

(2008) 08 DEL CK 0134

In the Delhi High Court

Case No : I.A. No. 7657 of 2008 in O.M.P. No. 424 of 2006

National Highways Authority of India

APPELLANT

Vs

Ssangyong - OSE (JV)

RESPONDENT

Date of Decision : 27-08-2008

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 31, 32, 32(2), 32(3), 33

Citation : (2008) 08 DEL CK 0134

Hon'ble Judges : Sanjiv Khanna, J

Bench : Single Bench

Advocate : Sandeep Sethi and Mukesh Kumar, for the Appellant; P.V. Kapur Anil Airi and Sadhna Sharma, for the Respondent

Final Decision : Allowed

Judgement

Sanjiv Khanna, J.—This order disposes of I.A. No. 7657/2008 an application u/s 34(4) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act, for short) filed by M/s Ssangyong - OSE (JV) (hereinafter referred to as the applicant, for short).

2. During the course of arguments, M/s National Highways Authority of India, objector-non applicant had submitted that the impugned award passed by the Arbitral Tribunal dated 18th April, 2006 is incomplete and, therefore, liable to be set aside. My attention was drawn to the findings given by the learned Arbitrators in respect of claim No. 1 and counter claim No. 2 and other claims. It was pointed out that learned Arbitrators have allowed or rejected the claims of the parties but have not quantified and calculated the amount due, e.g. the applicant has been held entitled to cost of idling of plant and equipment and cost of overheads to cover manpower etc under claim No. 1 and counter claim No. 2, but the amount payable have not been worked out and quantified. Learned Arbitrators have merely held that the aforesaid amounts would be worked out in terms of paragraphs 2.6.2.1 and 2.6.2.2 respectively. It was, thus, stated that the award is incomplete and the learned Arbitrators have not made complete and

full adjudication. It was stated that it is not possible to work out and quantify the amount merely on the basis of the award as there will be disputes and differences on the amount payable. My attention in this regard was drawn to the judgment of a Division Bench of this Court in National Highways Authority of India Vs. ITD Cementation India Ltd., wherein it has been observed as under:

Determination of these disputed questions of fact was absolutely essential for quantification of the amount and its reimbursement. That determination was permissible only at the hands of the arbitrators. The same could not be delegated to any other person or authority. Inasmuch as the arbitrators not only left the issues regarding quantification of the amount open but required the same to be decided by the appellant who was a party to dispute, they committed a mistake. To make the payment of the amount to the claimant by the respondent dependent upon the satisfaction of the appellant who has to make such a payment was not a workable solution. We say so because the award does not provide for any remedy to the claimant in case the appellant were to reject the claim in toto or accept the same only in part. We asked Mr. Thomas whether his client was prepared to make a statement that it would accept without any demur the determination of the amount by the appellant and seek no relief against it. He declined to make that statement. All that he argued was that such a situation may be hypothetical and the court could not set aside the award on the assumption that there would be an unfair refusal of the amount by the appellant. We are not impressed by that submission. If it was not necessary to quantify the amount for an effective and final adjudication of the dispute between the parties, we may have ruled in favour of the respondent and given quietus to the controversy, but quantification of the amount is, in our opinion, a major area of controversy between the parties. We are therefore, of the view that even when the claim made by the respondents may not have been rejected in toto simply because the material produced was not sufficient for the arbitrators to quantify the amount, it was necessary that the amount was quantified instead of being left open for determination by the Appellant.

3. The applicant in the present application had stated that the award is not incomplete and learned Arbitrators have decided the disputes and also the claims and counter claims. What is "left" and "remains to be worked out" are mere arithmetical calculations as per the formula determined by the Arbitrators. This requires substitution of figures and applying the formula laid down by the Arbitrators.

4. For deciding this application u/s 34(4) of the Act, I am not required to finally decide the objection petition and the controversy. Section 34 of the Act reads as under:

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 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

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

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

(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.

5. Section 34(4) of the Act stipulates that a court may adjourn proceedings u/s 34(1) of the Act where it is appropriate and if a request is made by a party, to enable the arbitral tribunal to resume arbitral proceedings or take any action which in the opinion of the tribunal will eliminate a ground or grounds for setting aside of the award. Thus, an order u/s 34(4) of the Act is to be passed where an application u/s 34(1) of the Act is pending and has not been finally disposed of. Therefore, for deciding an application u/s 34(4) of the Act, the court is not required to take final decision but a tentative or prima facie view has to be formed by the court whether or not to adjourn a matter. This is clear from the word "appropriate" used by the legislature in Section 34(4) of the Act. For forming tentative view and to decide the question whether it will be appropriate to adjourn the proceedings, the court has to consider and examine the grounds raised by the objector challenging the award. If the grounds raised by the objector can be eliminated, if the arbitral tribunal resumes arbitration proceedings or by taking further action, the court can exercise its discretion u/s

34(4) of the Act and adjourn proceedings u/s 34(1) of the Act. It is only in respect of grounds or objections, which can be eliminated by the arbitral tribunal that power u/s 34(4) of the Act can be exercised by the court. Where, however, the grounds of challenge are such which cannot be eliminated, the court will not exercise power u/s 34(4) of the Act. In these cases no useful purpose will be served. An arbitral tribunal cannot also be permitted and allowed to deliver a fresh award or review the earlier award. Power u/s 34(4) of the Act is not to be exercised for reconsideration of claims or disputes and where no useful purpose will be served. It is only in cases where the arbitral tribunal can eliminate a ground of challenge by resuming proceedings or by doing something further that the power u/s 34(4) of the Act can be exercised by the Court to adjourn the matter.

6. Section 34(4) of the Act does not take away power of the arbitral tribunal or curtail its right to adjudicate and decide disputes. The arbitral tribunal remains the final arbiter, who decides the disputes on merits. It is for the arbitral tribunal to ultimately decide whether to resume the proceedings or to take further action to deal with any objection or ground of challenge. An arbitral tribunal can come to the conclusion or hold that no action is required and in other cases can also resume proceedings or take action. The Court while deciding an application u/s 34(4) of the Act cannot compel the arbitral tribunal to resume arbitration proceedings or take action. Function and jurisdiction of the Court u/s 34 (4) of the Act is limited to formation of a tentative opinion and to decide whether it could be appropriate to adjourn the matter. For adjourning a matter, a final adjudication on merits is not required. Therefore, at this stage, I would not like to give any opinion or decision on the merits of the controversy or give any direction to the Arbitrators to resume hearing or to take further steps. I am only required, at this stage, to form a prima facie or tentative opinion on the question whether it would be appropriate to adjourn the matter. To decide whether it would be appropriate to adjourn the matter, I have to examine the grounds of challenge to an award and whether it is possible for the arbitral tribunal to rectify and meet the said challenge by resuming arbitration proceedings or taking further steps. Of course, a hollow or a frivolous challenge will not be a ground to adjourn a matter u/s 34(4) of the Act. Possibly, it is for this reason that for exercising power u/s 34(4) of the Act, a request has to be made by a party to the Court. A request in this regard will normally be from the party who has succeeded and on a challenge being made, makes a request for adjournment, to enable them to go back to the arbitrator.

7. The present application in being treated by me as a request by the applicant-respondent to adjourn the matter as provided u/s 34(4) of the Act.

8. Learned Counsel for the non-applicant-objector, however, submitted that Section 34 (4) of the Act is not an independent provision and does not give jurisdiction to arbitrators to reopen proceedings or resume them or take any further steps. It was submitted that Section 34(4) of the Act does not in any

manner confer any power or jurisdiction on the arbitral tribunal, other than situations governed by Section 33 of the Act. In other words, power u/s 34 (4) of the Act can be only exercised within situations and within the time limit specified in Section 33 of the Act. It is only in cases where conditions mentioned in Section 33 of the Act are satisfied that power u/s 34(4) of the Act can be exercised by the Court and the proceedings u/s 34(1) of the Act can be adjourned.

9. I have examined the said contention raised by the counsel for the objector-non applicant but I do not find any merit in the same. There are number of reasons to reject the said contention. The said contention has to be rejected if one examines the scheme of the Act from Sections 31 to 36 of the Act as also the language of Section 34 (4) of the Act.

10. Section 31 of the Act prescribes form and contents of an arbitral award. Section 32 of the Act stipulates when arbitration proceedings terminate. Arbitration proceedings terminate when a final arbitral award is made or the arbitral tribunal passes an order under Sub-Section 2 terminating the arbitration proceedings when conditions mentioned in sub-clause a, b and c are satisfied. Sub-Section 3 of Section 32 is relevant and is reproduced below:

32. Termination of proceedings.-(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.

11. Section 32(3) of the Act stipulates that the mandate of an arbitral tribunal shall terminate on passing of the award or on termination of proceedings by an order u/s 32(2), but these are subject to power and jurisdiction of an arbitral tribunal to exercise their power under Sections 33 and 34(4) of the Act. Power under Sections 33 and 34(4) of the Act have been treated and regarded as two distinct and independent powers under Section

32 (3) of the Act. Therefore, an arbitral tribunal even after making an award or after terminating proceedings u/s 32(2) of the Act, can exercise powers and does not become functus officio, if conditions mentioned in Section 33 of the Act are satisfied or the Court has adjourned the matter u/s 34(4) of the Act. In both situations, mandate of the arbitral tribunal is not terminated and a tribunal remains incessant and capable of exercising its jurisdiction. Of course, while exercising jurisdiction under Sections 33 or 34(4) of the Act, the pre-conditions mentioned in the said Sections must be satisfied but the two powers are separate and distinct.

12. Section 33 of the Act enables a party to move an application within thirty days of the receipt of an award to correct computation, clerical or typographical errors or errors of similar nature or to give an interpretation on a specific point or a part of the award. Section 33 (4) gives option to a party to make an application within thirty days to request the arbitral tribunal to adjudicate claims, which have been left out and omitted from adjudication. For exercising powers u/s 33 of the Act, an arbitrator does not require an order from the court and an application u/s

33 of the Act can be moved suo moto by any of the parties to the award. However, application must be filed within a period of thirty days from the receipt of the award and an arbitral tribunal is required to deal with the said application within the period specified in Sections 33(2) or 33 (5) read with Sub-Section 6.

13. Section 34 of the Act deals with objections to an award which are to be filed before the court. It also stipulates the grounds on which the award can be set aside and the limitation period for entertaining an application challenging the award. A single Judge of this Court in the case of *Sanyukit Nirmata v. Union of India*, 2004 II AD (Delhi) 575, after interpreting Sections 33 and 34 of the Act has held that an application for setting aside of an award can be filed within three months after receipt of the arbitral award or within three months of the date on which an application u/s 33 has been disposed of by the arbitrator. Therefore, if an application u/s 33 of the Act is filed, period of limitation for challenging the award will begin from the date on which the application u/s 33 of the Act is disposed of by the arbitrator. In such cases, the date on which the original award was received will not be relevant. Learned Single Judge also referred to the proviso to Section 34(3) of the Act.

14. Section 35 of the Act states that subject to Part-I of the Act, arbitral award shall be final and binding on the parties and persons claiming under them. Section 36 stipulates that wherein an application u/s 34 of the Act is not made and the period has expired or where an application has been made and it has been refused, an arbitral award can be enforced as a decree of the Court.

15. A fascicule reading and above interpretation of Sections 31 to 36 of the Act is in consonance with the accepted principle that a court should approach an award with a desire to support it. Courts are entrusted with powers to facilitate the arbitration process and effectuate awards. (Refer *Smt. Santa Sila Devi and Another Vs. Dharendra Nath Sen and Others*,). Therefore, if a defect or ground of challenge to an award can be eliminated by the arbitrators themselves, Section 34(4) of the Act permits and allows learned arbitrators to take remedial steps. Of course, after request is made by a party, the Court has to first adjourn proceedings u/s 34 (1) of the Act and it is for the arbitrator to decide.

16. I have quoted Section 34(4) of the Act. The said Section does not refer to Section 33 or stipulate that power under the said Section can be exercised only if the conditions of Section 33 of the Act are satisfied. It may be noted that power u/s 34(4) of the Act can be only exercised on a request of a party, if the court feels appropriate and adjourns the proceedings after an application u/s 34(1) objecting to the award is filed. Once an application is pending before the Court, grounds of challenge are known. It is only in cases where grounds of challenge for setting aside of the award can be eliminated by the arbitral tribunal resuming the arbitral proceedings or by taking further action that Section 34(4) of the Act becomes applicable. The words "eliminate the grounds for setting aside the arbitral award" used in Section 34(4) of the Act are explicit and clear. For Section 34(4) of the Act, we have to examine the grounds of challenge to the award. The

legislature has been careful and has not used the words "where conditions mentioned in Section 33 of the Act are satisfied" and has deliberately used the words "eliminate the grounds for setting aside the arbitral award". It is obvious that the legislature was aware of the grounds available in Section 33 but has deliberately avoided any reference to the said Section in Section 34(4) of the Act. On the other hand, power u/s 34(4) of the Act can be exercised to eliminate "the grounds" raised by the objector for setting aside the arbitral award. Grounds for setting aside the arbitral award may or may not include conditions mentioned in Section 33 of the Act. I do not think it will be proper to import conditions prescribed in Section 33 of the Act into Section 34(4) of the Act. The two provisions viz. Sections 33 and 34(4) of the Act are independent. In a given case conditions of Section 33 of the Act may be applicable, when power is exercised by a court u/s 34(4) of the Act to adjourn proceedings but in another matter, a court can adjourn proceedings even if conditions of Section 33 of the Act are not satisfied. For Section 34 (4) of the Act, we have to examine the grounds of challenge for setting aside the award and reference to Section 33 of the Act is not required. Other condition which is required to be satisfied is whether it is possible to eliminate the said ground of challenge by resuming arbitral proceedings or if the arbitral tribunal takes further action.

17. In view of the above discussion, the application u/s 34 (4) of the Act filed by the applicant is allowed and the proceedings u/s 34(1) of the Act are adjourned to 15th December, 2008.

18. It will be open to the applicant to move an application before the arbitral tribunal u/s 34(4) of the Act. It is clarified that the observations made in this order are not binding on the arbitral tribunal, which will decide whether or not to proceed with the matter u/s 34(4) of the Act by independently applying their mind and without being influenced by any observation made in this order.