
(2020) 08 RAJ CK 0185
In the Rajasthan High Court
Case No : Civil Misc. Appeal No. 701 Of 2020

S.C. Garg

APPELLANT

Vs

Union Of India And Ors

RESPONDENT

Date of Decision : 17-08-2020

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 14, 15(2), 25, 25(a), 31, 32, 32(2)(c), 32(3), 34, 37

Citation : (2020) 08 RAJ CK 0185

Hon'ble Judges : Sangeet Lodha, J;Arun Bhansali, J

Bench : Division Bench

Advocate : D.L.R. Vyas

Final Decision : Dismissed

Judgement

This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 ('the Act') has been filed by the appellant aggrieved against the order dated 20.12.2019 passed by the Commercial Court, Jodhpur, whereby the application filed by the appellant under Section 34 of the Act has been rejected as not maintainable.

By order dated 27.07.2018, the respondent No.5 was appointed as Sole Arbitrator by this Court under Section 11 of the Act. The arbitrator held the meetings on 07.10.2018, 21.10.2018, 13.11.2018 & 30.11.2018. On 30.11.2018, the arbitrator, inter- alia, observed as under :-

"Three occasions have been given to the claimant but he has not attended meeting on 21.10.2018, 13.11.2018 and today on 30.11.2018. Earlier he was accorded last opportunity to be present with the statement of claims but he has not attended. It appears that he does not want to pursue his claims and hence the arbitration proceedings are closed. The counsel for respondents was informed accordingly."

Whereafter, the arbitrator purportedly on the same day noticing the facts and

calculating the fees as chargeable, inter- alia, ordered as under :-

"In the absence of claimant the amount of Rs.56000/- is to be paid by the respondents, NWR, Jodhpur to the under signed. The 50% of share of claimants of Rs.28,000/- (Rupees Twenty Eight Thousand only) shall be recovered by the respondents, NWR, Jodhpur from S.C. Garg (claimant).

This award is made & signed by me on this day 30th November 2018 at Jodhpur.

Copy of award and the order will be sent to both the parties by speed post."

It may be noticed that in the above order, the title given is Arbitral Award (under Section 25 of the Act).

On 08.12.2018, the arbitrator issued another order, inter- alia, indicating that due to typographical error, the award passed was shown as under Section 25 of the Act. In fact, the correct provision was Section 31 of the Act and therefore, Section 31 be read in place of Section 25 in the award dated 30.11.2018.

Feeling aggrieved by the award dated 30.11.2018 as corrected by communication dated 08.12.2018, the appellant filed application under Section 34 of the Act before the Commercial Court, Jodhpur. Before the Commercial Court, the respondents raised preliminary objections regarding maintainability of the application under Section 34 of the Act, inter-alia, indicating that as the arbitrator has not passed any award, the application was not maintainable.

Learned Commercial Court, after hearing the parties and relying on the judgment of Delhi High Court in Economic Transport Organisation v. Splendor Buildwell Pvt. Ltd. : 2018 Supreme (Del.) 1200 and Pandit Munshi & Associated Ltd. v. Union of India & Anr. :2014 Supreme (Del.) 2221, came to the conclusion that as the order passed by the arbitrator did not fall within the category of an award, the application filed under Section 34 of the Act was not maintainable and consequently, dismissed the same.

Learned counsel for the appellant vehemently submitted that the Commercial Court was not justified in rejecting the application under Section 34 of the Act, inasmuch as, the arbitrator himself had titled the order dated 30.11.2018 as arbitral award and the operative portion has been indicated as final award, which aspect was clarified by him by communication dated 08.12.2018 indicating that the order was passed under Section 31 of the Act, which deals with form and contents of arbitral award and therefore, rejection of the application under Section 34 of the Act on the ground indicated was not justified.

Further submissions have been made that in the present case, if it is held that the application under Section 34 of the Act is not maintainable, the appellant would be rendered remediless, inasmuch as, the orders passed under Section 25 of the Act are not appealable and therefore, the rejection of the application by the Commercial Court cannot be sustained. It was prayed that the order impugned be set-aside and the matter be remanded back to the Commercial

Court for decision in accordance with law.

Reliance was placed on SERI Infastructure Finance Limited v. Tuff, Drilling Pvt. Ltd. : (2018) 11 SCC 470.

We have considered the submissions made by learned counsel for the appellant and have perused the material available on record.

A bare perusal of the order dated 30.11.2018 passed by the Arbitrator, which though has been titled as an arbitral award under Section 25 of the Act, which section has been sought to be replaced by communication dated 08.12.2018 with Section 31 of the Act, that the arbitrator had passed order on the same day closing the arbitral proceedings, which order-sheet has been quoted herein-before, wherein it was indicated that as the appellant claimant was accorded last opportunity to present the statement of claims, but he did not attend and therefore, he did not want to pursue his claims and therefore, the arbitration proceeding was closed.

Though, it has been disputed by learned counsel for the appellant that the appellant did not file his claim as indicated in the award but claims that the claim was submitted and the arbitrator was requested to instruct the respondents to provide the copies of the requisite documents. Apparently, once the order dated 30.11.2018 was passed closing the proceedings, the same apparently would fall neither under Section 25 nor under Section 31 but Section 32(2)(c) of the Act.

Insofar as, relevant provisions of Section 32 of the Act reads as under :-

"32. Termination of proceedings. - (1) The arbitral proceedings shall be terminated by the final 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."

A perusal of the provisions would indicate that the arbitral proceedings are terminated either by the final award or by an order of the arbitral tribunal under sub-section (2). Sub-section (2), inter-alia, provides that the tribunal shall issue an order for termination of the arbitral proceedings where it finds that the continuation of the proceedings has for any reason become unnecessary or impossible.

Once, it was noticed by the arbitral tribunal that the appellant has not appeared

on three occasions and based on such conduct, closed the arbitral proceedings, the order would squarely fall within the above provision.

As to what would be the fallout of passing of order under Section 32(2)(c) and as to whether the appellant could take remedy under Section 34 of the Act or he was remediless, the said aspect has been considered by the Hon'ble Supreme Court in *Lalitkumar V. Sanghavi v/s Dharamdas V. Sanghavi & Ors.*: (2014) 7 SCC 255, wherein also, in a similar nature case whether for lack of interest shown by the claimant, the arbitral proceedings were terminated, the Hon'ble Supreme Court, inter-alia, laid down as under :-

"11. Section 32 of the Act on the other hand deals with the termination of arbitral proceedings. From the language of Section 32, it can be seen that arbitral proceedings get terminated either in the making of the final arbitral award or by an order of the arbitral tribunal under sub-section (2). Sub-section (2) provides that the arbitral tribunal shall issue an order for the termination of the arbitral proceedings in the three contingencies mentioned in sub-clauses (a) to (c) thereof.

12. On the facts of the present case, the applicability of sub-clauses (a) and (b) of Section 32(2) is clearly ruled out and we are of the opinion that the order dated 29.10.2007 by which the Tribunal terminated the arbitral proceedings could only fall within the scope of Section 32, sub-section (2), sub-clause (c) i.e. the continuation of the proceedings has become impossible. By virtue of Section 32(3), on the termination of the arbitral proceedings, the mandate of the arbitral tribunal also comes to an end. Having regard to the scheme of the Act and more particularly on a cumulative reading of Section 32 and Section 14, the question whether the mandate of the arbitrator stood legally terminated or not can be examined by the court "as provided under Section 14(2)".

13. The expression "Court" is a defined expression under Section 2(1)(e) which reads as follows:-

"2(1)(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;"

14. Therefore, we are of the opinion, the apprehension of the appellant that they would be left remediless is without basis in law.

15. The appellants are at liberty to approach the appropriate court for the determination of the legality of the termination of the mandate of the arbitral tribunal which in turn is based upon an order dated 29.10.2007 by which the arbitral proceedings were terminated."

The Hon'ble Supreme Court in the case of *SREI Infrastructure Finance Limited*

(supra), had dealt with the issue whether the arbitral tribunal, which has terminated the proceedings under Section 25(a) due to non-filing of claim by the claimant has jurisdiction to consider the application for recall of the order terminating the proceedings on sufficient cause being shown by the claimant, came to the following conclusion :-

"..... In view of the above discussions, we are of the view that the arbitral tribunal committed an error in holding that it has no jurisdiction to recall an order terminating the proceedings under Section 25(a). The arbitral tribunal having not considered the cause shown by the claimant in its application, it is in the ends of justice that the arbitral tribunal be asked to consider the application filed by the claimant dated 20.01.2012 praying for recall of the order dated 12.12.2011 and to grant extension for filing the statement of claim."

Further the Hon'ble Supreme Court in Sai Babu v. Clariya Steels Pvt. Ltd. : Civil Appeal No.4956 of 2019, decided on 01.05.2019, referring to the judgment in the case of SREI Infrastructure Finance Limited (supra), while distinguishing between a order passed under Sections 25 & 32 of the Act, came to the following conclusion and ordered that in such a case section 15(2) of the Act would apply, while observing as under :-

"3. It is clear, therefore, that a distinction was made by this Court between the mandate terminating Under Section 32 and proceedings coming to an end Under Section 25. This Court has clearly held that no recall application would, therefore, lie in cases covered by Section 32(3).

4. This being the case, we allow the appeal that is being filed and set aside the judgment of the High Court of Karnataka dated 14.06.2017.

5. However, this is not the end of the matter. Section 15(2) of the Act states :

15. Termination of mandate and substitution of arbitrator.-

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

6. By the consent of the parties, Hon'ble Mr. Justice K.N. Keshavanarayana, former Judge of the High Court of Karnataka, is appointed to be the sole arbitrator to decide all disputes between the parties."

As there is a dispute whether the claim was filed by the appellant or not, in view of the indications made in the order passed by the arbitrator and the claim made by the appellant, as to whether the order would be treated under Section 25(a) of the Act or 32(2)(c) of the Act depend on the fact of filing of the claim. In either case, the remedy against the order passed is either to file an application seeking recall of the order under Section 25(a) or under Sections 14 & 15(2) of the Act.

In any case, filing of application under Section 34 of the Act is not contemplated

in either case and therefore, the Commercial Court was justified in coming to the conclusion that the application under Section 34 of the Act is not maintainable and consequently, the order impugned does not call for any interference.

The appeal has no substance, the same is, therefore, dismissed.