneous Application No. 1249 Of 2019

Delhi Development Authority

APPELLANT

Vs

Electronic Corporation Of India Limited (Ecil)

RESPONDENT

Date of Decision : 21-01-2019

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 36
Constitution of India, 1950 — Article 227

Citation : (2019) 01 DEL CK 0234

Hon'ble Judges : Anu Malhotra, J

Bench : Single Bench

Advocate : Arjun Pant, Gunjan Kumar

Judgement

Anu Malhotra, J

CM.APPL.1249/2019 (Ex.)

Exemption allowed subject to all just exceptions.

CM (M) 44/2019

1. The petitioner Delhi Development Authority vide the present petition filed under Article 227 of the Constitution of India seeks directions that the impugned award dated 01.12.2017 of the Additional Secretary and Appellate Authority, Ministry of Law and Justice, Department of Legal Affairs in terms of the provision of the Permanent Machinery of Arbitration (PMA) under the aegis of the Ministry of Heavy Industries and Public Enterprises, Department of Public Enterprises, vide which an appeal filed by the petitioner herein as appellant in Appeal No.02/AS(RY)/2017 in case No. PMA/Dr.GR/17/2012 passed by the Sole Arbitrator,- was disposed of whereby the Appellate Authority whilst accepting the liability of the appellant herein to pay Rs.79,90,022/- to the respondent modified the rate of interest awarded by the Arbitrator as being 15% p.a. to 8% p.a. from the date of award passed by the Sole Arbitrator with further directions to the effect that in

case the entire awarded amount was not paid within the period of two months from the date of receipt of the award, the appellant would pay the entire awarded amount along with interest @ 10% p.a. till the date of realization and thus the award in respect of the interest payable by the petitioner to the respondent stand amended.

2. The Sole Arbitrator vide the award dated 09.01.2013 had allowed the claim of the respondent, M/s Electronics Corporation of India Limited in relation to the bills raised by the respondent for work done by it for the supply, installation, commissioning and for the establishment of the integrated security system for the Commonwealth Games, 2010 for its Saket sport complex in relation to which a contract had been entered into between the petitioner and the respondent vide agreement No.19/EE/ED(CWG)/3/DDA/09-10, in view of the invocation of the arbitration clause by the respondent under the aegis of Permanent Machinery of Arbitration.

3. As per the agreement no.19/EE/ED (CWG) 3/DDA/09-10 dated 07.12.2009 between the parties to the present petition vide clause 19.1, the arbitral clause therein was incorporated to the effect:-

"RESOLUTION OF DISPUTES- 19.1 In the event of any dispute or difference relating to the interpretation and application of the provision of this Contract, such dispute or difference shall be referred by either party to Arbitration by one of the Arbitrators having specialist knowledge in commercial contracts in the Department of Public Enterprises to be nominated by the Secretary to the Government of India In-charge of the Department of Public Enterprises. The Arbitration and Conciliation Act, 1996 need not be applicable to the arbitration under this clause. The award of the Arbitrator shall be binding upon the parties to the dispute, provided, however, any party aggrieved by and dissatisfied with such award may make a further reference for setting aside or revision of the award to the Law Secretary, Department of Legal Affairs, Ministry of Law and Justice, upon such reference, the dispute shall be decided by the Law Secretary or the Special Secretary/ Additional Secretary, when so authorized by the Law Secretary, whose decision shall bind the parties finally and conclusively. The parties shall share equally the cost of arbitration as intimated by the Arbitrator.

19.2 Subject to the clause no.19.1 of the Courts of NCT of Delhi shall have exclusive jurisdiction."

4. On behalf of the petitioner, it was submitted that the present petition had been filed under Article 227 of the Constitution of India as the award passed by the Appellate Authority under the aegis of the Permanent Machinery of Arbitration is beyond the purview of the Arbitration and Conciliation Act, 1996 and the petitioner had no other alternative efficacious remedy but to seek redressal before this Court.

5. Learned counsel for the petitioner has fairly brought to the notice of this Court the observations of the Hon'ble Supreme Court in Northern Coalfield Ltd. Vs.

Heavy Engineering Corp. Ltd. and Ors. AIR 2016 SC 3715 in which too there existed a procedure of the Permanent Machinery of Arbitration for settlement of disputes by arbitration between the public sector enterprises and the Government Departments which contained a similar term to the effect:

"In the event of any dispute or difference relating to the interpretation and application of the provisions of the contracts, such dispute or difference shall be referred by either party for Arbitration to the sole Arbitrator in the Department of Public Enterprises to be nominated by the Secretary to the Government of India in-charge of the Department of Public Enterprises. The Arbitration and Conciliation Act, 1996 shall not be applicable to arbitration under this clause. The award of the Arbitrator shall be binding upon the parties to the dispute, provided, however, any party aggrieved by such award may make a further reference for setting aside or revision of the award to the Law Secretary, Department of Legal Affairs, Ministry of Law & Justice, Government of India. Upon such reference the dispute shall be decided by the Law Secretary or the Special Secretary/Additional Secretary, when so authorized by the Law Secretary, whose decision shall bind the Parties finally and conclusively. The Parties to the dispute will share equally the cost of arbitration as intimated by the Arbitrator".

The observations in para-22 of the said verdict of the Hon'ble Supreme Court are to the effect:

22. The net effect of the above can be summarized as under: The Permanent Machinery of Arbitration was put in place as early as in March, 1989, even before ONGC II was decided on 11th October, 1991. The Permanent Machinery of Arbitration was outside the statutory provision then regulating arbitrations in this country namely Arbitration Act, 1940 (10 of 1940).

The award made in terms of the Permanent Machinery of Arbitration being outside the provisions of the Arbitration Act, 1940 would not constitute an award under the said legislation and would therefore neither be amenable to be set aside under the said statute nor be made a rule of the court to be enforceable as a decree lawfully passed against the judgment debtor. The Committee on disputes set up under the orders of this Court in the series of orders passed in ONGC cases did not prevent filing of a suit or proceedings by one PSE/PSU against another or by one Government department against another. The only restriction was that even when such suit or proceedings was instituted the same shall not be proceeded with till such time the Committee on Disputes granted permission to the party approaching the Court.

The time limit fixed for obtaining such permission was also only directory and did not render the suit and/ or proceedings illegal if permission was not produced within the stipulated period.

The Committee on Disputes was required to grant permission for instituting or pursuing the proceedings. If the High Power Committee (COD) was unable to resolve the dispute for reasons to be recorded by it, it was required to grant

clearance for litigation.

The Committee on Disputes experience was found to be unsatisfactory and the directives issued by the Court regarding its constitution and matters incidental thereto were recalled by the Constitution Bench of this Court thereby removing the impediment which was placed upon the Court's/Tribunal's powers to proceed with the suit/ legal proceedings. The Department of Public Enterprises has subsequent to the recall of the orders in the ONGC line of cases modified its guidelines deleting the requirements for a COD clearance for resorting to the Permanent Machinery of Arbitration and;

The Permanent Machinery of Arbitration was and continues to be outside the purview of Arbitration Act, 1940 now replaced by Arbitration and Conciliation Act, 1996."

6. As regards the institution of the civil suit in that matter, the observations of the Hon'ble Supreme Court are depicted in para-24 of the same which read to the effect that

24. The question then is whether the requirement of the clearance of COD could be insisted upon even at this stage. Our answer is in the negative. We say so because COD stands abrogated/dissolved and the orders directing constitution of such a Committee reversed. Since there is no COD at present there is no question of either obtaining or insisting upon any clearance from the same. The upshot of the above discussion is that the orders passed by the High Court rejecting the plaint on the ground that the same was not preceded or accompanied by permission from COD is unsustainable, are hence, liable to be set aside.

7. Vide the observations in para-25 of the said verdict read to the effect:-

25. That brings us to the question whether we ought to remand the matter back to the Civil Court for adjudication and if that were not a desirable course of action whether adjudication of the matters in dispute by way of arbitration would be a better option. It was argued by Mr. Ranjit Kumar, learned Solicitor General that the respondent has an award in its favour made in terms of the Permanent Machinery of Arbitration and that so long as that award stands there is no need for any fresh or further arbitration on the claims already adjudicated upon under the said mechanism. The argument appears to be attractive at first blush but does not survive a closer scrutiny. That is so because an arbitral award under the Permanent Machinery of Arbitration may give quietus to the controversy if the same is accepted by the parties to the dispute. In cases, however, a party does not accept the award, as is the position in the case at hand, the arbitral award may not put an end to the controversy. Such an award being outside the framework of the law governing arbitration will not be legally enforceable in a court of law. In fairness to Mr. Ranjit Kumar, learned Additional Solicitor General, we must mention that he did not dispute that the award made by the arbitrator under the Permanent Machinery of Arbitration was outside the statute regulating

arbitration in this country and was not, therefore, executable in law. What he argued was that since both sides to the disputes were government corporations the Government could adopt administrative mechanism for recovering the amount held payable to the respondent. That does not, in our opinion, answer the question. Remedies which are available to the Government on the administrative side cannot substitute remedies that are available to a losing party according to the law of the land. The appellant has lost before the arbitrators in terms of the Permanent Machinery of Arbitration and is stoutly disputing its liability on several grounds. The dispute regarding liability of the appellant under the contract, therefore, continues to loom large so long as it is not resolved finally and effectually in accordance with law. No such effective adjudication recognized by law has so far taken place. That being so, the right of the appellant to demand such an adjudication cannot be denied simply because it happens to be a Government owned company for even when the appellant is a government company, it has its legal character as an entity separate from the Government. Just because it had resorted to the permanent procedure or taken part in the proceedings there can be no estoppel against its seeking redress in accordance with law. That is precisely what it did when it filed a suit for declaration that the award was bad for a variety of reasons and also that the contract stood annulled on account of the breach committed by the respondents.

8. It was thus considered appropriate that in that case the arbitral award under the Permanent Machinery of Arbitration may give quietus to the controversy if the same was accepted by the parties to the dispute and in the facts and circumstances of that case all the disputes were referred afresh to arbitration. The said verdict of the Hon'ble Supreme Court with observations in paras-23 & 24 there of were referred to in the verdict of the Hon'ble Supreme Court in NTPC Ltd. Kahalgaon Super Thermal Power Station Vs. Hindustan Steel Works Construction Ltd. In Civil Appeal No.11122/2017 vide verdict dated 28.08.2017 and it was observed to the effect:

"The Permanent Machinery of Arbitration (PMA) had been set in place earlier than the judgment in the ONGC case, as noticed in Northern Coalfields (supra) in March, 1989. Yet in the summary contained in para 23, this Court, instead of appreciating that the Committee on Disputes was set up judicially, and ran parallel to the Permanent Machinery of Arbitration, appears to have combined the two in requiring permission from the CoD to refer disputes already finally decided by the PMA to a litigative process while the CoD was in place, as was held in para 24 of the said judgment."

and the matter was thus referred to a larger Bench in terms of

"This being the case, it is clear that it requires to be determined by a Larger Bench as to whether a litigative process can yet be availed in situations like the present where, under the PMA, the Appellate order of the Secretary is final and binding on both parties.

For this reason, we refer the said judgment to a Bench of three learned Judges of this Court. Regard being had to the fact that the judgment delivered by the three-Judge Bench would have extremely large ramifications in that it would affect litigation between government bodies, we request the Hon'ble Chief Justice of India to constitute such a Bench at the earliest."

with directions that "There shall be an interim stay of the arbitration proceedings before Hon'ble Mr. Vijender Jain (Retd. Chief Justice)" and thus a restraint having been granted of the arbitral proceedings that had been invoked by the Division Bench of this Court.

9. Vide the verdict of this Court in Engineering Projects (India) Ltd. Vs. Steel Authority of India Ltd. In Ex.P. 316/2012 and Ex. Appl. (OS) 691/2012, a verdict dated 15.03.2017 whilst referring to the aspect of question of the enforceability of an award under the Permanent Machinery of Arbitration (PMA) and the applicability of the provision of the Arbitration and Conciliation Act, 1996 when a petition had been filed under Section 36 of the Arbitration and Conciliation Act, 1996 for enforcement of an award dated 17.02.2011 as rendered by the Arbitrator appointed under the PMA on a similar clause in the contract between the parties which read to the effect:

"In the event of any dispute or differences relating to the interpretation and application of the provisions of the contracts, such dispute or difference shall be referred by either party for Arbitration to the Sole Arbitrator in the Department of Public Enterprises to be nominated by the Secretary to the Government of India In-Charge of the Department of Public Enterprises. The Arbitration and Conciliation Act, 1996 shall not be applicable to arbitration under this clause. The award of the Arbitrator shall be binding upon the parties to the dispute, provided, however, any party aggrieved by such award may make a future reference for setting aside or revision of the award to the Law Secretary, Department of Legal Affairs, Ministry of Law & Justice, Government of India. Upon such reference the dispute shall be decided by the Law Secretary or the Special Secretary / Additional Secretary, when so authorized by the Law Secretary whose decision shall bind the Parties finally and conclusively. The parties to the dispute will share equally the cost of arbitration as intimated by the Arbitrator."

whilst referring to the verdict of the Hon'ble Division Bench of this Court in M/s IRCON International Ltd. Vs. M/s. National Building Construction Corporation Ltd. In EFA (OS) No.22/2006 decided on 28.11.2008 wherein it was held by the Hon'ble Division Bench of this Court that:-

"24. Resolution of disputes by arbitration is now governed by the Arbitration and Conciliation Act, 1996, under which parties may by means of agreement in writing, agree to refer to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. It also makes provisions about composition of the Arbitral Tribunal, its jurisdiction, the conduct of arbitral proceedings, the making of

arbitral award and termination of proceedings, the recourse against the award.

25. If by an agreement the parties exclude the provisions of an Act they can easily escape the clutches of law without any difficulty. Every jural relationship has to be governed by some law of the land and the parties cannot contract out of statute.

26. It is well established that a statute ousting jurisdiction of a civil court must be strictly constructed, and it is for the party seeking to oust the jurisdiction of an ordinary civil court to establish that there is no jurisdiction. (see AIR 1966 SC 1718 para 9; AIR 1967 SC 781 Para 13). In the case of Smt. Ganga Bai v. Vijay Kumar AIR 1974 SC 1126 the Supreme Court held :

"There is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by any statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue. A suit for maintainability requires no authority of law and it is enough that no statute bars the suit."

27. The object of the rule is, that no party/person should be left remedy less. Necessary corollary to this would be that, if no adequate remedy is provided for by a special statute through the Forum established under it for a particular purpose/situation, civil courts remedy to administer justice cannot be said to be ousted to deal with even such cases.

28. So far as the part in the arbitration clause in the said agreement regarding the non-applicability of the Act of 1996 is concerned, we consider that it is void and the parties cannot by themselves exclude the statute itself which is being drafted by the Legislature to look after the arbitration matters."

and thus reference was made in Engineering Projects (India) Ltd. (supra) to observations of the Hon'ble Supreme Court in Northern Coalfield Ltd (supra) qua summarization of law in para-22 already adverted to hereinabove and it was observed to the effect that in view of the verdict of the Hon'ble Supreme Court in Northern Coalfield Ltd (supra), the decision of the Hon'ble Division Bench of this Court in M/s IRCON International Ltd. (supra) was no longer in force as the provisions of the Arbitration and Conciliation Act, 1996 had been held to be inapplicable to the proceedings under the PMA and the petition for enforcement of the award under Section 36 of the Arbitration and Conciliation Act, 1996 was not maintainable.

10. As it is thus well settled that the provisions of the Arbitration and Conciliation Act, 1996 do not apply to the arbitral proceedings invoked and determined through the mode of the Permanent Machinery of Arbitration, taking into account that the aspect of the scope of the redressal of a further litigative process in cases where the arbitral order of the Secretary is final and binding on both parties having been requested to be referred to a larger Bench of the Hon'ble Supreme Court of India vide the judgment dated 28.08.2017 of the Hon'ble

Supreme Court in NTPC Ltd. Kahalgaon Super Thermal Power Station (supra), it is considered appropriate to adjourn the proceedings of the present petition sine die, to be taken up on determination of the said issue by the Larger Bench of the Hon'ble Supreme Court of the question referred in NTPC Ltd. Kahalgaon Super Thermal Power Station (supra). The petitioner is at liberty to bring such decision of the larger Bench of Hon'ble Supreme Court to the notice of this Court.