
(2016) 04 AHC CK 0070

In the Allahabad High Court

Case No : First Appeal From Order No. 1584 of 2013.

Indian Oil Corporation Ltd.

APPELLANT

Vs

M/s Vidyawati Construction Company

RESPONDENT

Date of Decision : 08-04-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 33, 34, 37
Limitation Act, 1963 — Section 14, 5

Citation : (2016) 5 ADJ 74

Hon'ble Judges : Arun Tandon; Umesh Chandra Srivastava, JJ.

Bench : Division Bench

Advocate : Prakash Padia, Advocate, for the Appellant; Mahesh Sharma and Vinod Sinha, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

1. This First Appeal From Order under section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as Act, 1996), has been filed by M/s Indian Oil Corporation Ltd. Against the order of the District Judge, Varanasi dated 23.3.2013, where under Application 20C made by the appellant for the condonation of delay in filing of the application/objection under section 34 of Act, 1996, has been rejected on two grounds :- a) provisions of Section 5 of the Limitation Act do not apply in the matter of objection/application to be filed under section 34 of the Act, 1996, b) even if the benefit of section 14 of the Limitation Act is granted to the objector-appellant then also the period taken for filing of the objection under section 34 of the Act, 1996, would be beyond maximum time limit prescribed under section 34 proviso of the Act, 1996.

2. Before dealing with the rival contentions raised on behalf of the parties it would be worthwhile to narrate the facts in short.

3. An agreement was entered into between Indian Oil Corporation Ltd. and M/s Vidyawati Construction Company, Allahabad in the matter of construction of office building and road etc. for the LPG Bottling Plant at Varanasi. The

agreement admittedly contained an arbitration clause. A dispute was raised by the contracting party leading to the arbitral proceedings which were referred for Arbitrator named by the High Court.

4. The sole Arbitrator made an award on 27.4.2005. The operative portion of the award reads as under :-

"For the reasons given while adjudicating upon the claims raised by the parties, the AWARD is made as hereunder:

The claimants will be entitled to Rs.12,66,002/- awarded against their claim no. 1, but will not be entitled to any interest on the said amount, as it has been established that they had abandoned the contract and neither came for joint measurement nor settlement of final bill after termination of the contract. The claimants shall also be entitled to Rs.25,350/- allowed by me as refund of the sales tax. Thus, the total claim allowed by me in favour of the claimants is Rs.12,91,352/- apart from the release of the bank guarantee of Rs.9,46,029/- which I have ordered to be released in favour of the claimants. The respondent is entitled to Rs.20,71,223/- on account of the work done through the alternative agency, i.e. M/s Kapoor Builders on account of extra expenditure incurred in getting the balance work done, but shall not be entitled to any interest thereon. The said counter claim was raised during the arbitration proceedings which is permissible. Thus, against the total amount awarded in favour of the respondent, i.e. Rs.20,71,223/-, the sum of Rs.12,91,352/- awarded in favour of the claimants is set off and the balance amount of Rs.7,79,871/- shall have to be paid by the claimants to the respondent. The claimant shall pay the said sum of Rs.7,79,871/- to the respondent within a period of four months from the date of publication of the award. The respondent shall be entitled to claim interest at the rate of 12% on the said amount till the receipt of the payment. I further hold that each party shall bear their own costs of the proceedings.

Justice R.P. Singh (Retd.)

Allahabad

Dated April 27,2005."

5. It appears that an application was made by the Contractor on 21.10.2005 for an additional award being made under section 33 of the Arbitration and Conciliation Act, 1996 in respect of certain disputes which were subject matter of the arbitral proceedings but qua which no award had been made by the sole Arbitrator in his order dated 21.10.2005.

6. To this application, objections were filed on behalf of the Indian Oil Corporation Ltd. Amongst other the objections were i.e. a) The application under section 33 for additional award had been made beyond the prescribed period of 30 days from the date of the award and b) the contesting party had not agreed to such additional award being made by the Arbitrator, which was a condition precedent under section 33 of the Act, 1996.

7. Learned counsel for the parties before us agreed that on both the aforesaid issues no finding has been returned by the sole Arbitrator.

8. The arbitrator proceeded to make an additional award on 21.2.2006. The operative portion whereof reads as under :-

"In view of the additional award given by me, as stated above, I modify my award dated 27.04.2005 as under :

1. The respondent will immediately release the bank guarantees for Rs.9,46,029.00.

2. The respondent will pay to the claimant bank commission on the total amount of the bank guarantees already incurred til 29.06.2001 to the tune of Rs.1,04,541.00 and will further pay to the claimant bank commission, on the bank guarantees @ 1% per annum with effect from 30.06.2001 till the release of the bank guarantees along with interest at the rate of 12% per annum till the date of payment.

3. The respondent will pay to the claimant interest @ 12% per annum on the total amount of bank guarantees i.e. Rs.9,46,029.00 from 27.12.1989 till the date of release/return of the bank guarantees.

4. The respondent will further pay Rs.3,63,437.81 towards the cost of materials left by the claimant at the spot in the premises of the Indian Oil Corporation Limited, Varanasi with interest @ 12 % per annum from the date of termination of the contract , i.e. 27.06.1989 till the date of payment.

5. The respondent will also pay Rs.12,66,002.00 for completing the other works, as admitted by the respondent, and further Rs.25,350.00 on account of refund of sales tax along with interest at the rate of 12% per annum from 27.06.1989 till the date of payment.

6. Since a sum of Rs. 20,71,223.00 has been awarded in favour of the respondent against their counter claim no. 2, I order that the above amount be deducted by the respondent from the payment to be made to the claimant, as stated above.

Allahabad

Justice R.P. Singh (Retd),

Dated February 21, 2006

Sole Arbitrator"

9. Not being satisfied with the additional award dated 21.02.2006 Indian Oil Corporation Ltd. filed Writ Petition No. 30461 of 2006 before this Court. In the said writ petition an interim order was granted by the High Court on 26.5.2006 and the operation of the additional award dated 21.2..2006 was stayed. The writ petition remained pending before this Court, ultimately on 8.5.2012 the writ

petition was dismissed after recording that the appellant had a right to file objection under section 34 of the Arbitration and Conciliation Act, 1996. The appeal was dismissed with liberty to file objection under section 34 of the Arbitration and Conciliation Act, 1996. The last paragraph of the order dated 8.5.2012 reads as under :-

"In the opinion of the Court, the writ petition did not deserve to be entertained at all in view of the aforesaid statutory scheme under the Arbitration and Conciliation Act, 1996. Accordingly, the writ petition is dismissed without any prejudice to the right of the petitioner to assail the award under section 34 of the 1996 Act.

Order Date:- 8.5.2012"

10. The appellant is stated to have filed his objection under section 34 of the Arbitration and Conciliation Act, 1996 in compliance thereto on 14.9.2012 along with an application under section 5 read with section 14 of the Limitation Act, 1943. Learned District Judge has rejected the application filed under section 5 read with section 14 of the Limitation Act on the following grounds: (a) in view of the judgment of the Apex Court in State of Maharashtra v. Hindustan Construction Company Ltd. reported in 2010 (2) Arbitration Law Reporter 1 (SC), section 5 of the Limitation Act has no application in view of the specific language of Section 34 proviso and the period of limitation of 90 days for filing the objection under section 34 of the Act, 1996, at the best can be entertained for a further period of 30 days and nothing beyond, (b) even if the benefit of Section 14 of the Limitation Act is granted to the appellant by excluding the period spent while pursuing the writ petition referred to above in the Hon"ble High Court then- to the objection would be beyond prescribed period of 3 months and 30 days as per section 34 proviso of Act, 1996.

11. It is against this order the present Appeal has been filed on behalf of the appellant.

12. It may be recorded that nothing much could be said about the applicability of Section 5 of the Limitation Act in the matter of filing of objection under section 34 of the Act, 1996, as the issue stands settled under the judgment of the Apex Court in the case of State of Maharashtra v. Hindustan Construction Company Ltd. (supra). Similarly nothing much could be said by the learned counsel for the appellant in respect of the finding that even if the period spent while pursuing the remedy of writ petition before the High court is excluded the objection would still be beyond 3 months and 30 days.

13. We therefore, find that no infirmity in the order of the District Judge rejecting the objections filed under section 34 of the Act, 1996 by the appellant as being barred by the limitation.

14. At this stage Sri Prakash Padia, learned counsel for the appellant submitted before us that (a) the objections in respect of the additional award on the ground

that the application for the purpose under section 34 of the Act, 1996 had been made beyond 30 days and (b) that the appellants had not consented to such additional award being made by the Arbitrator cannot be subject matter of objections under section 34 of the Act, 1996. Therefore, the only remedy available to the petitioners was to approach the High Court in writ jurisdiction. The Court may, therefore, permit the petitioner to file a Writ Petition challenging the order of the Arbitrator by means of a Writ Petition under Article 226 of the Constitution of India. It is his case that the appellant cannot be left remediless.

15. Sri Vinod Sinha, learned counsel for the respondents in reply submits that earlier Writ Petition filed by the petitioner as noted above, was dismissed on the ground that the petitioners could avail their remedy by way of objections under section 34 of the Act, 1996. Therefore, this Court may not grant any liberty now to the petitioner to reopen the said controversy by permitting the petitioner to file a fresh writ petition.

16. This Court may first examine as to whether: (a) objections under section 34 of the Act, 1996 could be maintained against the additional award made in exercise of powers under section 33 of the Act, 1996 on the ground that such application for additional award had been filed beyond 30 days of the main award (b) no consent of the contesting party in the matter of making of such additional award had been obtained.

17. It would be worthwhile to reproduce Section 33 as well as Section 34 of the Arbitration and Conciliation Act, 1996, which read as follows:-

"33. Correction and Interpretation of award; additional award:- (1) Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties :-

(a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

(2) If the arbitral tribunal considers the request made under sub-section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.

(3) The arbitral tribunal may correct any error of the type referred to in clause (a) of the sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.

(4) Unless otherwise agreed by the parties , a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the

arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

(5) If the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.

(6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub-section (2) or sub-section (5).

(7) Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section.

34. Application for setting aside arbitral award. - (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and subsection (3).

(2) An arbitral award may be set aside by the Court only if:-

(a) the party making the application furnishes proof that-

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force: or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside.; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation - Without prejudice to the generality of sub-clause (ii), it is hereby declared , for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal.

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

18. From a simple reading of Section 33 of the Act, 1996 it is apparent that it contemplates 3 different proceedings i) in the matter of correction of errors and typographical or any other error of similar nature occurring in the award. This application is covered by Section 33 (1) (a) which is required to be moved within thirty days and after notice to the other party. ii) an application for interpretation of a specific point or part of the award.

19. This application is also required to be made within thirty days and that too with the consent of the parties and iii) an application for making of an additional award in respect of the claim presented in the arbitral proceedings but omitted from the arbitral award covered by section 33 (4) of the Act, 1996.

20. On simple reading of Section 33(4) of the Act, 1996 it is clear that application for additional award is to be filed within thirty days of the receipt of the arbitral award and that the parties have to agree for such additional award being made. A notice is required to be given to the other party by the party seeking such an additional award. Unless and until the three conditions are satisfied no additional award can be made by the Arbitrator.

21. Now turning to Section 34 of the Act, 1996 we find that a right, to file an application for setting aside an arbitral award which will include the additional award has been conferred upon the aggrieved party on limited grounds as enumerated in Section 34 (2) only of the Act, 1996.

22. From the various clauses of Section 34(2) which have been quoted herein above, it is apparent that these clauses do not contemplate any ground with regard to (a) application for additional award having been made beyond the

prescribed period of thirty days and (b) the other party having not consented to such additional award being made by the Arbitrator.

23. Since the right to file objection under section 34 of the Act, 1996 against the arbitral award has been given only on limited grounds under the Statutes, in our opinion no objection beyond the grounds mentioned under Section 34 (2) of the Act, 1996 would be maintainable before the Court concerned.

24. From the record we find that the said two grounds were pressed before the Arbitrator by the appellant before us (a) application for additional award having been made beyond the prescribed period of thirty days and (b) there was no consent of the appellant in making of the additional award. On first issue the only finding returned by Arbitrator is that he is condoning the short delay. In respect of second plea no finding has been returned by the Arbitrator.

25. We are not required to enter into the correctness or otherwise of the ground so raised by the appellants as we are only to examine as to whether such can be the grounds for filing objection under section 34 of Act, 1996 or not. The correctness of the pleas is to be examined by the competent court/authority as already noticed above.

26. The grounds which has been raised for objecting to the additional award on behalf of the appellant in their objections are not within the four corners of Section 34 of the Act, 1996, therefore, the objections in that regard in our opinion were not maintainable.

27. The issue, therefore, arises whether this Court may permit the appellant to challenge the award by way of writ petition or not specifically in the circumstance when the earlier writ petition filed by the appellants has already been dismissed by this Court as noticed above.

28. In our opinion for the same cause of action a second writ petition will not be maintainable and therefore this Court cannot grant any liberty to the appellants to file a fresh writ petition for challenging the additional award.

29. We may only observe that the order passed in the first writ petition filed by the petitioner has proceeded on non-consideration of the scope of the objection which can be filed under Section 34 of the Act, 1996, as has been noticed by us herein above. It is left open for the petitioner to file a review petition if so advised in his earlier writ petition which may be examined by the Court concerned in accordance with law.

30. With the aforesaid observations the appeal is dismissed.

31. It is clarify that any observations made by this Court on the merit of the objections will not prejudice the interest of the parties and it will be open to the court concerned to pass order independently of the same.

32. No order as to costs.