

(1998) 08 DEL CK 0017

In the Delhi High Court

Case No : OMP No. 162 of 1998 and I.A. No. 6174/98

Union of India and Another

APPELLANT

Vs

M/s. East Coast Boat Builders and Engineers Ltd.

RESPONDENT

Date of Decision : 25-08-1998

Acts Referred:

Citation : (1998) 76 DLT 958 : (1998) 47 DRJ 333 : (1998) ILR Delhi 797

Hon'ble Judges : A.K. Srivastava, J

Bench : Single Bench

Advocate : Mr. Dushyant Dave, Ms. Ritu Bhalla and Ms. Rashmi Pruthi, for the Appellant; Mr. Shiv Dayal and Mr. D.K. Kapur, Mr. Ranbir Chandra, Mr. Yoginder Pal and Mr. Fayyaz Hassan, for the Respondent

Judgement

A.K. Srivastava, J.—This petition filed by Industrial Credit and Investment Corporation of India Limited against M/s. East Coast Boat Builders & Engineers Ltd. is u/s 34(2)(iv) of the Arbitration and Conciliation Act, 1996 (hereinafter for short referred to "the Act") for setting aside an order dated 11.6.1998.

2. By the aforesaid order, the learned arbitral tribunal has ruled that the disputes raised in the claim petition are arbitrable. Feeling aggrieved with the order and treating the same as an interim award, the petitioner has challenged it u/s 34 of the Act. Notice in this petition was issued for 7.8.1998. On that date Mr. Shiv Dayal, Senior Advocate appeared for respondent No.1. and raised a preliminary objection about maintainability of this petition. Accordingly, learned counsel for parties were heard on the point of maintainability of this petition.

3. Challenge to maintainability of the petition is on grounds, inter alia, that under the scheme of Arbitration and Conciliation Act, 1996, if the arbitral tribunal u/s 16 of the Act rejects the plea of party that the arbitral tribunal does not have jurisdiction, the Courts cannot interfere with the arbitral proceedings at that stage and the only remedy left with the affected party is to challenge the ultimate award which may be made by the arbitral tribunal after continuing with the arbitral proceedings. Mr. Shiv Dayal, Senior Advocate invited my attention to

the provisions of Sections 5, 16 and 37 of the Act. The relevant provisions of these Sections read as follows:-

"5. Extent of judicial intervention. - Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

16. Competence of arbitral tribunal to rule on its jurisdiction. _ (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose, _

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the validity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

.....

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34.

37. Appealable orders. - (1) An appeal shall lie from the following orders (and from no others) to the court authorised by law to hear appeals from original decrees of the Courts passing the order, namely:-

(a) granting or refusing to grant any measure u/s 9;

(b) setting aside or refusing to set aside an arbitral award u/s 34.

(2) An appeal shall also lie to a court from an order of the arbitral tribunal _

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of Section 16; or

(b) granting or refusing to grant an interim measure under Section 17."

4. In order to substantiate his contentions Mr. Shiv Dayal also referred to the definitions of the terms "arbitral award", and "Court" which are given in section 2(1)(c) and (e) of the Act. These definitions read as follows:-

2(1)(c) "arbitral award" includes an interim award.

(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;"

5. The thrust of argument advanced by Mr. Shiv Dayal is that if the arbitral decides u/s 16 of the Act that it has jurisdiction to deal with disputes referred to it then that decision is not an award under the Act; that no appeal lies against that decision; that the said decision not being an award cannot be challenged u/s 34 of the Act and that there cannot be any intervention by Court in respect of that order as no appeal against such decision is provided u/s 37 of the Act and in view of the above position Section 5 of the Act prohibits any judicial intervention at that stage of the arbitral process.

6. In support of his contention that the order in question is not an interim award, Mr. Shiv Dayal relied on Uttam Singh Dugal and Co. Pvt. Ltd., New Delhi Vs. Hindustan Steel Ltd., Bhilai Steel Project, Bhilai, with specific reference to the following observations made by their Lordships in that case:-

"The argument on this point of the learned counsel for the contractors is that the arbitrators by their order dated 6th Sept., 1973 made an interim award that they had jurisdiction to proceed with the reference and the effect of the orders of the Additional District Judge is to set aside this award and so the orders are appealable. S. 27 of the Arbitration Act permits the arbitrators to make an interim award and if the Court sets aside an interim award, there is no doubt that an appeal will lie under S. 39(1)(vii). The difficulty, however, is in accepting the submission that the order of the arbitrators dated 6th Sept, 1973 is an interim award. Before an order of the arbitrators may be held to be an interim award, it must decide a part of the claim or an issue of liability. What the arbitrators did in this case was to decide a preliminary issue relating to their jurisdiction. As the order of the arbitrators does not decide the claim or even any part of the claim of any issue of liability, it cannot be held to be an interim award. The learned counsel for the contractors placed reliance in support of his submission on Anand Prakash V. Assistant Registrar, Co-operative Societies, AIR 1968 ALL ER 22. This case, in our opinion, cannot be read to decide that even a finding on a question of jurisdiction would amount to an interim award."

7. He also relied on Anand Prakash and Another Vs. Assistant Registrar, Co-operative Societies and Others, on the point as to what is an interim award. He invited my attention on the following observations made by His Lordship in that case:

"By an interim award the arbitrator has to decide a part of the dispute referred to him. He may decide some of the issues or some of the Claims referred. He may determine the issue of liability by leaving the question of the amount of damages

to be dealt with later. An interim award must determine some part of the dispute referred to the arbitrator. It cannot deal with any other matter. The question of passing an order of stay or an injunction pending the determination of the referred dispute is foreign to the concept of an interim award. The interim order of injunction cannot be held to be an interim award."

8. Mr. Dushyant Dave for the petitioners, on the other hand, submitted that impugned order passed by the learned Arbitrator was an interim award and thus challengeable u/s 34 of the Act. Though he accepted that no appeal against the impugned order could lie u/s 37 of the Act but contended that since that Act did not provide filing of an appeal against order of an arbitral tribunal deciding that it had the jurisdiction, the party aggrieved with the order could not be left with no remedy at that stage and could not be compelled to object to the impugned order only after the arbitral tribunal had made the final award. According to him, if the arbitral tribunal rejects the plea of jurisdiction raised by a party, the aggrieved party can at that very stage challenge that order u/s 34 of the Act treating it as an interim award. He relied on the preamble and the statement of the Objects and Reasons of the Act to give support to his aforesaid interpretation. The preamble of the Act reads as follows:-

"WHEREAS the United Nations Commission on International Trade Law (UNCITRAL) has adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985;

AND WHEREAS the General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice;

AND WHEREAS the UNCITRAL has adopted the UNCITRAL Conciliation Rules in 1980;

AND WHEREAS the General Assembly of the United Nations has recommended the use of the said Rules in case where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation;

AND WHEREAS the said Model Law and Rules make significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international - commercial relations;

AND WHEREAS it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law and Rules;"

9. The relevant para 4(iv) of the Objects and Reasons as given in the Arbitration and Conciliation Bill, 1995 reads as follows:-

"4(iv) to ensure that the arbitral tribunal remains within the limits of its jurisdiction."

10. Mr. Dushyant Dave referred to the relevant provisions of the UNCITRAL Model Law on International Commercial Arbitration. Russell's commentary on Arbitration and the British Arbitration Act, 1996 to substantiate his submissions on the point at issue.

11. Article 16(3) of the UNCITRAL Model Law on International Commercial Arbitration reads as follows:-

"(3a) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty day after having received notice of that ruling, the court specified in Article 6 to decide the matter, which decision shall be subject to no appeal; while such a re-quest is pending, the arbitral tribunal may continue the arbitral proceedings and make an award."

12. Russell on Arbitration says that any ruling on jurisdiction should be made by the arbitral tribunal prior to the final award and that also in the form of an award so that challenge to it in the courts be commenced without delay.

13. The relevant provisions of the British Arbitration Act, 1996 provide that :-

"(1) Where the objection to substantive jurisdiction of arbitral tribunal is taken, the arbitral tribunal may rule on that matter in an award as to jurisdiction [Section 31(iv)(a)]

(2) A party to arbitral proceedings may challenge any award of the arbitral tribunal as to its substantive jurisdiction [Section 67(i)]".

14. The argument of Mr. Dave is that when the Indian Arbitration Act, 1996 had been enacted taking into account the UNCITRAL Model Law and Rules, the provisions contained in the Model Law and Rules should allowed to play while interpreting the provisions of the Act. According to him as per the Objects and Reasons of the Act it is one of the main objectives to ensure that the arbitral tribunal remains within the limits of its jurisdiction. He further contended that the British Arbitration Act which was also enacted taking into account the UNCITRAL Model Law and Rules provides for judicial intervention at that very stage, if the arbitral tribunal rules that it has jurisdiction. Therefore, according to him, in view of the UNCITRAL Model Law and Rules, the Indian Arbitration Act should be interpreted in a manner that the party aggrieved with the order of the arbitral tribunal holding in favor of its jurisdiction should have an opportunity to challenge the same before the court before proceeding with the arbitration and without waiting for the final award. According to him if in the Indian Arbitration Act, no appeal has been provided against such order, then such order should be treated as an interim award challengeable u/s 34 of the Act.

15. In reply Mr. Shiv Dayal contended that in India the Arbitration and Conciliation Act, 1996 is the law of arbitration and the provisions of the same would govern the issues which may arise in arbitration. According to him, when

the impugned order is not an interim award it cannot be challenged u/s 34 of the Act. He further invited the attention of the Court to para 4(v) of the Statement of Objects and Reasons of the Act to emphasis that one of the main objectives of the Act is to minimise the supervisory role of the courts in the arbitral process.

16. I have carefully considered the respective contentions of the learned counsel for parties and have gone through the provisions of the Arbitration and Conciliation Act, 1996 as well as the relevant provisions of the British Arbitration Act, 1996, the UNCITRAL Model Law and Rules and the commentary of Russell on Arbitration Act. For reasons given in the following paragraphs, I am of the view, that this petition is not maintainable as no appeal is provided under the Act against the impugned order and that the impugned order is not an interim award and thus not challengeable u/s 34 of the Act.

17. No doubt the preamble of the Act says that it is expedient to make laws respecting Arbitration and Conciliation taking into account the UNCI-TRAL Model Law and Rules but it cannot be said that each and every provision of the said Model Law and Rules forms part of the Act. Those Model Law and Rules were in fact taken into account while drafting and enacting the Act but whatever has been enacted is the law on arbitration enforceable in India. It may be a fact that the British Arbitration Act, 1996 contains a provision that if the arbitral tribunal rules on jurisdiction in its favour, the order would be an award and thus challengeable in courts but any such provision in the British Act enacted on the lines of the said Model Law and Rules cannot be binding in the county of India where the provisions of the Indian Act do not conform to the provisions of the British Act on the point under consideration. In my opinion, had there been a lacunae in the provisions of the Indian Arbitration Act on the point at issue or if it contained such provisions which is capable of two or more different interpretations then of course internal aid of the preamble to the Act could be taken for interpreting such provision and then the relevant provisions of the said Model law and Rules could be read so as to interpret that provision because while enacting the Indian Act, said Model Law and Rules were taken into account. I, however, do not find any such lacunae or confusion. The provisions on the relevant point at issue are unambiguous. The scheme of the Act is in clear terms. Provisions of Section 37 appears to have been consciously enacted not to provide relief to the aggrieved party at that stage of the arbitral proceedings where the arbitral tribunal decides the issue of jurisdiction in its favour. Otherwise, Section 37 of the Act would have been enacted differently. To my mind, Section 37 had been enacted in that manner only to minimise the supervisory role of courts in the arbitral process at that stage.

18. In my opinion, the impugned order is not an interim award. The terms "award" of "arbitral award" have not been defined in the General Clauses Act, 1897. In the Arbitration and Conciliation Act, 1996 though the term "arbitral award" has been defined but the definition is only an inclusive definition, that is to say, the arbitral award includes an interim award. It is also to be seen that the

term "interim award" has not been defined in the Act. Therefore, definition of interim award is to be found elsewhere. Their Lordships in *M/s. Uttam Singh Duggal Vs. M/s. Hindustan Steel Ltd.* and in *Anand Prakash Vs. Assistant Registrar Co-operative Societies* (supra) held that an order in the nature of the impugned order cannot be termed as an interim award. I am in agreement with the observations in the aforesaid cases in holding that the impugned order is not an interim award.

19. If an order on the point of jurisdiction of the arbitral tribunal was to be an interim award under the Act, Section 37 of the Act would not have provided for appeal against an order whereby the arbitral tribunal holds that it has no jurisdiction. While enacting Section 16 of the Act, the legislature was conscious that the arbitral tribunal could hold in its favor or against itself on the point of jurisdiction. If the legislature had to treat an order u/s 16 to be an interim award, it would not have provided for an appeal u/s 37 where the arbitral tribunal allows the plea that the arbitral tribunal does not have jurisdiction and the legislature would have left challenge to such order as well u/s 34 of the Act. It cannot be accepted that the order u/s 16 would change its nature upon two different contingencies, that is to say, where the order rejects the plea of no jurisdiction it becomes an interim award and where the arbitral tribunal allows the plea of no jurisdiction it is not an interim award and only appealable. Therefore, it can easily be interpreted that in either case it is only an interim order and not an interim award. Analogy of British law on the subject cannot be pressed into service because under the British Arbitration Act such order has been specifically termed as award whereas in the Indian Arbitration Act such order has not been so specifically termed.

20. From the scheme of the Act, it is apparent that the legislature did not provide appeal against the order u/s 16(5) where the arbitral tribunal takes a decision rejecting the plea that the arbitral tribunal has no jurisdiction. The intention appears to be that in such case, the arbitral tribunal shall continue with the arbitral proceedings and make an award without delay and without being interfered in the arbitral process at that stage by any court in their supervisory role.

21. Section 5 of the Act categorically provides that no judicial authority shall intervene except where so provided in Part I of the Act. On perusal of the provisions of Part I of the Act it is apparent that nowhere it is provided that a Court may intervene and entertain a petition challenging the order passed by arbitral tribunal u/s 16(5) taking a decision that the arbitral tribunal has jurisdiction to proceed with the arbitration case. In view of the prohibition contained in this Section, I refrain to interfere.

22. On the basis of the aforesaid discussion and reasons, I hold that the petition is not maintainable and deserves to be dismissed.

23. Accordingly, the petition is dismissed.

24. OMP and I.A. stand disposed of.