

(2009) 11 DEL CK 0006
In the Delhi High Court
Case No : OMP No. 358 of 2009

National Highways Authority of India	Vs	APPELLANT
BEL-ACC Joint Venture		RESPONDENT

Date of Decision : 03-11-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 5, 9
Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, 10

Citation : (2009) 11 DEL CK 0006

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Padma Priya, for the Appellant; George Thomas, Sanjay K.C. and Rajshree, for the Respondent

Final Decision : Dismissed

Judgement

Valmiki J Mehta, J.

IA No. 14060/2009 in OMP No. 358/2009

1. An award was passed on 31.1.2009 by an Arbitral Tribunal in the disputes between the parties pertaining to construction of road by the respondent for the petitioner. The award has been challenged in the present OMP 358/2009 and in which notice has been issued and the matter is now listed before the Joint Registrar on 20.11.2009 for completion of pleadings.

2. Now the present application has been filed by the respondent seeking stay of fresh arbitration proceedings which are sought to be initiated by the petitioner herein pursuant to its letter dated 4.4.2008 whereby the risk and cost claims are sought to be referred for arbitration and for which a tender was awarded with respect to the cancelled contract between the parties.

3. The Counsel for the applicant/respondent, in this application u/s 9 of the Arbitration and Conciliation Act 1996, has canvassed four main issues. The first issue is that the subject matter of the award dated 31.1.2009 and the subject

matter of the arbitration proceedings which are not now sought to be initiated would have the same subject matter viz. the alleged validity of termination of the subject contract by the petitioner in terms of Clause 63.1 of the contract. The second issue which has been urged is that it is an against the public policy because on the basis of an existing cause of action a fresh arbitration proceeding cannot be initiated. The third point is of principle of estoppel and fourth is of res judicata.

4. I am unable to agree with any of the contentions as raised by the applicant/respondent whereby arbitration proceedings in a subsequent reference is sought to be stayed by moving of an application in wholly independent proceedings wherein the first award has been challenged.

5. Firstly, I may refer to points three and four as urged by the applicant namely that the fresh initiation of arbitration proceedings are barred by the principle of estoppel and res judicata. There does not arise the issue of estoppel and res judicata because the award dated 31.1.2009 has already been challenged in this Court and being not final today it cannot be said that the petitioner is definitely bound to loose and, with the consequential effect that the second proceedings would be barred by the principle of estoppel and res judicata. The principle of estoppel and res judicata will only apply when the proceedings achieve finality after crossing all the necessary tiers of appeals as provided in law. Admittedly, since the award dated 31.1.2009 is challenged by means of the OMP 358/2009, it cannot be said that the issues decided therein can operate either as res judicata between the parties or there is a principle of estoppel which will apply against the petitioner/non-applicant. A reference in this behalf is invited to the decision the Supreme Court in Shashibushan Prasad Mishra and Another Vs. Babuji Rai and Others, wherein it is held that once appeal is filed against a decree, the decree does not operate as res judicata.

6. The point which was strenuously and very vehemently urged by the Counsel for the applicant is that since the matter in issue in the second arbitration proceedings will be the same as in the first arbitration proceeding viz of challenge to the termination under Clause 63.1 of the contract, the second arbitration proceeding cannot continue. In this regard, I am not making any observation on merits as to whether the second arbitration proceeding can or cannot go on, but, the present application seeking stay of the arbitration proceedings in an earlier petition u/s 34 of the Act, is clearly misconceived. If, I understand rightly, the issue which is urged by the Counsel for the applicant would be u/s 10 of the CPC whereby there cannot take place a second proceeding between the same parties when the first proceeding on the same issue between the same parties is already pending. No doubt, Section 10 of the CPC can apply if a subsequent proceeding has started but, that would have to be by means of an application in the subsequent proceeding and surely not by means of an application in a first substantive earlier proceeding whereby an award has been challenged u/s 34 of the Act.

7. The second argument as urged of violation of public policy on the ground that a second proceeding cannot be initiated after the decision on a first completed proceeding can also be said to be effectively one under Order 2 Rule 2 of the CPC that on the same cause of action additional claims cannot be preferred and it was incumbent on the petitioner to have made such claims in the first proceedings. Again, I do not say anything on the merits with respect to this issue on whether there was an existing cause of action in an earlier proceeding for the present petitioner/non-applicant to have filed its claim in those arbitration proceedings, because not only the same will have to be decided in an appropriate proceeding and not the present but also prima facie the risk and cost purchase tender is a subsequent event and would be a fresh cause of action and it is only when the risk and cost tender is finalized would amounts as claimed to be due be said to be crystallized for an alleged aggrieved party to file a claim with respect to the same against the other party.

8. The Counsel for the applicant/respondent has very heavily relied upon the decisions of Satish Kumar and Others Vs. Surinder Kumar and Others, and CREF Finance Ltd. Vs. Puri Construction Ltd. and Others, to canvass that an award is not a waste piece of paper and if rights arise under that award such rights have to be given effect to. I do not agree with what has been urged by Counsel for the applicant not only because the effect of granting of the relief prayed herein will amount to giving effect to the Award which is not final since objections to the same are pending but also because of two reasons stated hereafter. The first reason is that the Supreme Court in the case of Satish Kumar (Supra) was dealing with a case where within a family by an award various properties were divided and the award was not registered under the Registration Act. In order to uphold family settlement and to avoid disputes between the family members, the Supreme Court has consistently been holding that to the extent possible family settlement must always be upheld because it brings family peace. Also, even if an award is not registered, if the same is acted upon, it may create rights and consequently, the Supreme Court in Satish Kumar case held that the award even if not registered is not a waste piece of paper. Therefore, there is no dispute to this proposition in Satish Kumar's case however the facts of the case of the Supreme Court have absolutely no co-relation with the facts of the present case. In the second judgment relied upon of CREF Finance Ltd., it has been said that after the award has been passed, certain interim orders can be prayed for u/s 9 of the Act. This proposition is well settled and not much need be urged to support such a proposition. However, the application which is filed in the present case is not u/s 9 with respect to the award in question but seeks stay of subsequent arbitration proceedings which are sought to be initiated by the petitioner.

9. I may at this stage refer to the decision of the Supreme Court in the case of Bhatia International Vs. Bulk Trading S.A. and Another, where the Supreme Court has held that Section 9 of the Act, does not allow every type of application and only that application can be filed as envisaged u/s 9 for interim measures or a

direction with respect to the substantive arbitration proceedings. The Supreme Court referred to Section 5 to state that judicial authorities shall not intervene except where so provided. It is clearly laid down in the judgment that Section 9 does not permit filing of an application for stay of arbitral proceedings or challenge to the existence or validity of arbitration agreements or the jurisdiction of the Arbitral Tribunal.

10. Accordingly, in view of the above, without expressing any opinion as to whether such application is or is not maintainable in the subsequent arbitration proceedings or otherwise, whether u/s 10 CPC or by initiation of any substantive proceedings, I dismiss this application as not maintainable which has been filed in a proceeding u/s 34 of the Act with respect to an earlier award dated 31.1.2009. The application is dismissed with costs which are quantified at Rs. 50,000/- to be deposited in the Delhi High Court Legal Services Authority, as no notice has been issued to the petitioner. The costs be deposited within a period of two weeks from today, failing which it will carry further interest at 18% per annum.

The I.A. stands disposed of.