A.F.R.

RESERVED

Court No. -38

Case :- ARBITRATION AND CONCILI. APPL.U/S11(4) No. - 92 of 2021

Applicant :- M/S P.N. Garg, Engineers & Contractors
Opposite Party :- Chief Engineer, Bhopal Zone, Sultania Infantry Lines Bhopal
Counsel for Applicant :- Aarushi Khare

Hon'ble Jayant Banerji,J.

1. Heard Ms. Aarushi Khare, learned counsel for the applicants and perused the record.

2. This application has been filed praying for appointment of an independent Arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996[1]. The opposite parties are as follows:- (I) Chief Engineer, Bhopal Zone, Sultania Infantry Lines, Bhopal-462001, (II) Engineer-in-Chief, Branch Army Head Quarter, New Delhi, (III) Commander Works Engineer, Military Engineer Services, Jhansi, and, (IV) Garrison Engineer, Military Engineer Services, Jhansi-284001, U.P.

3. The applicants and the opposite parties entered into a contract under a Contract Agreement No.CEJZ/JHA-05. Since a dispute arose between the parties, under clause 70 of the general conditions of the aforesaid agreement which provides for arbitration, the competent authority-opposite party no.2 appointed one Mr. Baljit Singh as the sole Arbitrator under the terms of the arbitration agreement, who made the final award on 25.02.2010.

1 Act

4. The aforesaid award was challenged before the District Judge, Jhansi by means of an application under Section 34 of the Act (Arbitration Misc. Case No.20/2010) for setting aside the award. By an order dated 16.09.2019, the Court allowed the application, set aside the award dated 25.02.2010, and remitted the matter back to the Arbitrator to reconsider all the issues raised before the Court in light of the terms of the contract as well as the issue regarding extension of period for completion of work of IIIrd Phase and to pass the award afresh.

5. However, thereafter, the Arbitrator Mr. Baljit Singh resigned and withdrew from the aforesaid arbitration proceedings citing his ineligibility to continue as Arbitrator as he had retired, and only a serving officer could be an Arbitrator as per the agreement.

6. It is contended by the learned counsel for the applicants that despite repeated reminders to the opposite parties, no substitute Arbitrator is being appointed by them and, therefore, this application has been filed.

7. When the matter was listed on 23.09.2021, the learned counsel for the applicants sought adjournment to address the Court on the issue of maintainability of the application. Learned counsel has thus made her submissions on the issue of maintainability.

8. A query was made by the Court to the learned counsel for the applicants that whether the Court exercising jurisdiction under Section 34 of the Act, had power to remand the matter to the Arbitrator after setting aside the arbitral award dated 25.02.2010, and if not, whether the present application would be maintainable. The learned counsel for the applicants referred to Sections 14 and 15 of the Act, and contended that since the matter has been remanded, and since the Arbitrator withdrew from his office, his mandate stood terminated, and, therefore, under Section 15(2) of the Act, a substitute Arbitrator is required to be appointed. It is, therefore, contended that under the facts of the case,

since the award has been set aside, an Arbitrator would anyway be required to be appointed and therefore, the present application would be maintainable. Learned counsel has referred to the judgement of the Supreme Court in **McDermott International Inc. v. Burn Standard Company Ltd. and others**[2].

9. On perusal of the order passed by the court below on 16.09.2019 on the application filed by the applicants under Section 34 of the Act, it is evident that the award passed by the Arbitrator on 25.02.2010 was set aside and the matter was remitted back to the Arbitrator to reconsider all the issues raised before the court in light of the terms of the contract as well as the issue regarding extension of period for completion of work of Phase-III and to pass the award afresh. The relevant extract of the order of the Court below is quoted :-

> "12. A perusal of Impugned award reveals that the Arbitrator has rejected the claim of applicant/firm for want of extension of period for completion of work for III phase, while the applicant/firm has vehemently submitted that extension of time was recommended by Chief Engineer, Jabalpur, who was the competent authority under the contract to extend the period for completion of any work, which itself amounts to extension of period. Admittedly, the applicant/firm has completed the work of III phase as per the agreement. The dispute is only with regard to extension of period for completion of work of III phase. When the applicant/firm has completed the work of III phase without any interruption from the side of opposite parties, though without extension of period as alleged by the opposite parties, but it would draw adverse presumption against the opposite parties that they were conceded to the request of applicant/firm for extension of period, otherwise they would have stopped the work of III phase.
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> The Arbitrator, while passing the impugned award, has not given a detailed finding on this fact; rather rejected the claim of the applicant/firm for want of extension of period for completion of work. Further, the Arbitrator has also not taken into consideration the terms of contract for deduction of sales tax @ 4% instead of 1% from the final bill. He also failed in consider the

2 (2006) 11 SCC 181

applicability of VAT, which was allegedly enforced after completion of work on 27.09.1993. The Arbitrator has committed gross error of law in rejecting the claim of the applicant without considering these legal issues in the light of terms of contract. Hence, there appears some substance in the argument of learned counsel for the applicant/firm that matter requires reconsideration in the light of terms of contract.

Thus, in view of the above discussion, it is proved that award suffers from illegality and infirmity, as it has been passed without considering the points being raised by applicant/firm at the time of hearing before Arbitrator. Hence, the impugned award requires reconsideration in terms of the contract.

ORDER

Application 3B for setting aside the award dated 25.02.2010 is allowed with no order as to cost. The award dated 25.02.2010 is hereby set aside. The matter is remitted back to the Arbitrator to reconsider all the issues being raised before this Court in the light of terms of contract as well as the issue regarding extension of period for completion of work of III phase and to pass the award afresh, as early as possible. Let the record of Arbitrator, if any, be sent back along with a copy of this judgment forthwith."

10. Thus the Court below, while affirming that an award by the arbitrator cannot be modified, set aside the award, and proceeded to hold that the matter requires reconsideration in light of the terms of the contract, and remitted the case to the arbitrator.

11. A three Judge Bench of the Supreme Court in the case of **Kinnari Mullick and Another vs. Ghanshyam Das Damani**[3] has held that no power has been invested by Parliament in the Court to remand the matter to the Arbitral Tribunal except to adjourn the proceedings for the limited purpose mentioned in sub-section (4) of Section 34 of the Act. It was further held that the limited discretion available to the Court under Section 34(4) of the Act can be exercised only upon a written application made in that behalf by a party to the arbitration proceedings.

3 (2018) 11 SCC 328

The relevant paragraphs of the judgment of **Kinnari Mullick and Another (supra)** are quoted below:-

> "6. Being dissatisfied with the interim award dated 27-8-2010 and final award dated 18-6-2013 passed by the Arbitral Tribunal, the appellants filed an application under Section 34 of the Act, for setting aside of the said awards. The learned Single Judge was pleased to allow the said application on the finding that the impugned award did not disclose any reason in support thereof. The impugned award was accordingly set aside and the parties were left to pursue their remedies in accordance with law. The relevant portion of the decision of the learned Single Judge reads thus: (Kinnari case, SCC OnLine Cal para 9)
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> > "9. Since the present award is completely lacking in reasons and is littered with the unacceptable expressions like "I feel that the claim is justified", "I find no basis" and the like which cannot be supplement for reasons that the statute demands, AP No. 1074 of 2013 is allowed by setting aside the award dated 18-6-2013. The parties are left free to pursue their remedies in accordance with law."
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> 7. Against the aforementioned decision, the respondent preferred an appeal before the Division Bench of the High Court of Calcutta. The appellants also filed a cross-objection in respect of the adverse findings recorded by the learned Single Judge against them. The cross-objection bearing APO No. 223 of 2014 and APOT No. 318 of 2014 were heard and decided together by the Division Bench vide the impugned judgment dated 13-8-2014. The Division Bench affirmed the findings and conclusion recorded by the learned Single Judge that the award did not contain any reason whatsoever and thus rejected the appeal preferred by the respondent, in the following words: (Ghanshyam Das case, SCC OnLine Cal)
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> > "We have considered the rival contentions. Section 31 is clear that it would require the Tribunal to assign reason. The award would suffer from such lacunae. We would not be in a position to agree with Mr Sharma when he would contend, it was reasoned, but reasons might have been insufficient.
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> > The learned Judge observed:
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> > *'The award does not indicate a line or sentence of reasons and notwithstanding the petitioners herein, having pulled out of the reference and not urging their*

counter-statement or any defence to the claim, it was still incumbent on the arbitrator to indicate the grounds on which the respondents were entitled to succeed.'

We fully endorse what his Lordship would say as quoted (supra). Hence, the appeal fails on such count."

(emphasis in original)

8. While considering the cross-objection filed by the appellants, the Division Bench negatived the ground urged before it about the inappropriate and illegal constitution of the Arbitral Tribunal. As a result, the cross-objection filed by the appellants was also rejected. Having decided as above, the Division Bench suo motu decided to relegate the parties before the Arbitral Tribunal by sending the award back with a direction to assign reasons in support of its award. It will be useful to reproduce the observations of the Division Bench in this regard. The same reads thus: (Ghanshyam Das case, SCC OnLine Cal)

"On the cross-objection we would, however, agree with Mr Sharma when he would draw our attention to Section 13. The learned Judge, in our view, rightly rejected the contention of the respondents. The challenge procedure as spelt out in Section 13 would refer to constitution of the Tribunal as well. Section 4 would clearly provide, if a party knowing his right does not take any step that would debar him to object at a later stage as if he shall be deemed to have waived his right to object.

… Section 34 would empower the Court to remit the award to the arbitrator, at a stage when the award was under challenge, to eliminate the ground for setting aside of the arbitral award. Applying such provision we send the award back to the arbitrator with a direction, he must assign reason to support his award. However, we wish to give the arbitrator a free hand. If he feels, further hearing to be given to the parties, he may do so and upon hearing, he may publish his award in accordance with law adhering to the norms and procedures laid down under the said 1996 Act without being influenced by the award that the learned Judge already set aside.

The appeal is dismissed without any order as to costs."

(emphasis supplied)

…….

13. We have heard the learned counsel for the parties. At the outset, we may note that if the plea taken by the appellants in relation to the concluding part of the impugned judgment—of sending the award back to the Arbitral Tribunal for recording reasons—was to be

accepted, we may not be required to dilate on any other argument. Inasmuch as the learned Single Judge allowed the application under Section 34 of the Act for setting aside of the award preferred by the appellants; and the Division Bench has already affirmed the conclusion recorded by the learned Single Judge while dismissing the appeal preferred by the respondent. Thus, the award has been set aside on that count. The respondent has not challenged that part of the impugned judgment and has allowed it to become final.

14. In this backdrop, the question which arises is: whether the highlighted portion in the operative part of the impugned judgment of the Division Bench can be sustained in law? For that, we may advert to Section 34(4) of the Act which is the repository of power invested in the Court. The same reads thus:

> "34. (4) On receipt of an application under sub - section (1), the court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the Arbitral Tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of Arbitral Tribunal will eliminate the grounds for setting aside the arbitral award."

15. On a bare reading of this provision, it is amply clear that the Court can defer the hearing of the application filed under Section 34 for setting aside the award on a written request made by a party to the arbitration proceedings to facilitate the Arbitral Tribunal by resuming the arbitral proceedings or to take such other action as in the opinion of the Arbitral Tribunal will eliminate the grounds for setting aside the arbitral award. The quintessence for exercising power under this provision is that the arbitral award has not been set aside. Further, the challenge to the said award has been set up under Section 34 about the deficiencies in the arbitral award which may be curable by allowing the Arbitral Tribunal to take such measures which can eliminate the grounds for setting aside the arbitral award. No power has been invested by Parliament in the Court to remand the matter to the Arbitral Tribunal except to adjourn the proceedings for the limited purpose mentioned in sub-section (4) of Section 34. This legal position has been expounded in*McDermott International Inc*. In para 8 of the said decision, the Court observed thus: (Bhaskar Industrial case, SCC OnLine Kar)

> *"8. … Parliament has not conferred any power of remand to the Court to remit the matter to the Arbitral Tribunal except to adjourn the proceedings as provided*

> *under sub-section (4) of Section 34 of the Act.* The object of sub-section (4) of Section 34 of the Act is to give an opportunity to the Arbitral Tribunal to resume the arbitral proceedings or to enable it to take such other action which will eliminate the grounds for setting aside the arbitral award."
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> (emphasis supplied)

> 16. In any case, the limited discretion available to the Court under Section 34(4) can be exercised only upon a written application made in that behalf by a party to the arbitration proceedings. It is crystal clear that the Court cannot exercise this limited power of deferring the proceedings before it suo motu. Moreover, before formally setting aside the award, if the party to the arbitration proceedings fails to request the Court to defer the proceedings pending before it, then it is not open to the party to move an application under Section 34(4) of the Act. For, consequent to disposal of the main proceedings under Section 34 of the Act by the Court, it would become functus officio. In other words, the limited remedy available under Section 34(4) is required to be invoked by the party to the arbitral proceedings before the award is set aside by the Court.
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> 17. In the present case, the learned Single Judge had set aside the award vide judgment dated 7-3-2014. Indeed, the respondent carried the matter in appeal before the Division Bench. Even if we were to assume for the sake of argument, without expressing any opinion either way on the correctness of this assumption, that the appeal was in continuum of the application under Section 34 for setting aside of the award and therefore, the Division Bench could be requested by the party to the arbitral proceedings to exercise its discretion under Section 34(4) of the Act, the fact remains that no formal written application was filed by the respondent before the Division Bench for that purpose. In other words, the respondent did not make such a request before the learned Single Judge in the first instance and also failed to do so before the Division Bench rejected the appeal of the respondent."

12. In the aforesaid judgement of the Supreme Court in **Kinnari Mullick** (supra) it has been held that the Court can defer the hearing of the application filed under Section 34 of the Act for setting aside the award on a written request made by a party to the arbitration proceedings to facilitate the Arbitral Tribunal by resuming the arbitral

proceedings or to take such other action as in the opinion of the Arbitral Tribunal will eliminate the grounds for setting aside the arbitral award. The power under Section 34 (4) of the Act can be exercised so long the arbitral award is not set aside. No power has been invested in the Court to remand the matter to the arbitral tribunal except to adjourn the proceedings for the limited purpose mentioned in sub-section (4) of Section 34 of the Act. It was further held that consequent to disposal of the main proceedings under Section 34 of the Act by the Court, it would become *functus officio*. The judgement in the matter of **McDermott International Inc**.(supra), which has been relied upon by the Supreme Court in the case of Kinnari Mullick (supra), is of no assistance to the applicants.

13. It is pertinent to mention here that the Supreme Court, in the case of **Project Director, National Highways v. M. Hakeem & another**[4] (para. 28), has relied upon a judgement of the Delhi High Court in **Puri Construction P. Ltd. v. Larsen and Tubro Ltd.**[5] in which it was held that the power to modify, vary or remit the award does not exist under Section 34 of the Act.

14. Therefore, the order passed by the Court on 16.09.2019 under Section 34 of the Act remitting the matter back to the Arbitrator to reconsider all the issues would be beyond the statutory mandate conferred on the Court and is thus without jurisdiction.

15. In view of the facts of the present case, after making the final arbitral award, given the provisions of sub-Section (1) of Section 32 and subject to sub-Section (3) of Section 32 of the Act, the mandate of the arbitral tribunal stood terminated with the termination of the arbitral proceedings. Thereafter, the Arbitrator became *functus officio,* and, therefore, remitting the matter back to him by the Court to reconsider all the issues is not permissible.

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4 2021 SCC OnLine SC 473
5 2015 SCC OnLine Del. 9126

16. The last letter written by the applicant to the opposite parties on 22.03.2021, which is enclosed as Annexure-7 to the present application, demands the appointment of a substitute sole Arbitrator. In the present case, just because after remission of the case to the arbitral tribunal the Arbitrator has resigned and withdrawn from that case, does not result in termination of his mandate as envisaged in Sections 14 and 15 of the Act. It is pertinent to mention here that under the facts and circumstances of the present case, since the arbitrator has been rendered *functus officio*, there exists no occasion to invoke the provisions of Sections 14 and 15 of the Act for appointing a substitute arbitrator. Sections 14 and 15 of the Act provide for appointment of a substitute arbitrator where the specified conditions cause the mandate of an arbitrator to terminate. The provisions are as follows:-

"**14. Failure or impossibility to act.**—(1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if -

(a) he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.

15. Termination of mandate and substitution of arbitrator.—(1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate—

(a) where he withdraws from office for any reason; or

(b) by or pursuant to agreement of the parties.

> (2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.
>
> (3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.
>
> (4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal."

17. Thus, the conditions prescribed in these Sections 14 and 15 are distinguishable and very different from the sole condition prescribed in sub-section (1) of Section 32 of the Act which mandates termination of the arbitral proceedings by the final arbitral award of the arbitral tribunal. Sections 14 and 15 of the Act provide for termination of the mandate of the arbitrator and for substitution of the arbitrator. Clearly, the mandate of an arbitrator stems forth from an arbitration agreement under Section 7 of the Act and his appointment under Section 11 of the Act. Sections 14 and 15 of the Act would only be applicable where the arbitral proceedings are pending. In the present case, under sub-section (1) of Section 32 of the Act, the arbitral proceedings stood terminated by the final arbitral award, and, in view of sub-section (3) of Section 32 of the Act, the mandate of the arbitral tribunal stood terminated with with the termination of the arbitral proceedings. Under the circumstances, seeking appointment of a substitute Arbitrator in respect of the dispute between the parties pursuant to the aforesaid order of the Court below dated 16.09.2019, is misconceived.

18. With regard to the maintainability of an application before the High Court under the relevant provisions of Section 11 of the Act, a coordinate bench of this Court, in the case of **S.K. and Associates v. IFFCO & others**[6], (paragraph 25), has held that the sine qua non for

6 (2019 SCC OnLine All 5390

invocation of the powers conferred by Section 11 of the Act is a failure of a party to the agreement to act or discharge a function, and that, in the absence of these primordial conditions being satisfied, the Chief Justice or his nominee Judge would not be entitled to exercise jurisdiction.

19. Clause 70 of the agreement, which provides for arbitration, reads as follows:-

> "**70. Arbitration.** - All disputes, between the parties to the Contract (other than those for which the decision of the C.W.E. or any other person is by the Contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of them, be referred to the sole arbitration of an Engineering Officer to be appointed by the authority mentioned in the tender documents.
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> Unless both parties agree in writing such reference shall not take place until after the completion or alleged completion of the Works or termination or determination of the Contract under Condition Nos. 55, 56 and 57 hereof.
>
> Provided that in the event of abandonment of the Works or cancellation of the Contract under Condition Nos. 52, 53 or 54 hereof, such reference shall not take place until alternative arrangements have been finalized by the Government to get the Works completed by or through any other Contractor or Contractors or Agency or Agencies.
>
> Provided always that commencement or continuance of any arbitration proceeding hereunder or otherwise shall not in any manner militate against the Government's right of recovery from the contractor as provided in Condition 67 hereof."

20. From the record of this application, it appears that :

(a) A letter dated 11.09.2020 was sent by Mr. Baljit Singh, the arbitrator, to both the parties stating that as per the directions of the Court dated 16.09.2019 for reconsideration of all the issues and to pass the award afresh, he had called upon both the parties by his letter dated 09.11.2019 to submit the matter for his reconsideration, and both the parties had been making various

submissions till March 2020. It was stated that due to the Covid-19 pandemic it may not be possible to hold oral hearing, as requested by the parties, in the near future till the pandemic situation becomes normal. That he would superannuate from Government service on 30.09.2020 and therefore, he would not be eligible to continue as sole arbitrator. Therefore the arbitrator resigned and withdrew from the matter.

(b) Thereafter, by a letter dated 12.10.2020, the Garrison Engineer sent the case files of the matter received from the Arbitrator, to the Government counsel for filing them in the Court, with a copy of the letter being endorsed to the applicants for information.

(c) By a letter dated 15.10.2020, the applicants, with reference to the letter dated 11.09.2020 of Mr. Baljit Singh (former arbitrator), requested the Chief Engineer to communicate the name appointing another officer as sole arbitrator to enable them to represent their case before him to adjudicate on the disputes afresh arising out of the agreement. It was further requested to hand over the relevant files/ document returned by the former arbitrator to the officer who would be appointed as an arbitrator to enable him to process the case further.

(d) By means of a letter of 26.10.2020, the Chief Engineer wrote to the applicant that the former arbitrator had forwarded all the files and documents to file in the Court for further direction in the matter, and, since the matter is sub-judice, as such further action would be taken as per the directions of the Court.

(e) Thereafter, by means of a letter of 22.03.2021 (Annexure no.7 to the affidavit) addressed to the Chief Engineer, the applicant referred to a letter dated 23.11.2020 sent by him for substituting the arbitrator under Section 14 (b) of the Act as the

mandate of the earlier arbitrator was terminated due to his superannuation. It was stated that in the event of the failure of the opposite parties to appoint a substitute sole arbitrator within 30 days, an application would be moved before the High Court under Section 11 (6) of the Act to appoint an independent and impartial arbitrator.

21. There is no averment in the present application that, after setting aside of the award passed by the arbitral tribunal, under the aforesaid provision of clause 70 of the agreement, any written notice has been given to the opposite parties regarding any dispute, to initiate arbitration proceedings *de novo*. As stated above, the last notice given to the opposite parties by the applicants is the one dated 22.03.2021, which is enclosed as Annexure-7 to the present application, demanding the appointment of a substitute sole Arbitrator. Thus, in view of the facts and circumstance of the present case, there is no failure on part of the opposite parties to act or discharge a function which would entitle the applicants to invoke the powers conferred by sub-sections (4), (5) and (6) of Section 11 of the Act, and which would render the present application maintainable.

22. Accordingly, this application is **dismissed**. However, the applicants are free to pursue any remedy they may be entitled to in accordance with law.

Order Date :-16.11..2021
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