

(2014) 11 DEL CK 0190

In the Delhi High Court

Case No : Writ Petition (Civil) 3570/2012 and CM 7535/2012

Steel Authority of India Ltd.

APPELLANT

Vs

Engineers Project India Ltd.

RESPONDENT

Date of Decision : 07-11-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 36, 5
Constitution of India, 1950 — Article 226, 227
Contract Act, 1872 — Section 28

Citation : (2014) 11 DEL CK 0190

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : A.K. Ganguly, Sr. Advocate, Amit Keshav, Ashish Kumar and George Varghese, Advocate for the Appellant; J.P. Sengh , Sr. Advocate and Manoj K. Das, Advocate for the Respondent

Judgement

Vibhu Bakhru, J.—M/s. Steel Authority of India Ltd. (hereafter "SAIL") impugns an appellate award dated 16.04.2012 passed by the Appellate Authority, whereby the appeal filed by the respondent "Engineers Project India Ltd. (hereafter "EPIL") against an award dated 16.05.2011 passed by the Sole Arbitrator, in terms of the dispute resolution mechanism under the Permanent Machinery of Arbitrators (hereinafter "PMA"), was allowed.

2. The parties are Central Public Sector Enterprises of the Government of India and as per the executive orders issued by the Government, had agreed for resolution of their disputes through the mechanism of PMA. The principal controversy in this petition involves the question whether a writ petition would be maintainable against an appellate award made under the PMA.

3. Briefly stated, the facts relevant for considering the controversy in the present petition are that SAIL awarded a contract (No. P/Proj/Modn/4011899105/140062) dated 13.11.1991 to EPIL for commissioning of a new Calcining Plant at its steel plant at Rourkela, Odisha on turnkey basis. In

terms of the contract, the said project was required to be completed in 36 months i.e. by 12.11.1994, however, the said project was completed on 22.06.1998 after a delay of around 3 years and 7 months. This inter alia led to certain disputes between SAIL and EPIL in relation to the said contract, which could not be resolved amicably.

4. Since, the parties are Central Public Sector Enterprises, the arbitration clause in the contract dated 13.11.1991 was substituted by an arbitration agreement, as per the draft annexed to the Office Memorandum (hereafter "OM") dated 22.01.2004, for resolution of their disputes through PMA. The said arbitration agreement reads as under:-

"In the event of any dispute or differences relating to the interpretation and application of the provisions of the contracts, such dispute or difference shall be referred by either party for Arbitration to the Sole Arbitrator in the Department of Public Enterprises to be nominated by the Secretary to the Government of India In-Charge of the Department of Public Enterprises. The Arbitration and Conciliation Act, 1996 shall not be applicable to arbitration under this clause. The award of the Arbitrator shall be binding upon the parties to the dispute, provided, however, any party aggrieved by such award may make a future reference for setting aside or revision of the award to the Law Secretary, Department of Legal Affairs, Ministry of Law & Justice, Government of India. Upon such reference the dispute shall be decided by the Law Secretary or the Special Secretary / Additional Secretary, when so authorized by the Law Secretary whose decision shall bind the Parties finally and conclusively. The parties to the dispute will share equally the cost of arbitration as intimated by the Arbitrator."

5. Thereafter, SAIL initiated proceedings under PMA and filed its claim before the Sole Arbitrator - Joint Secretary, Ministry of Heavy Industries and Public Enterprises. SAIL in its claim alleged that it was under compulsion to undertake additional burden of finance, services, material and execution to ensure completion of work and had sustained losses due to delay on the part of EPIL, in concluding the project. EPIL also filed its counter claims, essentially, claiming payments/damages for additional works, prolongation of works, sales tax and octroi, extra quantity of steel etc. EPIL also claimed that the delay in completion of works was for reasons beyond its control and the delay and lapses - including delay in release of payments - was on part of SAIL.

6. The Sole Arbitrator passed an award dated 16.05.2011, partly allowing the claims of SAIL and awarded an amount of Rs. 14,30,96,779/- with interest at the rate of 18% p.a. from 24.08.1995 to 16.05.2011 (computed at approximately Rs. 40.5 Crores) . The Sole Arbitrator also partly allowed the counter claims of EPIL and awarded an amount of Rs. 28,77,000/- in its favour with interest at the rate of 12% p.a. from 12.11.1994 to 16.05.2011.

7. EPIL filed an appeal (No. 06. LS/2011) before the Appellate Authority - Law Secretary & Appellate Authority, Ministry of Law and Justice, Department of Legal

Affairs challenging the Award dated 16.05.2011. The Appellate Authority, by an appellate award dated 16.04.2012, allowed the appeal of EPIL and reduced the amount awarded by Sole Arbitrator to SAIL, from Rs. 14,30,96,779/- to Rs. 4,28,29,749/- with reduced rate of interest from 18% p. a to 10% p.a. from 14.02.2002. The Appellate Authority also increased the amount awarded by Sole Arbitrator to EPIL, in pursuance of its counter claims, from Rs. 28,77,000/- to claim Rs. 3,60,00,000/- with reduced rate of interest from 12% p. a to 10% p.a. from 22.08.2002.

8. SAIL contended that the appellate award dated 16.04.2012 passed by the Appellate Authority was patently arbitrary, illegal, perverse and not based on any material as the said award ignored the pleadings of the parties, provisions of the contract, evidence produced, submissions and arguments made before the Sole Arbitrator and the finding of facts returned by the Sole Arbitrator in the award dated 16.05.2011.

9. EPIL contended that in line with the scheme of the PMA and the arbitration clause, the dispute between the parties was referred to a Sole Arbitrator and any appeal challenging the award of the Sole Arbitrator could only be filed before the Law Secretary/Special Secretary/Additional Secretary, Ministry of Law & Justice, Government of India. It was further contended that as per Clause X of the OM dated 22.01.2004 the "decision of the Law Secretary/Special Secretary/Additional Secretary shall bind the parties finally and conclusively"; therefore no further appeal was permissible in terms of the OM dated 22.01.2004 and, accordingly, the petition was not maintainable.

10. EPIL further contended that the Appellate Authority had passed a reasoned award after examining in detail the issues involved, including disputed questions of fact and re-agitation of those issues by SAIL by means of a writ petition was not permissible, as it is well settled that High Court, in exercise of writ jurisdiction under Article 226/ 227 of the Constitution of India, cannot interfere with findings of facts unless it is perverse, not based on any material or without any cogent reason. And, in the present case no such grounds were made out.

11. SAIL contended that Clause X of the OM dated 22.01.2004, insofar as it provides that the "decision of the Law Secretary/Special Secretary/Additional Secretary shall bind the parties finally and conclusively", is violative of Article 28 of the Indian Contract Act, 1872 as it restrains legal proceedings.

12. The question whether parties could exclude the application of Arbitration and Conciliation Act, 1996 (hereafter "A&C Act") by agreement was considered by a Division Bench of this court in Ircon International Limited v. National Building Construction Corporation Limited: EFA (OS) No. 22/2006, decided on 28.11.2008 and this court held that:-

"28. So far as the part in the arbitration clause in the said agreement regarding the non-applicability of the Act of 1996 is concerned, we consider that it is void and the parties cannot by themselves exclude the statute itself which is being

drafted by the Legislature to look after the arbitration matters.

In the circumstances, SAIL's grievance that the arbitration agreement under the PMA excludes judicial review does not survive as recourse to courts, albeit, to a limited extent would be available.

13. Interestingly, SAIL has also relied on the aforesaid decision of this court in *Ircon International* (supra) and in its rejoinder pleaded that:-

"guidelines pertaining to the effect that "decision of the Law Secretary/Special Secretary/Additional Secretary shall bind the parties finally and conclusively", is violative of the Section 28 of the Indian Contract Act being in restraint of legal proceedings and also falling foul of the settled legal proposition that one cannot contract out of the statute [i.e. Arbitration and Conciliation Act]"

Thus, even according to SAIL, A&C Act would be applicable to arbitration proceedings under the PMA. In this view, the present petition would not lie as by virtue of Section 5 of the A&C Act recourse to courts is limited to the extent provided under the said Act.

14. Mr. Ganguly, learned senior counsel appearing for SAIL argued that the decision in *Ircon International* (supra) would not come in way of SAIL in maintaining a petition under Article 226 of the Constitution of India as the said decision was in the context of Section 36 of the A&C Act and was not in the context of a challenge to an appellate award. He submitted that recourse to an appeal was not contemplated under the A&C Act and thus, the appellate award ought to be set aside.

15. I am not inclined to accept this contention, first and foremost for the reason that this challenge has not been laid in the petition; SAIL has not challenged the PMA and/or the provision of a two tier arbitration procedure in its petition. Secondly, this is contrary to SAIL's conduct in other proceedings. In another case - *W. P. (C) No. 7970/2012*, which also relates to arbitration proceedings under the PMA in respect of disputes with EPIL, SAIL had preferred an appeal against an award made by an arbitrator before the Appellate Authority and has pressed for its right to the appellate remedy provided under the PMA, before this court.

16. I am also of the view that a two tier arbitration procedure does not fall foul of the A&C Act. An arbitration agreement providing for an appellate procedure was permissible under the Indian Arbitration Act, 1899 as well as Arbitration Act, 1940. The Calcutta High Court in the case of *Heeralal Agarwalla and Co. Vs. Joakim Nahapiet and Co. Ltd.*, dealt with a situation where the dispute was first referred to Arbitrators, then to an umpire, and the award of the umpire was, thereafter, challenged before the Committee of the Calcutta Baled Jute Association. The Single Judge set aside the award of the Committee on the ground that the award of the committee did not conform to the scheme of the Indian Arbitration Act, 1899. The order of Single Judge was challenged before

Division Bench wherein Justice Buckland in its concluding para held as under:-

"The procedure whereby the dispute comes before the committee is called an appeal. What it is called is of no consequence; the fact remains that the committee is a body other than a Court of justice to whom the parties have agreed, to refer their dispute. Such a proceeding is known to the law as an arbitration and those in whom the arbitrament is lodged are known as arbitrators or an umpire."

17. A similar view was expressed by the Bombay High Court in *Fazalally Jivaji Raja Vs. Khimji Poonja and Co.*, , and it was held that a two tier arbitration procedure does not fall outside the scheme of the Indian Arbitration Act, 1899. The Bombay High Court was persuaded to conclude as above as the arbitration proceedings are consensual and parties are at liberty to agree to the manner in which their disputes are to be resolved. The following observations of the Bombay High Court are relevant:-

"The intention of the parties is to be sole guide for determining the mode of working out the submission and reaching a final decision till the law of arbitration is based upon the principles of withdrawing the disputes from the ordinary Courts and enabling the parties to substitute a domestic tribunal. Once a Tribunal reaches a final decision, as contemplated or agreed upon by the parties, the Arbitration Act as it was enforced come to the help to the parties to enforce the same decision."

18. The aforesaid principle is equally applicable to the A&C Act and there is no provision in A&C Act that proscribes a two tier arbitration procedure.

19. However, it is not necessary to delve into this issue any further as it is not determinative of the fate of this petition. As noted earlier, SAIL has not impugned the PMA or the two tier procedure; on the contrary SAIL had voluntarily accepted the same. Thus, the validity of a two tiered arbitration agreement need not be considered in this petition.

20. The petition and the application are, accordingly, dismissed.