

(2014) 02 KAR CK 0047

In the Karnataka High Court

Case No : Writ Petition No's. 37279, 37280, 37281 and 37282 of 2013 (GM-RES)

M/s. Udupi Power Corporation Limited (Formerly Known as
Nagarajuna Power Corporation)

APPELLANT

Vs

M/s. Simplex Infrastructures Limited

RESPONDENT

Date of Decision : 06-02-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34 34(2) 34(2)(a) 34(2)(a)(iv)
Civil Procedure Code, 1908 (CPC) — Order 14 Rule 1, Order 14 Rule 3 151

Citation : (2014) 3 AKR 574 : (2014) 2 ARBLR 86 : (2014) ILR 1923 : (2014) 4
KarLJ 391 : (2014) 1 KCCR 929

Hon'ble Judges : A.S. Bopanna, J

Bench : Single Bench

Advocate : Uday Holla for Sri Shashi Kiran Shetty, for the Appellant; P.C.
Markanda for Sri D.G. Chinnappa Gowda and Sri B.N. Anantha Narayan, for the
Respondent

Judgement

A.S. Bopanna, J.—The parties to all these petitions are common. The petitioner in W.P. No. 37279/2013 is also the petitioner in W.P. Nos. 37280, 37281 and 37282/2013 and is assailing the separate orders, all dated 24.06.2013 passed respectively in A.S. Nos. 40, 41, 42 and 43/2011, by the VI Addl. City Civil and Sessions Judge, Bangalore City. By the said orders, the respective applications filed by the petitioner herein who is also the petitioner before the Court below have been rejected. Since common questions arise, the petitions are taken up together, heard and disposed of by this common order. The brief facts leading to these petitions are, the respondent herein had raised certain disputes with regard to the contract entered into between the petitioner and the respondent herein for the different scope of work agreed therein. The Arbitral Tribunal after considering the rival contentions has passed four separate Awards, all dated 05.03.2011. The petitioner herein claiming to be aggrieved by the said Awards has filed Arbitration Suits in terms of Section 34 of the Arbitration and Conciliation Act, 1996 ("Act" for short), which are registered as A.S. Nos. 40, 41,

42 and 43/2011 respectively. In the pending suits, the petitioner subsequently filed respective applications u/s 151 of the CPC ("CPC for short) seeking to recall the order dated 01.08.2012 and permit the petitioner to lead evidence and produce documents in support of their case. The respondents opposed the same. The Court below has thereafter rejected the applications by the orders impugned herein. The petitioner is therefore before this Court.

2. Heard Sri. Udaya Holla, learned Senior Counsel on behalf of Sri. Shashi Kiran Shetty, learned Counsel for the petitioner and Sri. P.C. Markanda, learned Senior Counsel on behalf of Sri. B.N. Anantha Narayana, learned Counsel for the respondent and perused the petition papers.

3. Though elaborate pleadings have been filed by both the parties, even touching upon the merits of the rival claims relating to the contract between them and the scope of consideration of the same by the Arbitral Tribunal, the same need not be adverted to in detail. The only consideration required in these petitions is with regard to the issue as to whether the procedure provided under the CPC in relation to trial in civil suit could be applicable to proceeding in the suit filed u/s 34 of the Act. In that view, the question for further consideration is as to whether the prayer made by the petitioner in its application is justified and as to whether the Court below has committed any error in rejecting the applications.

4. The learned Senior Counsel for the petitioner has referred to the prayer made in the application, a copy of which is available at Annexure-G to the petition wherein it is prayed that the order posting the suit for arguments be recalled and permit the petitioner to lead evidence and produce documents. The reason mentioned in the affidavit supporting the application is that the Arbitral Tribunal has gone beyond the terms and scope of reference. The liability has been fastened under the Clause contained in the General Conditions of Contract ("GCC for short), based on the work done under the Letter of Intent ("LOI" for short) in contravention of the terms. It is contended that the error committed by the Arbitral Tribunal is required to be proved by the petitioner for which the opportunity was sought. The decision of the Hon'ble Supreme Court in the case of Fiza Developers and Inter-Trade P. Ltd. Vs. AMCI (I) Pvt. Ltd. and Another, which was relied upon before the Court below is also relied herein. In that view, it is contended that the petitioners should at least be given the opportunity of filing the affidavit as held therein. The learned Senior Counsel has also relied on the order dated 21.11.2011 of this Court in W.P. No. 36533/2011 wherein this Court permitted to adduce evidence. Another order dated 29.07.2013 of this Court in W.P. No. 32270/2013 is referred to point out that though in the said facts this Court did not permit evidence, it was in the facts arising therein and both the said orders are passed after relying upon the decision in the case of Fiza Developers (supra). In the instant facts, since the ground of attack on the validity of the Award is as provided u/s 34(2)(a) of the Act, the LOI is to be produced and proved to dispel the wrong assumption of the Arbitral Tribunal.

5. The learned Senior Counsel for the respondents would contend that neither

the Act nor the decision in the case of Fiza Developers provides for converting the proceeding u/s 34 of the Act as a regular suit though the CPC is applicable to the limited extent. In that regard, the decision rendered by the Division Bench of the High Court of Punjab and Haryana on 11.10.2012 in the case of M/s. Punjab State Industrial Development Corporation Ltd. v. Mr. Sunil K. Kansal in CR No. 4216/2011 is relied. Though the learned Senior Counsel has also referred to the decisions of the learned Single Judges of the Delhi and Madras High Courts, the same need not be adverted to in detail since they were rendered prior to the decision of the Hon"ble Supreme Court in the case of Fiza Developers (supra). On facts, the learned Senior Counsel for the respondents has contended that the application does not refer to the documents sought to be produced. Even otherwise, the LOI is a part of the records of the Arbitral Tribunal. Further, the order sheet will disclose that on 07.07.2012, the petitioner filed the reply to the written statement and sought time for arguments. On the next date i.e., on 01.08.2012, an application was filed to call for the records of the Arbitral Tribunal which was allowed and adjourned for arguments. On the next date, time was sought and only thereafter on 20.10.2012 the application was filed. It is therefore clear that it lacks bonafide and it is dilatory tactics to avoid payment. Hence, the Court below was justified in holding that it is a matter of argument based on the records.

6. In the backdrop of the rival contentions, the scope of the proceedings and the nature of the right available would revolve around the view taken by the Hon"ble Supreme Court in Fiza Developers case(supra). Hence, it is necessary to notice the same. In that case, the question relating to the framing of issues as contemplated under Order XIV Rules 1 and 3 of CPC in a suit filed u/s 34 of the Act arose for consideration in the light of Rule 4(b) of the High Court of Karnataka Arbitration (Proceedings before the Court) Rules, 2001 providing that all the provisions of the CPC shall apply to such proceeding insofar as they could be made applicable. Rule 12 of the Rules, 2001 was also noticed and the Hon"ble Supreme Court has made it clear that there is no wholesale or automatic import of all the provisions of CPC into proceedings u/s 34 of the Act, as that will defeat the very purpose and object of the Act. Thereafter the Court has concluded in paragraph 14 as hereunder.

14. Having regard to the object of the Act, that is providing an expeditious alternative binding dispute resolution process with minimal court intervention, it is difficult to envisage proceedings u/s 34 of the Act as full-fledged regular civil suits under Code of Civil Procedure. Applications u/s 34 of the Act are summary proceedings with provision for objections by the defendant/respondent, followed by an opportunity to the applicant to "prove" the existence of any ground u/s 34(2). The applicant is permitted to file affidavits of his witnesses in proof. A corresponding opportunity is given to the defendant/respondent to place his evidence by affidavit. Where the case so warrants, the court permits cross-examination of the persons swearing to the affidavit. Thereafter, court hears arguments and/or receives written submissions and decides the matter. This is of

course the routine procedure. The Court may vary the said procedure, depending upon the facts of any particular case or the local rules. What is however clear is that framing of issues as contemplated under Rule 1 of Order 14 of the Code is not an integral part of the process of a proceedings u/s 34 of the Act.

7. In that light, a reference to the decision in the case of M/s. Punjab State Industrial Development Corporation Ltd., (supra) will disclose that in a circumstance where the Court below had allowed the recording of evidence and on a reference being made to the Division Bench on that issue, the Division Bench on noticing the decision rendered in Fiza Developers among others, has answered the question of law as follows;

30. In view of the above, we answer the question of law framed as follows:

i) The issues, as required under Order XIV Rule 1 of the Code as in the regular suit, are not required to be mandatorily framed by the Court. However, it is open to the Court to frame questions which may arise for adjudication.

ii) The Court while dealing with the objections u/s 34 of the Act is not bound to grant opportunities to the parties to lead evidence as in the regular civil suit. The jurisdiction of the Court being more akin to appellate jurisdiction;

iii) The proceedings before the Court u/s 34 of the Act are summary in nature. Even if some questions of fact or mixed questions of law and/or facts are to be decided, the court while permitting the parties to furnish affidavits in evidence, can summon the witness for cross-examination, if desired by the other party. Such procedure is keeping in view the principles of natural justice, fair play and equity.

8. From a perusal of the above, it is clear that the provisions of the CPC does not apply in its entirety to a proceedings filed u/s 34 of the Act in all the circumstances though the same is treated as suit. Keeping in perspective the object of the Act in providing an expeditious alternative dispute resolution mechanism with least intervention of a regular Court proceeding, it is essentially a summary consideration within the frame work of the challenge permitted u/s 34 of the Act. Based on the grounds raised, the points for consideration would be formulated to consider the validity or otherwise of the Award. While undertaking the said exercise, to avoid miscarriage of justice, an opportunity to prove the ground raised will be provided and the CPC in its spirit, though not in its substance or strict sense as in the case of a regular trial will be adopted. As held by the Hon''ble Supreme Court, the applicant can be permitted to file the affidavit of his witness in proof of the grounds raised. The statement made in such affidavit can be controverted by the respondent by filing a counter affidavit. In exceptional cases, where the Court is convinced that the situation warrants an opportunity of cross-examination, it can be permitted, but not as a routine procedure. Such affidavit and cross examination shall be limited to the proof of the grounds raised to attack the Award, within the framework of Section 34(2) and not beyond the same or to delve into the merits so as to convert it into a re-

trial.

9. In the above backdrop, if the nature of the ground raised against the award in the case on hand is noticed, it is in the nature as provided u/s 34(2)(a)(iv) of the Act and the proof for raising such contention is to be provided by the petitioner. To that extent, the need for filing an affidavit and opportunity being sought in that regard would have been justified, if such prayer alone was made. With regard to the scope of the arbitration under the agreement and the issues that could have been decided by the Arbitral Tribunal will have to be established from the documents produced before the Arbitral Tribunal by referring to the same during arguments. Though it is contended by the learned Senior Counsel for the petitioner that the Arbitral Tribunal has erroneously referred that no objection has been raised in the High Court, these are also issues arising out of the documents available in the records of the arbitration proceedings. In that light, if the application filed before the Court below is perused, it is seen that the petitioner being unmindful of the nature of proceedings u/s 34 of the Act has sought for recalling the order posting the case for arguments and has sought for leading evidence and to produce documents. Even in the affidavit supporting the application, the nature of evidence or the documents intended to be produced has not been disclosed.

10. The affidavit also does not disclose the specific document that is required to be produced except contending that LOI dated 10.09.2004 including other documents forming part of it also superceded and as such fastening of liability on the petitioner holding that the works done under the LOI deemed to be work done under the agreement dated 22.03.2006 is a serious error. As such, it is stated that the applicant needs to lead evidence in order to furnish proof of the fact that the impugned award is beyond the scope of submission. Since documents are available in the file relating to the proceedings before the Arbitral Tribunal, in view of the contention raised; what is to be established is that the Award is contrary to the documents, which in the instant case could be established by referring to the documents available on record to point out contradictions and error in the Award, but would not warrant a situation where fresh documents are required to be filed and evidence to be tendered. Hence, to the said extent, the Court below was justified in its conclusion to reject the application. However, the Court below on noticing the decision in Fiza Developers case could have permitted the petitioner to file the affidavit so as to proceed further.

11. In that light, keeping in view the position of law and also the submission made by the learned senior counsel for the petitioner that they be granted leave to file an affidavit, I am of the considered opinion that the same is to be permitted by moulding the relief in prayer (b) of the petition so as to avoid further delay if such application was to be filed once again. However, considering the long delay that has already occurred in the instant case and also the stage at which the application was filed as noticed from the order sheet of the Court

below, in the interest of justice, it should also be regulated herein. Therefore, the Court below shall on a date to be fixed by it, permit the petitioners in all the four suits to file the affidavit. If the respondents also seek to file their affidavit or choose to cross examine the deponent to the affidavit of the petitioner, the same shall be permitted and completed in a time bound manner, or else, the affidavit shall be received and the arguments shall be heard. The cross-examination of the deponent to the counter affidavit of the respondents will be permitted only if the deponent to the affidavit of the petitioner is sought to be cross-examined by the respondents and not otherwise. This is so keeping in view the ground that has been raised herein to assail the award as noticed above. In the result, for the reasons aforestated, the following:

ORDER

- i) The order dated 24.06.2013 passed on IA-I in A.S. Nos. 40, 41, 42 and 43/2011 by the VI Additional City Civil & Sessions Judge, impugned herein does not call for interference.
- ii) However, for the reasons stated in paragraph No. 12 of this order, the petitioner shall be permitted to file the affidavit in the manner regulated therein.
- iii) The W.P. Nos. 37279, 37280, 37281 and 37282 of 2013 stand disposed of in the above manner with no order as to costs.