

(2019) 01 CAL CK 0071

In the Calcutta High Court

Case No : Arbitration Petition (Ap) No. 866 Of 2018

Winsome International Ltd.

APPELLANT

Vs

New India Assurance Co. Ltd.

RESPONDENT

Date of Decision : 22-01-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 2(1)(c), 12, 12(1), 13, 13(2), 13(4), 13(5), 14, 16(2), 29A(4), 31(6), 34,

Citation : (2019) 01 CAL CK 0071

Hon'ble Judges : Ashis Kumar Chakraborty, J

Bench : Single Bench

Advocate : Jayanta Mitra, Samit Talukdar, Akriti Jain, Debolina Dey, Soumendra Nath Ganguli, Tannushree Dasgupta

Judgement

Ashis Kumar Chakraborty, J

The claimant in the arbitration proceeding has filed this application under Section 34 of the Arbitration and Conciliation Act, 1996(hereinafter referred to as "the Act of 1996") praying for, an order for termination of the mandate of the arbitrator and appointment of a new arbitrator in his place. The petitioner has also prayed for an order of injunction restraining the present arbitrator from proceeding with the arbitral proceeding between itself and the respondent, an insurance company.

At the very outset, learned Advocate appearing for the respondent raised an objection with regard to the maintainability of this application under Section 34 of the Act of 1996.

Shortly stated, the facts giving rise to this application are that the petitioner is a company incorporated under the Companies Act of 1956 owning a jute mill namely, Rameswara Jute Mill situated in the state of Bihar (hereinafter referred to as "the said jute mill"). The respondent is an insurance company wholly owned by the Government of India. The petitioner has taken out some "Standard Fire

and Special Perils" (SFSP) policies from the respondent to insure the godown of the said jute mill and the entire stock of jute kept therein. The said insurance policies contain arbitration agreements contemplating that if any dispute or difference arises as to the claims to be paid under the relevant policy (liability being otherwise admitted) the same shall independently of all other questions be referred to arbitration.

It is the case of the petitioner that in the month of March, 2012 fire broke out at the godown of the said jute mill and the raw jute lying therein and in the open areas of the jute mill was totally devastated. The petitioner lodged its claim with the respondent for recovery of the loss suffered on account of the devastated jute and the respondent appointed a surveyor. The surveyor filed his report assessing the loss suffered by the petitioner at Rs.7,27,91,529/- which was challenged by the petitioner. According to the petitioner, since the respondent failed to settle its bona fide claim it filed a writ petition before the Hon'ble High Court at Patna challenging, inter alia, the survey report/draft assessment of the surveyor. By an order dated June 30, 2015 a learned Single Judge of the Patna High Court disposed of the writ petition directing the respondent insurance company to release the admitted amount and the petitioner was directed to accept the same on protest and without prejudice to its rights and contentions. Accordingly, without prejudice to its rights and contentions, the petitioner received payment of Rs.5,82,88,204/-. In terms of the said arbitration agreement between the parties the balance claim of the petitioner has been referred to arbitration by a sole arbitrator. The petitioner and the respondent herein are the claimant and the respondent, respectively and they have completed their respective pleadings before the arbitrator. The arbitrator made the necessary disclosure under sub-section (1) of Section 12 of the Act of 1996 but subsequently, during the arbitral proceeding the petitioner claims to have discovered certain grounds giving rise to a justifiable doubt as to the independence or impartiality of the arbitrator. On January 19, 2018 the petitioner filed an application, under Sections 12 and 13 of the Act of 1996, before the Arbitrator alleging the facts giving rise to a justifiable doubt as to his independence or impartiality. In view of the question of law involved in this application, as mentioned hereinafter it is not necessary to dwell on the grounds urged by the petitioner in the said application. The arbitrator, nevertheless, sought to proceed with the arbitration proceeding without deciding the petitioners said application under Sections 12 and 13 of the Act of 1996. In this background, the petitioner filed an application, A.P. No. 228 of 2018, under Section 14 of the Act of 1996, before this Court for removal of the arbitrator and appointment of a fresh arbitrator in his place. By an order dated June 7, 2018 this Court disposed of the said application, A.P. No. 228 of 2018 by directing the arbitrator to decide the application filed by the petitioner under Sections 12 and 13 of the Act of 1996 before further proceeding with the arbitration. By the said order this Court further held that any decision of the arbitrator rejecting the application of the petitioner under Sections 12 and 13 of the Act of 1996 shall

follow the provisions provided in sub-sections (4) and (5) of Section 13 of the Act of 1996. By his decision dated July 24, 2018 the arbitrator has rejected the petitioner's application under Section 12 and 13 of the Act of 1996s. It is the said decision dated July 24, 2018 by the arbitrator which has been challenged by the petitioner in this application filed on December 12, 2018.

Mr. Samit Talukdar, learned Senior Advocate appearing in support of the application strenuously contended that the decision of the arbitrator rejecting the petitioner's application under Section 12 and 13 of the Act of 1996 is an interim award and, as such, the same has been assailed in this application under Section 34 of the Act. It was submitted that the facts urged by the petitioner in its application under Sections 12 and 13 of the Act of 1996 to doubt the independence and impartiality of the arbitrator could not be disputed by the respondent, as such, the arbitrator has no authority or jurisdiction to proceed with the arbitral proceedings between the parties herein. Learned counsel for the petitioner urged that since the lack of independence and impartiality of the arbitrator on the grounds specified in the Fifth and Seventh Schedules of the Act of 1996 affects his authority / jurisdiction to proceed with the arbitral proceeding between the parties herein and the award to be made by the arbitrator in this case is liable to be set aside by the Court in an application under Section 34 of the Act of 1996 on that ground alone. In this regard, Mr. Talukdar relied on the decision of the Supreme Court in the case of Associated Builders -vs-Delhi Development Authority, reported in (2015)3 SCC 49.

It was stressed by the petitioner that in the present case, no useful purpose would be served by allowing the arbitrator to proceed with the arbitration and if, the parties are required to attend the arbitral proceeding before the present arbitrator the same would result in waste of time, as well as the parties would be required to incur unnecessary expenses. In support of the contention that in the instant case the decision of the arbitrator rejecting the application under Section 12 and 13 of the Act is an interim award, Mr. Talukdar relied on the decision of the Supreme Court in the case of Indian Farmers Fertilizer Cooperative Limited Vs. Bhadra Products, reported in (2018) 2 SCC 534. Urging these grounds learned Senior Counsel for the petitioner urged that this application be allowed with the orders, as already mentioned above.

On the other hand, Mr. Ganguli, learned counsel appearing for the respondent insurance company contended that the decision of the arbitrator in this case rejecting the petitioner's application is not at all a decision on the merit of the claim of the petitioner in the arbitration and, as such, the same cannot be an interim award under the Act of 1996. Thus, according to him, the present application is not maintainable under Section 34 of the Act of 1996. It was further submitted that the petitioner has motivatedly filed this application to delay the arbitral proceeding.

Before going into the merit of the application, the first point to be considered by this Court is whether the decision of the Arbitrator dated July 24, 2018 is an

'interim award' under the Act. The finding of this Court as to whether the decision of the arbitrator to reject the application of the petitioner is an interim award is essential for deciding the point of maintainability of the present application under Section 34 of the Act of 1996. The expression 'interim award' has not been defined under the Act of 1996 but Section 2(1)(c) of the Act lays down that the term 'arbitral award' includes an interim award. In the case of National Thermal Power Corporation Limited -vs- Siemens Atkeingesellschaft, reported in (2007) 4 SCC 451, the Supreme Court held that when in an application under sub-section (2) of Section 16 of the Act of 1996 the arbitral tribunal rendered a final decision on the merit of the claim of the claimant and the counter-claim of the respondent in arbitration such decision amounted to an award under the Act, which could be assailed by the aggrieved party in an application under Section 34 of the Act. In the case of Indian Farmers Fertilizer Cooperative Limited (supra) the respondent in the arbitral proceeding raised his defence to the claims of the claimant, inter alia, on the ground that the same were barred by the laws of limitation. The arbitrator framed various issues, including an issue if the claimant's claim was barred by limitation and with consent of the parties took up the said issue for decision as the preliminary issue on the basis of the documentary evidence alone. By his decision dated July 23, 2015 styled as the 'First Partial Award', the arbitrator decided the said issue holding that the claimant's claim were not time barred. Considering the fact that by his said decision, the arbitrator finally disposed of one matter between the parties, that is, the issue of limitation the Supreme Court held that the said decision of the Arbitrator was an 'interim award' within the meaning of Section 2(1)(c) of the Act of 1996 and being subsumed within the expression 'arbitral award' could, therefore, be challenged under Section 34 of the Act.

Further, as provided in sub-section (6) of Section 31 of the Act of 1996 the arbitral tribunal may at any time, during the arbitral proceeding, make an 'interim arbitral award' on any matter with respect to which it may make a final arbitral award. Thus, in view of the clear language used in sub-section (6) of Section 31 of the Act of 1996 and the enunciation of law by the Supreme Court in the cases of Siemens Atkeingesellschaft (supra) and Indian Farmers Fertilizer Cooperative Limited (supra) it is evident that the decision of an arbitral tribunal can be held to be an 'interim award' within the meaning of Section 2(1)(c) of the Act of 1996 when such decision finally decides an issue, at an intermediate stage of an arbitration proceeding, relating to the claim or counter-claim of the respective parties to the proceeding. This view was arrived at by this Court in the judgment dated February 3, 2018 delivered in A.P. 679 of 2017 (Ranjiv Kumar and Anr.- Vs - Sanjiv Kumar and Anr.) which has since been upheld by the Division Bench of this Court in the case of Ranjiv Kumar and Anr.-Vs- Sanjiv Kumar and Anr, reported in AIR 2018 Cal 130. In the facts of this case, the reliance placed by the petitioner on the decision of the Supreme Court in the case of Indian Farmers Fertilizer Cooperative Limited (Supra) is misplaced. Even the decision of the of the Supreme Court in the case of Associated Builders

(supra) cited by the petitioner explaining the grounds on which a party may challenge an arbitral award under Section 34 of the Act of 1996 has no application to this case.

Further, sub-section (4) of Section 13 of the Act of 1996, in clear and unambiguous term provides if the application of the party under sub-section (2) thereof is not successful, the arbitral tribunal shall continue the arbitral proceeding and make an arbitral award as per sub-section (5) of Section 13 of the Act of 1996 and the remedy of an unsuccessful party in an application under sub-section (2) of Section 13 of the Act of 1996 lies in challenging an arbitral award made by the arbitrator also on the grounds of stipulated in Section 12 of the Act. In view of such clear provisions contained in sub-sections (4) and (5) of Section 13 of the Act of 1996, the petitioner's present application is not maintainable. For the reasons as aforesaid, the application, AP no. 866 of 2018 stands rejected.

Before parting with the matter, it is to be noted that the petitioner has stated that under cover of the letter dated September 05, 2018 it received the impugned decision of the arbitrator. The petitioner has not mentioned the exact date of receipt of the said letter dated September 05, 2018 from the arbitrator. However, it was only on December 12, 2018 the petitioner filed this application. Such belated filing of the present application lacks bona fide.

If, in the meantime, the time stipulated for making and publishing of the arbitral award has already expired or is going to expire soon and the petitioner does not consent to the extension of time for making of the arbitral award, the respondent will be entitled to move an application under Section 29A (4) of the Act of 1996.

Urgent certified copy of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.