

(2015) 05 GAU CK 0080
In the Gauhati High Court
Case No : A.P. No. 13 of 2015

Raitani Engineering Works Pvt. Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 28-05-2015

Acts Referred:

Arbitration Act, 1940 — Section 11(6), 14, 14(2), 15, 16

Arbitration and Conciliation Act, 1996 — Section 11(6), 33, 34, 34(1), 34(2)

Citation : (2015) 2 GLD 615

Hon'ble Judges : Hrishikesh Roy, J.

Bench : Single Bench

Advocate : M. Jain and S.D. Deka, for the Appellant; A.K. Sarkar, SC, for the Respondent

Final Decision : Disposed Off

Judgement

Hrishikesh Roy, J.—Heard Ms. M. Jain, the learned counsel appearing for the petitioner. Also heard Mr. A.K. Sarkar, the learned Standing Counsel for the Railways, who is representing the two respondents. The petitioner contractor was engaged to execute the works in the Bogibeel Bridge Project of the Railways through the agreement dated 14.06.2005 (Annexure-I) and since the contract could not be concluded in due time allegedly because of the lapses of the principal employer, a dispute arose and the matter was referred to the Arbitral Tribunal, under Clause 64(1)(i) (page-23) of the agreement. The arbitration panel gave their award on 13.07.2012 (Annexure-II) allowing five out of eleven claims of the contractor while disallowing the others and eventually Rs. 20,10,878.96 was directed to be released by the Railways within 90 days or else interest @ 7% on the awarded amount was ordered to be paid by the Arbitration Tribunal.

2. The aggrieved contractor then challenged the arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Arbitration Act") in the Misc. Arbitration Case No. 527/2012. The learned Addl.

District Judge No. 1, Kamrup (M), Guwahati, through her judgment of 21.11.2014 (Annexure-III) held that the Arbitration Tribunal rendered a perverse decision by not granting the contractor's claim for the losses suffered by the contractor due to idling of their men, machine and materials who were mobilized and consequently the entire arbitral award was quashed by the Court.

3. Through this proceeding the petitioner seeks appointment of independent arbitrator under Section 11(6) of the Arbitration Act by projecting that the members of the previous arbitration panel as former railway officials had only technical expertise, but lacked the required judicial experience to consider the legal issues which arose during the arbitration process. To plea for substitution of the arbitration panel, Ms. Jain submits that the learned Civil Judge quashed the award of 13.07.2012 by observing that the Arbitration Tribunal gave a perverse decision by ignoring several key points and there is error apparent on the face of the award.

4. On the other hand, the Standing Counsel for the Railways Mr. A.K. Sarkar submits that when the award was quashed by the appellate authority under Section 34 of the Arbitration Act, and certain deficiencies were pointed out by the learned District Judge, the same arbitration panel can be asked to reconsider the matter within a time bound period to eliminate the grounds for setting aside the arbitral award. Alternately, Mr. Sarkar argues that the Arbitration Tribunal may be directed to make an additional arbitral award under sub-section (5) of Section 33 of the Arbitration Act.

5. Before proceeding any further with this matter, it may be appropriate to note the vital distinction in the Arbitration Act, 1940 (hereinafter referred to as the "old Act") and the current Arbitration Act enacted in the year 1996. For this we may usefully refer to the opinion of Justice V. Ramasubramanian of the Madras High Court in M.M.T.C. Vs. Vicivass Agency and Mr. Justice P.N. Nag (Retd.), Sole Arbitrator, :

".....

22. To summarise, there are at least six distinguishing features between Section 16(1) of the 1940 Act and Section 34(4) of the 1996 Act, which are as follows:--

(a) While Section 16(1) of the 1940 Act, empowered the Court "to remit the matter for reconsideration to the Arbitrator", Section 34(4) of the 1996 Act, empowers the Court just to adjourn the proceedings to enable the arbitral Tribunal to do what in his opinion would eliminate the grounds for setting aside the arbitral award. Thus there is an essential difference in the power conferred upon the Court.

(b) Under Section 16(1) of the old Act, the remand by the Court is "upon such terms as the Court may think fit". On the contrary, Section 34(4) of the New Act, leaves it to the discretion of the arbitral Tribunal to do what in the opinion of the arbitral Tribunal was required to eliminate the grounds for setting aside the

award. In other words, the Court used to fix the terms of reference while remitting the matter for reconsideration to the Arbitrator under Section 16(1) of the old Act. But under the new Act, the arbitral Tribunal itself determines the scope of the enquiry, so as to eliminate the grounds of objection.

(c) Section 16(1) of the old Act, enumerated three pre-conditions on the very substance of the matter, under clauses (a), (b) and (c), without satisfying which, the Court cannot remit the matter for reconsideration. On the other hand, Section 34(4) of the new Act, does not prescribe any condition precedent on the substance of the matter but prescribes three procedural conditions namely that there should be an application under Section 34(1) of the new Act and that a request should emanate from a party and the Court considers it appropriate to invoke the power Under Section 34(4) of the new Act.

(d) While the purpose of an enquiry under Section 16(1) of the old Act, was to have a fresh award upon reconsideration of the previous award, the purpose of the enquiry under Section 34(4) of the new Act, is to eliminate the grounds for setting aside the arbitral award. This is why Section 16(1) of the old Act, was not linked to the provisions of Section 30 of the old Act, under which an award can be set aside on specified grounds. In contrast, the power under Section 34(4) of the new Act, is linked to the grounds for setting aside the award under Section 34(2) of the new Act.

(e) Since there was a provision under Section 14 of the 1940 Act, to file the arbitration award into Court, the Court was empowered under the 1940 Act, to do any of the following, namely:--

(i) to modify or correct the award under Section 15

(ii) to remit the award for reconsideration under Section 16

(iii) to pass a judgment in terms of the award under Section 17 or (iv) to set aside the award under Section 30 .

But under the 1996 Act, the Court has only two sets of powers after the award is pronounced viz.,

(i) to set aside the award under Section 34(2) ; or

(ii) to adjourn the proceedings to enable the arbitral Tribunal to resume the proceedings or to take such other action as in the opinion of the Tribunal will eliminate the grounds for setting aside the arbitral award. The power to correct or modify an award under Section 15 of the old Act, has also been taken away though a power is now conferred upon the arbitral Tribunal itself to correct any computation errors or clerical or typographical or similar errors under Section 33 of the new Act.

(f) It appears from a combined reading of Sections 14 , 16 and 17 of the old Act that the power to remit an award for reconsideration could be exercised even suo moto by the Court. Section 14(2) of the 1940 Act speaks of the filing of the

award into Court either on a request made by a party to the arbitration agreement or when so directed by the Court. Section 17 mandates the Court to pronounce a judgment in terms of the award only if it sees no cause to remit or set aside the award. Neither Section 16 nor Section 17 speaks of an application by a party.

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6. As can be gathered from the above distinguishing features of the current Arbitration Act with the Old Act, it is apparent that the power of remanding the matter for reconsideration by the arbitrator panel, as was available under Section 16(1) of the Old Act is now drastically curtailed. However, an additional award can be permitted to be made upon application of a party, under Section 34 of the current Arbitration Act. Similarly when a proceeding under Section 34 is pending, it can be adjourned by the Court to facilitate the Arbitral Tribunal to take steps to eliminate the grounds for setting aside the arbitral award.

7. But unfortunately in the present case, the award given by the arbitration panel on 13.07.2012 was quashed in its entirety and the appeal under Section 34 is no more pending before the Court. Therefore, invoking the powers conferred under sub-section (4) of Section 34 of the Arbitration Act to facilitate the arbitration panel to take rectificatory steps is not an option in this matter. Moreover neither of the contesting party in this dispute have applied for an additional award and therefore it may not be appropriate to direct the arbitration panel to re-decide on the six un-decided claims of the contractor.

8. Faced with the above position and the need for a fresh decision on merit, one has now to consider whether another arbitrator panel should be appointed by substituting the earlier panel constituted exclusively by technical experts. For this, one can benefit by examining the ratio in Union of India (UOI) Vs. R. Gandhi, President, Madras Bar Association, , where the Supreme Court made the distinction between Tribunals including Arbitrational Tribunals and the Courts. The Apex Court observed that a person having ability, integrity, standing and special knowledge and professional expertise are considered eligible for appointment as technical members in a Tribunal and one can assume the expertise of the technical member in the field to which the Tribunal relates. On the other hand, when Tribunals are constituted by technical members and also judicial members, the presence of the judicial member will ensure that the Tribunal functions with due compliance with the basic principles of natural justice such as fair hearing and reasoned order. The judicial member can ensure impartiality, fairness and reasonableness in consideration. The Apex Court also opined the presence of a judicial member improves the quality of adjudication and the decision making process.

9. Under Clause 64(3)(a)(ii) governing the present contract, the Arbitral Tribunal is required to be constituted by serving or retired railway officers but there is no stipulation for inclusion of a judicial member in the arbitration panel. But as was

noticed in the Section 34 proceeding, the arbitration panel constituted by the 3 Railway Officers gave a perverse decision and failed to give any finding on some of the key claims of the contractor. Because of this, the award rendered by the arbitration panel was set aside by the impugned judgment of 21.11.2014 (Annexure-III).

10. Appointment of alternate arbitrator by Court under Section 11(6) of the Arbitration Act by making a departure from the agreed procedure is permissible in deserving cases like inordinate delay in completion of arbitration proceeding and where the Arbitral Tribunal fails to perform its functions. In such events, the Court may step in to appoint substitute arbitrator by disregarding the procedure agreed by the parties. The Apex Court in the case of Union of India (UOI) Vs. U.P. State Bridge Corporation Ltd.--> , noted that the High Court can appoint substitute arbitrators if the appointed arbitrator fails to discharge his duties. Similarly in North Eastern Railway Vs. Tripple Engineering Works, , it was observed by the Supreme Court that in exercise of powers under Section 11(6) of the Arbitration Act, the Court can deviate from the procedure agreed by the parties to provide for effective resolution of dispute through arbitration. Thus in a deserving case when a fresh decision of the arbitrator is necessary when the previous decision was quashed by Court, the law permits appointment of new arbitrator by departing from the agreed arrangement.

11. Proceeding on the above enunciation of the law, when we consider the defects in the arbitral award as was pointed out by the learned Court in the Section 34 proceeding, one can infer that want of judicial approach was the primary reason for the perverse decision by the Arbitration Tribunal, which was constituted only by retired/serving Railway Officers. In such circumstances, I feel that a departure from the agreed process will improve the quality of adjudication and the decision making process in the de-novo process, necessitated by the Court quashing of the previous arbitral award.

12. In view of the above discussion and reasoning, Mr. Justice H.N. Sarma, a former Judge of this Court is nominated as the Arbitrator for resolution of the contractual dispute. Accordingly both parties are directed to report before the learned Arbitrator on 15.06.2015 and the Arbitrator will fix the terms in presence of the parties before proceeding with the arbitration. With this direction, the case is disposed of. The Registry will immediately communicate this order to Mr. Justice H.N. Sarma for his kind information.