

ATV Projects India Ltd. Vs Indian Oil Corporation Ltd. and Another

Court: Delhi High Court

Date of Decision: April 29, 2013

Acts Referred: Arbitration and Conciliation Act, 1996 " Section 11, 11(7), 13(3), 14(2), 16
Constitution of India, 1950 " Article 12, 226, 227

Citation: (2013) 200 DLT 553 : (2013) 136 DRJ 720

Hon'ble Judges: D. Murugesan, C.J; Rajiv Sahai Endlaw, J

Bench: Division Bench

Advocate: Shailesh K. Kapoor and Mr. Ajay Kumar, for the Appellant; V.N. Koura, with Ms. Monia Aneja and Mr. Sumeet Benipal for R-1, for the Respondent

Final Decision: Allowed

Judgement

Rajiv Sahai Endlaw, J.

This intra-court appeal impugns the judgment dated 09.07.2004 of the learned Single Judge allowing W.P.(C) No.

4967/2003 preferred by the respondent no. 1 Indian Oil Corporation Ltd. (IOCL). The said writ petition was filed by the respondent no. 1 IOCL

against the order dated 02.06.2003 of the respondent no. 2 Sole Arbitrator, in an arbitration proceeding between the appellant and the respondent

no. 1 IOCL. The respondent no. 2 was appointed as the Sole Arbitrator vide order dated 07.05.2002 of the Civil Judge (Senior Division)

Panipat, Haryana in a petition u/s 11 of the Arbitration & Conciliation Act, 1996 preferred by the appellant. The respondent no. 2 Arbitrator

entered upon reference and directed the appellant to file its Statement of Claim with supporting documents. The appellant failed to file the

Statement of Claim in spite of repeated opportunities and which led to the respondent no. 2 Arbitrator to, vide order dated 12.03.2003, hold the

appellant to have lost its right to file the Statement of Claim. However since the respondent no. 1 IOCL stated that it also had claims against the

appellant, the matter was adjourned for the respondent no. 1 IOCL to file its Statement of Claim. The appellant applied for recall of the order

dated 12.03.2003 holding that it had lost its right to file Statement of Claim. The respondent no. 2 Arbitrator after hearing, vide order dated

02.06.2003 allowed the said application of the appellant, condoned the delay on the part of the appellant in filing the Statement of Claim and took

the Statement of Claim of the appellant on record.

2. It was impugning the aforesaid order of the respondent no. 2 Arbitrator that the respondent no. 1 IOCL filed the writ petition from which this

appeal arises.

3. The learned Single Judge, in the impugned order has held that two questions arose for consideration i.e. the maintainability of the writ petition

against the order of the respondent no. 2 Arbitrator and the powers of the respondent no. 2 Arbitrator to recall his earlier order. The learned single

Judge has held the writ petition to be maintainable and the mandate of the respondent no. 2 Arbitrator having stood terminated qua the claim of the

appellant and the respondent no. 2 Arbitrator having become functus officio in this regard and thus the respondent no. 2 Arbitrator being not

empowered to consider the application of the appellant for recall. Accordingly, the order dated 02.06.2003 of the respondent no. 2 Arbitrator

recalling the order dated 12.03.2003 and taking the Statement of Claim of the appellant on record was set aside.

4. Notice of this appeal was issued and the proceedings before the respondent no. 2 Arbitrator (vis-à-vis claim of the respondent no. 1 IOCL)

were though permitted to continue but final award therein stayed. The appeal was subsequently on 10.01.2005 admitted for hearing and the

proceedings before the Arbitrator were stayed. When this appeal came up for hearing on 12.01.2010, it was the contention of the counsel for the

appellant that though the notice of the writ petition was issued only on the aspect of maintainability but after hearing on the aspect of maintainability,

besides the order holding the writ to be maintainable, order was also pronounced on the merits and on which arguments had not been heard.

However since considerable time since the judgment of the learned Single Judge had lapsed, the counsel for the appellant stated that the merits of

the matter be also considered by the Division Bench only.

5. Thereafter when this appeal came up for hearing, attention of the counsels was invited to Awasthi Construction Co. Vs. Govt. of NCT of Delhi

and Another, holding that, the Arbitral Tribunal is empowered to review procedural orders and the writ remedy to be not available against the

orders of the Arbitral Tribunal and the matter was adjourned to give an opportunity to the counsels to study the said judgment.

6. The counsels have been heard. The counsel for the respondent no. 1 IOCL in accordance with the liberty granted while reserving the judgment

has also filed written submissions. Though the counsel for the appellant was also given an opportunity to file a response thereto but no such reply

has been filed.

7. The learned Single Judge has held; (i) that the arbitration proceedings qua the claim of the appellant could not be said to have been terminated

under any of the other clauses of Section 32 of the Arbitration Act; (ii) that the order dated 12.03.2003 of the respondent no. 2 Arbitrator could

thus be only construed as an order in exercise of powers u/s 25(a) read with Section 32(2)(c) of the Act; (iii) that with the termination of the

arbitration proceedings, the mandate of the Arbitral Tribunal also stood terminated and the Arbitral Tribunal ipso facto has no jurisdiction in

respect of such proceedings and became functus officio; (iv) that though the arbitration proceedings qua the claim of the respondent no. 1 IOCL

remained pending but Section 38 of the Act permitted/contemplated termination of part of the arbitral proceedings also and thus continuation of

arbitral proceedings in respect of claim of the respondent no. 1 IOCL would not ipso facto mean that the arbitral proceedings in respect of

appellant's claim were alive and continuing; (v) that the order dated 12.03.2003 of the respondent no. 2 Arbitrator terminated the proceedings in

respect of the claim of the appellant; (vi) that the recall order dated 02.06.2003 could not be construed as an order u/s 16 of the Arbitration Act

because the arbitral proceedings qua the claim of the appellant having stood terminated, there was no question of the Arbitral Tribunal ruling on its

own jurisdiction u/s 16 of the Act; (vii) that the bar u/s 5 of the Act applied only when an arbitration proceeding was pending and alive and is not a

bar where arbitral proceedings have terminated; (viii) that the arbitration proceedings qua the claim of the appellant having stood terminated, the

bar of Section 5 of the Act was not available; (ix) Section 5 of the Act is even otherwise not a bar on the exercise of powers under Articles 226

and 227 of the Constitution of India; (x) that since no remedy was available to the respondent no. 1 IOCL against the order dated 02.06.2003 of

the respondent no. 2 Arbitrator, the writ petition was maintainable; (xi) that since the respondent no. 2 Arbitrator had become functus officio qua

the claims of the appellant, the need for going into the question whether the respondent no. 2 Arbitrator was justified in recalling the order or not,

did not arise.

8. We had while pronouncing the judgment in Awasthi Construction Company supra noticed the judgment aforesaid of the learned Single Judge

impugned in this appeal and have expressly disagreed with the same. We as such asked the counsel for the respondent no. 1 IOCL to address us

only on whether Awasthi Construction Company requires reconsideration.

9. The counsel for respondent no. 1 IOCL has argued that Awasthi Construction Company does not consider the judgments of the Supreme

Court in Punjab Agro Industries Corpn. Ltd. Vs. Kewal Singh Dhillon, and in Punj Lloyd Ltd. Vs. Petronet MHB Ltd. (2006) 2 SCC 638 holding

the writ remedy to be available. However on going through the said judgments, we find that the writ remedy in Punjab Agro Industries Corporation

Ltd. supra was held to be available against the order of the Principal Civil Judge, Senior Division, Chandigarh exercising powers u/s 11 of the Act

as a delegatee of the Chief Justice. The Supreme Court since then in S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, has held such

delegation to be impermissible. We are even otherwise of the view that a judgment holding the writ to be maintainable against the orders of a

delegatee of Chief Justice will have no application on the question of maintainability of a writ petition against the order of an Arbitral Tribunal. The

writ petition under consideration in Punj Lloyd Ltd. supra also was against the order of a delegatee of the Chief Justice. Moreover, the said

judgment does not address the question of maintainability of the writ petition. The judgments cited thus do not persuade us from taking a view

different from already taken in Awasthi Construction Company supra.

10. The counsel for the respondent no. 1 IOCL in the written submissions has also referred to:

(i) New India Civil Erectors (P.) Ltd. Vs. Oil and Natural Gas Corporation, and Associated Engineering Co. Vs. Government of Andhra Pradesh

and another, in support of the contention that an Arbitrator is a creature of a contract, and has submitted that an Arbitral Tribunal cannot be

equated to an Industrial Tribunal or other statutory Tribunal of perpetual existence;

(ii) Shukkoor Vs. Muthoot Vehicle and Asset Finance Ltd., in support of the proposition that the mandate of the Arbitrator terminates by the

termination of arbitral proceedings with respect to the claims of a party and the Arbitral Tribunal ceases to be an Arbitral Tribunal with respect to

such claim and becomes functus officio; and

(iii) N.B.C.C. Ltd. Vs. J.G. Engineering Pvt. Ltd., in support of the proposition that an Arbitrator has no authority to confer jurisdiction on himself

once his mandate has terminated.

11. The counsel for the appellant has along with the appeal paper book filed a compilation of judgments but which were neither referred to during

the hearing nor relied upon except for N. Jayalaxmi Vs. R. Veeraswamy and Another, where a Single Judge of the Andhra Pradesh High Court

held a writ petition to be not maintainable against the order of Arbitrator.

12. The matter having been dealt with by us exhaustively in Awasthi Construction Company, we deem it appropriate to set out here in below our

reasoning from the said judgment only:

8. We have also drawn the attention of the counsel for the appellant to the judgment of the Supreme Court in S.B.P. and Co. Vs. Patel Engineering

Ltd. and Another, whereof it has been held as under:

45. It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable

of being challenged under Article 226 or 227 of the Constitution. We see no warrant for such an approach. Section 37 makes certain orders of the

arbitral tribunal appealable. u/s 34, the aggrieved party has an avenue for ventilating his grievances against the award including any in-between

orders that might have been passed by the arbitral tribunal acting u/s 16 of the Act. The party aggrieved by any order of the arbitral tribunal, unless

has a right of appeal u/s 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The arbitral

tribunal is after all, the creature of a contract between the parties, the arbitration agreement, even though if the occasion arises, the Chief Justice

may constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum chosen

by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral

tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution. Such an intervention by the High Courts is

not permissible.

46. The object of minimizing judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High

Court could be approached under Article 227 or under Article 226 of the Constitution against every order made by the arbitral tribunal. Therefore,

it is necessary to indicate that once the arbitration has commenced in the arbitral tribunal, parties have to wait until the award is pronounced unless,

of course, a right of appeal is available to them u/s 37 of the Act even at an earlier stage.

In view of the aforesaid dicta of the Supreme Court, the doubts expressed by the learned Single Judge as to the very maintainability of the writ

petition against the order of the Arbitral Tribunal are well placed.

9. As far as the judgment of the High Court of Patna relied upon by the appellant is concerned, the same merely follows the judgment of a Single

Judge of the Bombay High Court in M/s. Anuptech Equipments Private Ltd. Vs. M/s. Ganpati Co-op. Housing Society Ltd. and others, . The

reasoning which prevailed with the Bombay High Court, can be analyzed as under:

A. That the Act uses three different expressions i.e. arbitral award, order and decision, with remedies thereagainst provided in Section 11(7),

Section 13(3), Section 14(2), Section 16(5), Section 34 and Section 37(2).

B. No remedy had been provided against certain orders of the arbitral tribunal and one instance whereof was an order u/s 25(a) of the Act.

C. Section 5 of the Act prohibits intervention in arbitral process, ruling out approaching the Civil Courts against such orders.

D. The remedy u/s 34 against such order is also not available, being available only against an award or an interim award.

E. That for an order to be an award, it must be akin to a decree.

F. An order u/s 25(a) terminating the proceedings for default in filing a statement of claim could not be treated as an award.

G. That if such orders were to be read as an award, it would create an anomaly inasmuch as termination can happen u/s 32(2) or u/s 16 also and

remedy of appeal is provided where against, indicating that order of termination of proceeding is different from an award.

H. That while u/s 31, an award is required to state reasons, an order u/s 25(a) may be without any reason.

I. Finding no remedy available against such an order, it was held that the jurisdiction under Article 226 available against any person or authority

could be invoked against an order u/s 25(a) of the Act.

10. Though the Patna High Court in *Senbo Engineering Ltd.* (supra) merely followed the Bombay High Court in holding the writ petition to be

maintainable but also examined, whether the arbitral tribunal has the power and authority to recall its earlier order terminating the proceedings and

following the judgments holding the Adjudicator under the Industrial Disputes Act, 1947 to be having such powers, held that the arbitral tribunal

has the power of procedural review and authority to recall, on sufficient cause being shown, an order terminating the proceedings u/s 25(a).

12. We may also notice that the same learned Judge who sitting in Bombay High Court had pronounced the judgment in *Anuptech Equipments*

Private Ltd., sitting as the Chief Justice of High Court of Allahabad, in *S.K. and Associates and Another Vs. Indian Farmer and Fertilizers*

Cooperative Ltd. and Another, reiterated that an arbitral tribunal would be such a "person" to whom a writ could go under Article 226 of the

Constitution of India and that due to the non availability of a remedy to an aggrieved person, held the remedy of Article 226 to be available.

Though the observations aforesaid of the Supreme Court in *S.B.P. & Co.* (supra) were noted but were held to not apply to termination of

proceedings u/s 25(a). It was further held that, termination of proceedings if does not result in an award, though cannot give rise to a challenge u/s

34 but if the claim is within limitation it is open to a party to apply afresh.

13. Notice may also be taken of the dicta of another Division Bench of the Bombay High Court in *Rashtriya Chemical Fertilizers Ltd. and Mr.*

K.C. Prakash, Company Secretary of Rashtriya Chemical Fertilizers Ltd. Vs. J.S. Ocean Liner Pte. Ltd. and Others, though holding the writ

remedy to be available, but to be confined to minimum and to be exercised in very exceptional and deserving cases.

14. The High Courts of Bombay, Allahabad and Patna have held the writ remedy to be available only for the reason of no other remedy being

available to a party aggrieved from an order u/s 25(a). The Patna High Court however held that, notwithstanding the arbitral proceedings having

been closed, the remedy of approaching the arbitral tribunal is available and further held the arbitral tribunal, upon being satisfied with the

sufficiency of the cause for default given, is empowered to set aside the dismissal in default. It was however not considered that if such remedy of

approaching the arbitral tribunal is available, the writ remedy could not be justified on the ground of "no remedy".

15. The first question which thus according to us needs to be answered is, whether the remedy of approaching the arbitral tribunal for review/recall

of termination of proceedings is available, inasmuch as the only consideration which has prevailed in the judgments aforesaid for holding the writ

remedy to be available is that a party cannot be left remediless. If the remedy of approaching the arbitral tribunal is available, the said reasoning

would disappear.

16. Though the remedy of review has in State of Arunachal Pradesh Vs. Damani Construction, been held to be not available to an arbitral tribunal

and it is otherwise a settled principle that the power of review is not an inherent power and must be conferred by law either expressly or by

implication (and of which there is no indication in the Arbitration Act) but the Supreme Court in Grindlays Bank Ltd. Vs. Central Government

Industrial Tribunal and Others, followed in Kapra Mazdoor Ekta Union Vs. Management of Birla Cotton Spinning and Weaving Mills Ltd. and

Another, though in the context of Industrial Adjudicator, carved out a difference between a procedural review and a review on merits. It was held

that procedural review is inherent or implied in a Court or a Tribunal, to set aside a palpably erroneous order passed by it under a

misapprehension. On the contrary, a review on merits is for correction of error of law apparent on the face of the record. The law that there is no

power to review unless the statute specifically provides for it, was held to be applicable to review on merits and not to a review sought due to a

procedural defect. It was held that such procedural defect or inadvertent error must be corrected ex debito justitiae to prevent the abuse of

process and such power inheres in every Court or Tribunal. Cases where a decision is rendered by the Court or a quasi judicial authority without

notice to the opposite party or under a mistaken impression that notice had been served upon the opposite party were held to be falling in the

category where the power of procedural review may be invoked. It was held that the party seeking such review has to establish that the procedure

followed by the Court or the quasi-judicial authority suffered from such illegality that it vitiated the proceedings and invalidated the order made

therein inasmuch as the opportunity of hearing was denied without the fault of that party. The Supreme Court held that in such cases the matter has

to be re-heard in accordance with the law without going into the merits of the order passed and the order is liable to be recalled and reviewed not

because it is erroneous but because it was passed in a proceeding which was itself vitiated by an error of procedure or mistake. It was yet further

held that once it is established that the party was prevented from appearing at the hearing due to sufficient cause, the matter must be re-heard and

decided again. It is important to at this stage highlight that the Supreme Court in Damani Construction Co. (supra) was concerned with review of

an award and which power of "review on merit" was held to be not vested in the arbitral tribunal.

17. We may in this regard also notice that the legislature, in Section 25, has not provided for termination of proceedings automatically on default by

a party but has vested the discretion in the arbitral tribunal to, on sufficient cause being shown condone such default. We are of the view that no

distinction ought to be drawn between showing such sufficient cause before the proceedings are terminated and after the proceedings are

terminated. If the arbitral tribunal is empowered to condone default on sufficient cause being shown, it matters not when the same is shown. It may

well nigh be possible that the sufficient cause itself is such which prevented the party concerned from showing it before the proceedings terminated.

It would be a pedantic reading of the provision to hold that the arbitral tribunal in such cases also stands denuded. Once the legislature has vested

the arbitral tribunal with such power, an order of termination cannot be allowed to come in the way of exercise thereof.

18. There is another reason for us to hold so. The emphasis of the Arbitration Act is to provide an alternative dispute resolution mechanism. The

provisions of the Act ought to be interpreted in a manner that would make such adjudication effective and not in a manner that would make

arbitration proceedings cumbersome. A view that the arbitral tribunal is precluded, even where sufficient cause exists, from reviving the arbitral

proceedings and the only remedy available to a party is a writ petition and which remedy is available only in the High Court often situated at a

distance from the place where the parties are located, would be a deterrent to arbitration. It is also worth mentioning that Section 19(2) of the Act

permits the parties to agree on the procedure to be followed by the arbitral tribunal. The parties may, while so laying down the procedure, provide

for the remedy of review/revival of arbitral proceedings and which agreement would be binding on the arbitral tribunal. If the arbitral tribunal in

such a situation would be empowered to, on sufficient cause being shown, revive the arbitral proceedings, we see no reason to, in the absence of

such an agreement hold the arbitral tribunal to be not empowered to do so. If it were to be held that such power of review/recall is not available to

an arbitral tribunal, the arbitral tribunal would not be competent to set aside an order u/s 25(b) also, compelling the respondent against whom

proceedings have been continued, to file a writ petition, making the continuation of proceedings before the arbitral tribunal a useless exercise.

19. Before parting with the said line of reasoning, the consequences of the arbitral tribunal entertaining such procedural review may also be

discussed. If the Arbitral Tribunal finds sufficient cause and restores the arbitral proceedings, the challenge to such order of restoration would lie

along with challenge to the award itself if against such aggrieved party. However if the arbitral tribunal does not accept as sufficient, the cause

furnished for default, the arbitral tribunal would necessarily give reasons therefor within the meaning of Section 31 and such order of the Arbitral

Tribunal would definitely constitute an award remedy where against would be available u/s 34 of the Act. The definition in Section 2(1)(c) of the

Act of an ""arbitral award"" is an inclusive one i.e. of the same including an interim award; else an arbitration award is not defined. However, sub-

Section (1) of Section 32 provides for termination of arbitral proceedings either by an arbitral award or by an order of the arbitral tribunal under

sub-Section (2) of Section 32. An order of dismissal of an application for review/recall of an order u/s 25(a) does not fall under any of the clauses

in sub-Section (2) of Section 32. The same thus has to necessarily fall within the meaning of award.

20. We are further of the view that the proceedings under the Arbitration Act cannot at all times be viewed through the prism of CPC. The Act

equates the award to a "decree" only for the purposes of the enforcement thereof u/s 36 and our concepts and terminology of a suit cannot

otherwise be applied to arbitration proceedings. The Supreme Court in *Paramjeet Singh Patheja Vs. ICDS Ltd.*, held that the legal fiction of

equating the award to a decree is for the limited purpose of enforcement and not intended to make an award a decree for all purposes. Ordinarily

even the default termination order u/s 25(a) would be an award, with the remedy however available to the party of approaching the arbitral tribunal

with sufficient cause for setting aside of the default termination order. We may in this regard notice that Section 34 allows an arbitral award to be

set aside when a party was under some incapacity or when proper notice of the arbitral proceedings was not served or when the party was

otherwise unable to present his case. The said grounds for setting aside would be invoked only if orders as u/s 25(a) were to be an award and

there would have been no occasion for the legislature to provide such grounds u/s 34 if default orders were not to be an award. The same also

follows from sub-Section (4) of Section 34 whereunder, upon challenge u/s 34 being made to such termination, the Court has been empowered to

relegate the parties to the arbitral tribunal. We see no reason to not hold an order u/s 25(a) to be an award merely because the remedy of appeal

against orders of terminations u/s 16(2) & (3) has been provided. Further, the order u/s 25(a), stating default on the part of the party, would satisfy

the requirement of the award to contain reasons. Moreover, merely because the arbitral tribunal fails to give any reasons cannot be a ground for

making its orders unassailable u/s 34.

21. It cannot be lost sight of that though in the present case one of the contracting parties is Government but it may not always be so. The law of

arbitration in the Act is the same, whether the contracting parties are Government/State within the meaning of Article 12 of the Constitution of India

or private parties. What has been held by the Bombay, Patna and the Allahabad High Courts would equally apply to arbitration between the

private parties and would tantamount to the jurisdiction under Article 226 being invoked against such private arbitrators and the parties. We are in

the present state of affairs not prepared to hold so especially when in our view the remedy within the Act is available. In this regard it may be

noticed that the Madras High Court in Mangayarkarasi Apparels Pvt. Ltd., Millers Road, Bangalore and Another Vs. Sundaram Finance Ltd.,

Pattulos Road, Chennai, has disagreed with Anuptech Equipments Private Ltd. and held that the arbitral tribunal is not ""other authority"" within the

meaning of Article 226 and writ remedy against the orders of the arbitral tribunal is not available.

13. We reiterate the same reasoning and owing whereto, we are unable to agree with the reasoning given by the learned Single Judge in the

impugned judgment.

14. The counsel for the respondent has also contended that the question of limitation vis-à-vis the claims of the appellant would arise. We are

however not concerned with the same and the said aspect has to be gone into by the respondent no. 2 Arbitrator.

15. Once it is held that the writ petition itself was not maintainable, the question of going into the merits of the order dated 02.06.2003 of the

respondent no. 2 Arbitrator does not arise. However for the sake of completeness, we may mention that the respondent no. 2 Arbitrator having in

the recall order dated 02.06.2003 recorded that he was satisfied with the reasons given by the appellant for being unable to file the Statement of

Claim within the time granted by the respondent no. 2 Arbitrator and having in the exercise of discretion vested in him recalled the order holding

the right of the appellant to file the Statement of Claim having been lost, no case for interference with such decision arrived at by the by the

Arbitrator or the discretion exercised by the Arbitrator especially in jurisdiction under Article 226 of the Constitution of India does not arise. We

accordingly allow this appeal and set aside the judgment of the Single Judge. Axiomatically, the interim order in force of stay of arbitration

proceedings stands vacated. We request the respondent no. 2 Arbitrator to now take up the arbitration proceedings which have been stalled as

aforesaid, expeditiously. However in the facts, no costs.