

(2011) 02 MP CK 0026

In the Madhya Pradesh High Court

Case No : Arbitration Appeal No. 24 of 2010

Union of India (UOI)

APPELLANT

Vs

Amarlal Wadhvani

RESPONDENT

Date of Decision : 23-02-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16, 16(1), 16(2), 16(5), 16(6)

Citation : (2012) 1 ARBLR 268 : (2011) ILR (MP) 1401 : (2011) 2 MPHT 320 : (2011) 2 MPLJ 420

Hon'ble Judges : Alok Aradhe, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Alok Aradhe, J.

In this appeal preferred u/s 37(1) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act") the Appellant has called in question the validity of the order dated 24-10-2009 passed by the trial Court by which the application preferred by the Appellant u/s 9 of the 1996 Act has been rejected.

Facts giving rise to filing of the appeal in nutshell are that the Appellant awarded a contract to the Respondent vide agreement No. 66/EE/BCD-1/2006-2007 for construction of building of Rashtriya Sanskrit Sansthan Bhawan Bhopal. However, on account of slow progress of the work, the contract awarded to the Respondent was rescinded. Therefore, in accordance with Clause 25 of the agreement between the parties, the dispute was referred for adjudication by the sole arbitrator. The Respondent submitted a statement of claim before the arbitrator. The Appellant filed the written statement of claim to the statement of claim filed by the Respondent in which inter alia, an objection was raised that in view of Clause 25 of the agreement executed between the parties, the dispute pertaining to rescission of the contract and the dispute whether or not the Respondent had received payment of final bill under duress and coercion had not been referred to for adjudication of the arbitrator. The arbitrator vide order dated 24-10-2009

held that aforesaid issues have been referred for adjudication.

Being aggrieved by the order dated 24-10-2009 passed by the arbitrator, the Appellant filed an application u/s 9 of the 1996 Act, in which a prayer was made that the order dated 24-10-2009 passed by the arbitrator be stayed and it be held that arbitrator has no jurisdiction to decide the issue of rescission of contract and the question of duress and coercion as alleged by the non-applicant. The Respondent filed a reply to the aforesaid application and opposed the prayer in which inter alia it was pointed out that by way of interim relief u/s 9 of the 1996 Act the proceeding or order passed by the arbitrator cannot be stayed as the arbitrator u/s 16 of the 1996 Act has the authority to decide its jurisdiction. The trial Court vide order dated 11-5-2010 held that u/s 16 of the 1996 Act, the Arbitral Tribunal has competence to rule on its jurisdiction. A party shall be at liberty to raise plea that Arbitral Tribunal has exceeded the scope of its authority and thereupon the Arbitral Tribunal shall decide the plea in this regard and continue with arbitral proceeding. A party being aggrieved by such an arbitral award may make an application for setting aside the award passed by the Arbitral Tribunal u/s 34 of the 1996 Act. Accordingly, the application preferred by the Appellant was rejected.

Shri S. K. Menon, learned Counsel for the Appellant submitted that in view of Clause 25 of the agreement the issue of rescission of contract and the question of duress and coercion could not have been referred to arbitration and, therefore, the order passed by 24-10-2009 is per se without jurisdiction. No cogent reasons have been assigned by the arbitrator while rejecting the objection raised by the Appellant in this regard. The trial Court grossly erred in rejecting the application preferred by the Appellant u/s 9 of the 1996 Act and in not granting the stay of the order passed by the arbitrator. In support of his submissions, learned Counsel for the Appellant has placed reliance on the decisions in AIR 2009 SCW 6659, S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, , Rajinder Krishan Khanna and Others Vs. Union of India and Others, as well as The Chief Administrator, Dandakaranya Project, Koraput, Orissa and Another Vs. Prabartak Commercial Corporation Ltd., on the other hand, while opposing the submissions made by learned Counsel for the Appellant, learned Counsel for the Respondent submitted that once the Arbitral Tribunal decides the scope of its authority he should be allowed to proceed with the arbitration proceeding and his decision cannot be interdicted by the Court in view of Section 16(6) of the 1996 Act. An aggrieved person is at liberty to file an application u/s 34 of the 1996 Act. In support of his submissions, learned Counsel for the Respondent placed reliance in Bhatia International Vs. Bulk Trading S.A. and Another,

I have considered the submissions made by learned Counsel for the parties. The Arbitration and Conciliation Act, 1996 has been enacted inter alia, with an object to make the provisions of arbitral proceeding which is fair, efficient and capable of meeting the needs of specific arbitration and to minimise the supervisory role of the Courts in arbitral proceedings. Section 9 of the Act provides that a party

may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36 apply to the Court in respect of appointment of guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings or for an interim measure in respect of the following matters:

- (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
- (b) securing the amount in dispute in the arbitration;
- (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
- (d) interim injunction or the appointment of a receiver;
- (e) such other interim measure of protection as may appear to the Court to be just and convenient.

Section 16 of the Act deals with the competence of the Arbitral Tribunal to rule on its jurisdiction. Section 16(2) of the 1996 Act provides that a plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, 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. Sub-section (3) of Section 16 provides that a plea that Arbitral Tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during arbitral proceedings. Sub-section (4) of Section 16 empowers the Arbitral Tribunal to admit a later plea if it considers the delay justified. u/s 16(5), the Arbitral Tribunal shall decide on a plea referred to in Sub-section (2) or Sub-section (3) or where the Arbitral Tribunal takes a decision rejecting the plea, it shall continue with the arbitral proceedings and shall make an arbitral award. Sub-section (6) provides that a party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34 of the 1996 Act.

In *Bhatia International* (supra), the Supreme Court while considering the scope and ambit of Section 9 of the 1996 Act held that Section 9 does not permit any or all applications. It only permits the applications for interim measures mentioned in Clauses (i) and (ii) thereof. Thus, there cannot be an application u/s 9 for stay of arbitral proceeding or to challenge the existence or validity of arbitration agreement or jurisdiction of the Arbitral Tribunal. All such challenges would have been made before the Arbitral Tribunal under the said Act. Thereafter

the issue with regard to power, and jurisdiction of the Arbitral Tribunal to rule on its jurisdiction and remedy of an aggrieved party came up for consideration before the Supreme Court in S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, , in which the Supreme Court has held as under

...(iv) The Arbitral Tribunal has power and jurisdiction to rule "on its own jurisdiction" under Sub-section (1) of Section 16 of the Act.

(v) where the Arbitral Tribunal holds that it has jurisdiction, it shall continue with the arbitral proceedings and make an arbitral award.

(vi) A remedy available to the party aggrieved is to challenge the award in accordance with Section 34 or Section 37 of the Act.

Thus, in view of the aforesaid enunciation of law by the Supreme Court it is apparent that u/s 9 of the 1996 Act, the Court has no power to stay the arbitral proceeding or to entertain the question with regard to jurisdiction of the Arbitral Tribunal. All such challenges have to be made before the Arbitral Tribunal under the Act and the remedy of an aggrieved party is to challenge the award in accordance with Section 34 of the 1996 Act. Thus, the application for grant of interim measure filed by the Appellant was rightly rejected by the trial Court. No infirmity can be found with the order of the trial Court which warrants interference by this Court.

For the aforementioned reasons, I do not find any merit in the appeal. The same fails and is hereby dismissed.