

(2008) 05 DEL CK 0014
In the Delhi High Court
Case No : OMP No. 357 of 2007

National Highways Authority of India	APPELLANT
Vs	
SPCL-IVRCL (JV)	RESPONDENT

Date of Decision : 19-05-2008

Acts Referred:

Arbitration Act, 1940 — Section 31(4)
Arbitration and Conciliation Act, 1996 — Section 2(1), 21, 32, 32(2), 33

Citation : (2008) 2 ARBLR 404

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : Rajeev Bansal, Shailendra Swarup, D. Bhadra, Neha Khattar and A. Swarup, for the Appellant; P.C. Markanda and Rajesh Markanda, for the Respondent

Judgement

S. Ravindra Bhat, J.—The petitioner approaches this Court u/s 34 of the Arbitration and Conciliation Act, 1996, challenging an award. The parties had entered into a contract, awarded by the petitioner, to the respondent pursuant to the latter's tender dated 20.04.2001 for Rs. 2,29,75,93,104 for widening and upgrading portions of the National Highway, NH-5 in Andhra Pradesh. Disputes arose and were referred to arbitration, through invocation of the arbitration clause, on 24.06.2004.

2. The arbitrators had, through their decision, ruled against the petitioner, and allowed claims preferred by the respondent. The respondent/ claimant has objected to the jurisdiction of this Court, on the ground that at an earlier stage, an application was filed u/s 9, for interim measures, before the Court at Srikakulam, Andhra Pradesh, and contended that due to operation of Section 42, this Court's jurisdiction is excluded. The question relating to jurisdiction was treated, with consent of counsel for parties as a preliminary one, and heard. This order proposes to dispose of that issue.

3. The respondent contends that having approached the Court at Srikakulam, it

is not open to the petitioner to file the present petition before this Court, as jurisdiction, even if otherwise existing, is barred, in view of Section 42 of the Act.

4. It would be relevant, at this stage, to extract relevant provisions of the Act, which are as follows:

21. Commencement of arbitral proceedings—Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

xxx xxx xxx 32. Termination of proceedings:

(1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under Sub-section (2).

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where:

(a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings; or

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) Subject to Section 33 and Sub-section (4) of Section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.

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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 subsection (2) and Sub-section (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 u/s 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.

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42. Jurisdiction-Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a court, that court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that court and in no other court.

5. It is argued by Mr. Rajeev Bansal that the circumstance that a party approaches one court or another cannot be dispositive of a court's jurisdiction; this Court should not assume that it does not possess jurisdiction. He submitted that Section 42 has application only in cases where applications are made in relation to "arbitral proceedings". Counsel submitted, by relying on Sections 21 and 32, that arbitral proceedings commence with reference, and conclude, in the eventualities provided for u/s 32, which is with the final award, the withdrawal of claim, or agreement of parties to end the disputes. In this case, the "arbitral proceedings" ended with the final award, which is the subject matter of challenge in this proceeding. In these circumstances, there is no question of any further "arbitral proceeding" existing between the parties, which alone will clothe the Srikakulam Court with exclusive jurisdiction, in view of Section 42. Counsel contended that legislative intendment is clear; had the lawmakers wanted to include challenge proceedings u/s 34 in relation to Section 42, they would have explicitly referred to it, by providing for proceedings in relation to the award. Absent such manifest intent, there can be no application of Section 42.

6. Mr. Bansal also relied upon the decision of the Supreme Court reported as *Sumitomo Heavy Industries Ltd. Vs. ONGC Ltd. and Others*, , where it was held that courts administering the curial law have jurisdiction to entertain applications by parties to arbitrations being conducted within their jurisdiction, to ensure that the procedure adopted in the arbitral proceedings conform to the requirements of the curial law and for incidental reliefs. The court also held that such authority of courts administering the curial law ceases when the proceedings before the arbitrator are concluded. He relied on the following extract, in addition:

12. The proceedings before the arbitrator commence when he enters upon the reference and conclude with the making of the award. As the work by Mustill and Boyd aforementioned puts it, with the making of a valid award the arbitrator's authority, powers and duties in the reference come to an end and he is "functus officio" (p. 404). The arbitrator is not obliged by law to file his award in court but he may be asked by the party seeking to enforce the award to do so. The need to file an award in court arises only if it is required to be enforced, and the need to challenge it arises if it is being enforced. The enforcement process is subsequent to and independent of the proceedings before the arbitrator. It is not governed by the curial or procedural law that governed the procedure that the arbitrator followed in the conduct of the arbitration.

7. Mr. Markanda, learned senior counsel, opposed the argument on behalf of the petitioner and submitted that the court should give due consideration to the non obstinate clause in Section 42 and the legislative intent in excluding jurisdiction of all but one court, which had dealt with the arbitral proceedings, at Srikakulam. He also submitted that the court should give weight to the word "application" which occurs both in Sections 34 and 42. So viewed, objections under the former provisions are also barred. He relied upon the judgments reported as *Jindal Vijayanagar Steel (JSW Steel Ltd.) Vs. Jindal Praxair Oxygen Company Ltd.*, and

Shivnath Rai Harnarain (India) Ltd. Vs. Abdul Ghaffar Abdul Rehman (Dead) by L.Rs., , in support of his submission about the exclusive jurisdiction of the Srikakulam Court.

8. The term "court" is defined in Section 2(1)(e) which reads as under:

2. Definitions:

(1) In this Part, unless the context otherwise requires,:

xxx xxx xxx (e) "Court" means the principal civil court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not include any civil court of a grade inferior to such principal civil court, or any court of small causes;

In Section 42 the rule of exclusive jurisdiction has been enacted to provide a "forum conveniens" to the parties and to avoid conflicting orders of courts at the different stages of an arbitration proceeding arising out of the same agreement between the same parties. This provision is similar to Section 31(4) of the Arbitration Act, 1940, which reads as follows:

31(4) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force where in any reference any application under this Act has been made in a court competent to entertain it, that court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference and the arbitration proceedings shall be made in that court and in no other court.

9. The Supreme Court explained the necessity of conferring or earmarking exclusive jurisdiction upon one court in *Kumbha Mawji Vs. Union of India (UOI)*, , as follows:

The necessity for clothing a single court with effective and exclusive jurisdiction and to bring about by the combined operation of these three provisions the avoidance of conflict and scramble is equally essential whether the question arises during the pendency of the arbitration or after the arbitration is completed or before the arbitration is commenced.

10. The object underlying Section 42, to exclude courts' jurisdiction and confer power only upon one court (which first dealt with the arbitration agreement or arbitration proceeding), continues to be the same, even under the new Act. The rule of "that court alone" applies to "that court" in which any application under "this" Part (Part I) has been made. The argument on behalf of the petitioner is insubstantial. The advertence to *Sumitomo*, in the opinion of the court, is inapt, because the court there was concerned with conflict of law and jurisdiction; it had to decide which was the curial law concerning arbitration, and the law governing arbitration. The issue which arises here was not within contemplation

of the Supreme Court, in that decision. The petitioner is attempting to read far more than what was decided, and certainly what was not within the scope of the discussion. Besides, in this case, there is no dispute about the curial law, or the law governing arbitration; both are Indian Laws, and provisions of the Act.

11. In view of the above discussion, it is held that this Court does not possess jurisdiction to entertain and decide this petition. It is accordingly returned, with liberty to file it in the Srikakulam Court. The petition and pending interlocutory applications are disposed of in the above terms.