Visa Steel Ltd. Vs Durgapur Projects Ltd.

Court: Calcutta High Court

Date of Decision: Dec. 21, 2011

Acts Referred: Arbitration and Conciliation Act, 1996 â€" Section 11(6), 16, 16(2), 16(3), 16(5)
Partnership Act, 1932 â€" Section 69

Citation: (2012) 2 CALLT 285

Hon'ble Judges: Sanjib Banerjee, J

Bench: Single Bench

Advocate: Jayanta Kr. Mitra, Mr. Siddhartha Mitra, Mr. D.N. Sharma, Mrs. Roopa Mitra. Mr. Anindya Kr. Mitra, A.G. and Mr. Bhaskar Mitra, for the Appellant;

Final Decision: Dismissed

Judgement

Sanjib Banerjee, J.
Courts and tribunals in this country-and Judges and officers manning them-do not have omnibus authority to right any

perceived wrong. The contours of their authority are defined either by the statute under which they operate or the business that is allocated. The

present challenge is fashioned u/s 34 of the Arbitration and Conciliation Act, 1996 and the petitioner insists that the order dated November 1,

2011 passed by the arbitrator is an arbitral award within the definition of section 2(2) of the Act of 1996. At any rate, the petitioner contends that

it is an interim award and as an interim award is included within the definition of an award in the Act, it is amenable to challenge directly u/s 34 of

the Act.

2. Some of the essential facts need to be noticed before the question of the authority of the Court to entertain the challenge is assessed. Following

a request by the petitioner herein u/s 11 (6) of the Act, the arbitration Judge of this Court found that there was a valid arbitration agreement and

there were live disputes to go to a reference - only so much is trusted to the arbitration Judge of this Court, the task of naming of the arbitrator or

arbitrators is assigned elsewhere. Following the adjudication of the matter by the arbitration Judge, to the extent the adjudication was necessary in

the light of the Constitution Bench judgment rendered in S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, the matter went elsewhere for the

naming of the arbitrator. It appears that an affidavit was used by the respondent at such stage, though the only question relevant then was as to the

personnel of the arbitrator or the composition of the arbitral tribunal and nothing more.

3. The arbitrator was appointed and the statement of claim Tiled by this petitioner in the reference. The respondent herein lodged its counter

statement where matters pertaining to an altogether different contract between the parties, containing a separate arbitration agreement, were made

part of a counter-claim. The petitioner herein objected to such matters pertaining to another agreement being carried to the reference by the

respondent in course of its counter-claim. It does not appear that a written application in such regard was filed by the petitioner herein but the

objection was squarely taken and it was on the objection that the arbitrator rendered a finding which has been assailed as an interim award in the

present proceedings.

4. It is also a matter of some relevance that the respondent herein has filed a suit in this Court on the basis of its perceived claim in the other

agreement, matters pertaining to which were sought to be included by way of the counter-claim. The petitioner herein claims to have already filed

its written statement in the suit.

5. The arbitrator held that the counter-claim could be entertained in course of the reference only upon the respondent herein seeking and obtaining

a stay of its suit filed in furtherance of the same claim in this Court. A letter has since been written by the respondent to the arbitrator seeking an

adjournment in the reference on the ground that an application of such nature was being prepared by the respondent.

6. The question that arises is as to whether the challenge that was made by the petitioner herein before the arbitrator can be renewed at this stage

u/s 34 of the 1996 Act. There is a short answer to the question. It is that in view of sections 16 and 37(2) of the 1996 Act no question arises of the

arbitrator''s decision rejecting the petitioner''s objection being subjected to a challenge u/s 34 of the 1996 Act at this stage as such decision cannot

be deemed to be an award, whether interim or final, in the scheme of the 1996 Act.

7. But a more protracted answer is called for in the context of the body of judicial authorities that has been cited on behalf of the petitioner herein.

The petitioner says that even decisions rendered by an arbitral tribunal on matters concerning procedure that attain an element of finality may be

regarded as interim awards and immediately made the subject- matter of a challenge u/s 34 of the 1996 Act. In support of such proposition, the

petitioner has referred to Russell on Arbitration (23rd Ed.) and passages from Chapter 6 thereof on what order would amount to an award and

what factors would go in an order of the arbitral tribunal being regarded as an award. The discussion in the revered text and the petitioner''s

submission on such aspect does not appear to be apposite in the context. It is possible that some arbitral orders (say. a finding as to the law

applicable to the parent contract) may be deemed to interim orders if there is an element of finality in them. But the present matter is squarely

covered by the clear provisions of the statute.

8. The petitioner refers to a judgment reported at McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, for the explanation

therein as to what would be the implication of a partial award. At paragraph 68 of the report the Supreme Court found that though the 1996 Act

did not refer to a partial award, it was a fashionable, particularly in arbitrations conducted by the International Chamber of Commerce, for partial

awards to be made. The Supreme Court held that an interim award was such an award that was conclusive in respect of all matters covered

thereby but was interim in its nature in a sense it was rendered prior to the reference being concluded.

9. A judgment of a Single Judge of Delhi High Court reported at 2005 (3) ALR 234 has been cited by the petitioner for the proposition that in

matters as the present one, where the petitioner would be prejudiced and there would be serious miscarriage of justice in a protracted reference in

considering a matter for which the parties did not agree to go to that arbitral tribunal, the order of the arbitral tribunal, however, it is named, should

be seen to be an award that is capable of being challenged u/s 34 of the Arbitration and Conciliation Act, 1996. The judgment noticed the contrary

view expressed by the Delhi High Court itself, that upon reading of sections 16 and 37 of the 1996 Act it was not possible to hold that a failed

challenged to the competence of the arbitral tribunal could be carried to Court before a final award was rendered in the reference; but distinguished

such view on the basis of the second sentence appearing in paragraph 11 of the report:

This issue is not concerned with the competence of the arbitral tribunal, therefore, the impugned order cannot be placed in the category of orders

passed under sections 16(2) and 16(3) of the Act.

10. Such distinction will make whatever principle that has been decided by the Single Judge inapplicable in the present context without the Court

now being called upon to accept or reject the view expressed on the legal question that was answered in that case. The objection in that case was

on the ground of section 69 of the Partnership Act, 1932 which the arbitral tribunal rejected.

11. The petitioner also refers to Commercial Arbitration by Mustill & Boyd (1982 Ed.) and Redfern & Hunter on Law and Practice of

International Commercial Arbitration (3rd Ed.) on the various kinds of orders that may be passed by the arbitral tribunals and regarded as awards

by Court.

12. The petitioner has brought a judgment reported at National Thermal Power Corporation Ltd. Vs. Siemens Atkeingesellschaft, for the

proposition that not every challenge to the arbitral tribunal''s authority to take up a matter would amount to a challenge on the ground of

jurisdiction. It is necessary to appreciate the facts in that case. In course of an arbitration, a counter-claim was made in respect of certain matters

that had already been covered in the minutes of the meetings held between the parties. The minutes recorded that the respondent in the reference

would have no further claim in respect of such matters. The claim on the same matters were sought to be carried in the counter-claim in the

reference. On the claimant''s objection, the arbitrator held against the respondent on such score. Such party challenged the arbitrator''s order u/s

37(2) of the 1996 Act before a Single Judge of the Delhi High Court. The Single Judge found that the challenge was not maintainable.. The order

was carried by way of a SLP to the Supreme Court and in the resultant appeal, the view taken by the Delhi High Court was held to be correct.

13. At paragraphs 17 and 18 of the report, the Supreme Court said in so many words that the word ""jurisdiction"" has several hues. The Supreme

Court read the objection carried by the claimant in the relevant reference to be an objection not on the ground of the competence of the arbitral

tribunal but an objection in the nature of waiver or estoppel barring a party to carry a particular claim or counter-claim. There is a distinction

between the two: in a case where the authority of a tribunal to adjudicate upon any particular matter is challenged, its competence based on the

contract or the law governing the tribunal is called into question; in the other case it is the propriety of the claim being made by a party to the

proceedings which is under attack. Qualitatively, the two are poles apart. The Supreme Court judgment must be read in such context. In the

present case, it is the authority of the arbitrator to adjudicate upon the counter-claim that was challenged. Such challenge was on the ground of the

perceived incompetence of the arbitrator to take up the matter in view of his authority being restricted to the agreement under which he was

appointed. The challenge was not on the ground that the counter-claim was barred on account of the respondent having waived or abandoned the

same.

14. Judgments reported at 1992(1) LLR 1 and 1992(1) LLIR 169 have also been placed by the petitioner. These judgments deal with orders of

arbitral tribunals which amount to awards despite such orders covering procedural'' matters. The decisions rendered on arbitration matters prior to

1996 have all to be read with the caveat that the law relating to arbitration has undergone such a sea change internationally that it may not be safe

to go by the older authorities. In any event, in the first case cited, the seller was found to have abandoned the claim and a subsequent inclusion of

such claim before the arbitral tribunal was repelled on the ground that it stood abandoned. This decision was regarded by the Court to be an

interim award since there was an element of finality in it in that it concluded the seller''s claim such that the seller was precluded from making any

further claim without the arbitral tribunal''s view being dislodged. In the second case, the Court entertained the challenge as a challenge to an award

not on the Court''s satisfaction that the arbitral tribunal''s ruling amounted to an award but only by virtue of the arbitral tribunal having described the

ruling as an ""interim final award."" The further case referred to by the petitioner is reported at 1999(1) LLR 225. There were two originating

summons before the Court and the Court''s opinion was sought on several matters. The question was whether the arbitral tribunal in that case had

the authority to revisit an order of amendment that had already been made. With respect, it cannot be appreciated as to how a decision rendered

on the originating summons and on the question that was posed before the Court can be of any relevance in the present context or of any

assistance to the petitioner.

15. Section 16 of the 1996 Act permits a challenge to the jurisdiction of the arbitral tribunal to be made before the arbitral tribunal. After the

Constitution Bench judgment in SBP & Co., if an arbitral tribunal is constituted upon a request being received by the Chief Justice or his designate,

it is for the Chief Justice or his designate to assess whether there are live claims to go to a reference and whether the arbitration agreement is valid

and in existence. In course of a reference carried directly to an arbitral tribunal without the intervention of the Court, the arbitral tribunal is left free

to rule on its own jurisdiction. Even in cases where the arbitral tribunal is constituted by the Chief Justice or his designate, questions as to the

existence or validity of the arbitration agreement and as to the jurisdiction of the arbitral tribunal can also be gone into by the tribunal itself. The fact

that the tribunal has been constituted by the Court would not preclude all challenges conceivable u/s 16 of the 1996 Act being carried before it.

16. An example may be appropriate. Say, the physical existence of an arbitration agreement is called into question in course of a request u/s 11(6)

of the 1996 Act before the Chief Justice or his designate and that is answered in favour of the applicant and the arbitral tribunal is constituted. It

would not follow that in view of the existence or the validity of the arbitration agreement having been pronounced upon by the Chief Justice or his

designate, all other questions available to be raised u/s 16 of the 1996 Act would be barred. Despite the Chief Justice or his designate finding an

arbitration agreement to be valid, matters which are not covered by such agreement may be carried by either party to the reference by way of a

claim or a counter-claim and it would be open to the other party to challenge the competence of the arbitral tribunal to entertain such matters. The

resultant decision of the arbitral tribunal would then be amenable to an appeal u/s 37(2) of the 1996 Act only if the challenge is upheld. If the

challenge is repelled by the arbitral tribunal, in view of the wording of sub-sections (5) and (6) of section 16 of the 1996 Act, the party aggrieved

has to wait till the arbitral award is rendered before the objection as to the competence of the arbitral tribunal can be made a part of the challenge

to the arbitral award itself. It may well be that despite a challenge to the scope of the arbitration agreement failing, the award is passed in favour of

the challenger on merits. The challenger, in such case, will not be called upon to challenge the award merely on the ground that the original

objection carried by the challenger was overruled.

17. In the present case, it is the clear case of the petitioner that there were two or more agreements between the same parties which contained

individual arbitration clauses. In fact, in respect of one of the agreements there is a suit pending in this Court. The respondent in the reference

sought to make the claim in such pending suit as part of its counter-claim in the reference. The objection that the petitioner herein carried before the

arbitral tribunal was on the competence of the arbitral tribunal to adjudicate upon the matters referred to in the counter-claim. It was a

jurisdictional-objection-founded on the agreement under which the arbitrator derived his authority -that was taken and that is squarely covered by

section 16 of the 1996 Act. In the order dated November 1, 2011 finding against the petitioner on such objection, the petitioner cannot assail it as

an interim award u/s 34 of the 1996 Act.

18. Section 16(5) of the 1996 Act mandates that upon a challenge as to the jurisdiction of the arbitral tribunal (it must be remembered that the

nature of the challenge is not exhaustively described in the opening limb of sub-section (1), the arbitral tribunal may decide on such issue, ""and,

where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award."" Sub-section (6)

says that a party aggrieved ""by such an arbitral award"" may make an application for setting aside the same in accordance with section 34. The

expression ""such an arbitral award"" in sub-section (6) refers to the last two words of sub-section (5). In other words, upon an objection as to

jurisdiction being rejected by an arbitral tribunal, the arbitral tribunal should proceed to deal with the merits of the matter before it and render an

award and upon such award being rendered would the objector have a chance to renew the objection in course of challenging the award.

19. Section 34(2)(a)(iv) of the 1996 Act contemplates a challenge to the arbitral award based on the competence of the arbitral tribunal to decide

certain matters. The proviso to the relevant sub-clause makes it abundantly clear that if matters which fall within the jurisdiction of the arbitral

tribunal can be severed from matters which have been decided and are perceived to have been outside the domain of the arbitral tribunal, it would

be the duty of the Court to do so. In any event, the underlying non-interventionist philosophy of the 1996 Act, from the model on which it is

founded to section 5 thereof and the judicial interpretation rendered thereon, would go to show that the scope of interference by Court is limited

only to the extent expressly provided. Merely because the arbitrator may have committed an error or that the Court perceives the arbitrator to

have committed a mistake in the matter that is carried to the Court by a party to the reference cannot overwhelm the Court and make it disregard

the bounds of its authority to right to perceived error.

20. A reference in such context may be made to a recent judgment of the Supreme Court reported at Fuerst Day Lawson Ltd. and Others Vs.

Jindal Exports Ltd. and Others etc. etc., where, in the context of whether a Letters Patent appeal would lie from an order passed in an arbitration

matter de hors section 37 of the 1996 Act, it was held that the 1996 Act being a complete code by itself, there could be no appellate provision de

hors the provisions of such statute. It must then follow that if an immediate remedy is provided upon a challenge to the authority of the arbitral

tribunal succeeding, by way of section 37(2) of the Act, and no corresponding remedy is recognized in the statute for the failed objector, the

objector has to stay back and contest the reference in accordance with the mandate of section 16(5) of the Act and be entitled only to challenge

the same upon the award being passed in the reference. The authority to right a wrong that a Court exercises, in the constitutional scheme of things,

is not all pervasive; it is circumscribed by statute and extends only to the extent that the business allocated to the Court would permit. A Court

cannot reach out beyond its jurisdiction to correct a mistake.

21. There is no merit in the petitioner''s assertion that this Court would have the authority to accept a challenge to the order dated November 1,

2011 u/s 34 of the 1996 Act. AP No. 1056 of 2011 is dismissed with costs. It is made clear that the merits of the matter have not been gone into

and nothing in this order should be deemed to be an endorsement of the view expressed by the arbitrator in the order dated November 1, 2011.

The respondent has not been called upon.

Urgent xerox photocopies of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.