

Asian Electronics Ltd. Vs. M.P. State Electricity Board

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Court : Madhya Pradesh

Decided On : Dec-15-2006

Reported in : 2007(3)ARBLR22(MP); 2007(2)MPLJ144

Judge : Abhay M. Naik, J.

Appellant : Asian Electronics Ltd.

Respondent : M.P. State Electricity Board

Advocate for Def. : Shri. H.K. Upadhyaya

Disposition : Petition dismissed

Judgement :

Abhay M. Naik, J.

1. Statement of claim before the arbitration tribunal was filed on 15.11.2005 for the following claim reliefs:

(a) Rs. 1,25,66,256 being the outstanding amount of the supply of switched type capacitor bank.

(b) Rs. 10,80,059 being the outstanding amount of invoices raised for the work of installation, commissioning and monitoring of the capacitor banks at various divisions of the respondent.

(c) Interest @ 18% per annum as permissible under Section 31(7) of the Act.

(d) Rs. 10 lacs being the amount spent by the petitioner in forced litigation against the respondent.

2. Respondent filed a written statement containing denial of liability made in the statement of claim along with a counter-claim whereby it claimed (i) Rs. 77,01,946 towards the value of 873 defective LSTCB Panels, (ii) Rs. 1,16,82,209 towards the loss suffered by it on account of LSTCB units remaining inoperative due to non-replacement by the claimant in time, (iii) The respondent-Board laid claim for a further sum of Rs. 11,68,750 on account of non-commissioning of LSTCB Panels.

3. It is seen that the respondent did not deny the alleged agreement and orders mentioned in the statement of claim, nor did it deny specifically the receipt of notice dated 25.07.2005 invoking arbitration clause.

4. Before the arbitration tribunal, an application was submitted by the petitioner under Section 17 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act' for brevity) containing a prayer that the tribunal may command the respondent-Board to pay at least Rs. 1 crore within 10 days or within such time as the tribunal may deem fit pending adjudication and termination of the arbitration proceedings. The tribunal vide its impugned order dated 06.05.2006 directed the respondent-Board to pay a sum of Rs. 32,80,059.00 to the claimant within a period of six weeks from the date of order on furnishing solvent security and on furnishing an undertaking that this amount shall be refunded if the tribunal so directs at the time of passing of the final award. This order is on record as Annexure R/I which was challenged by the respondent in MA No. 2389/2006. The respondent withdrew the appeal with liberty to file an application under Section 37 of the Arbitration and Conciliation Act, 1996.

5. Thereafter, the petitioner submitted MA No. 11/2006 before the District Judge, Jabalpur against the order Annexure R/I. An objection was raised by the petitioner about the maintainability of the appeal before the District Judge. Learned District Judge, vide impugned order dated 08.09.2006 contained in Annexure R/3 declined to accept the objection and admitted the appeal for final hearing. Aggrieved by the

same, claimant/petitioner has submitted the present writ petition on the ground that order dated 06.05.2006 contained in Annexure R/I is an interim award which could only be challenged in appeal before this court.

6. Shri Sanghi, learned senior counsel contended that the order contained in Annexure R/I was passed in exercise of the power under Section 17 read with Section 31(6) of the Act and the learned District Judge has no jurisdiction to entertain an appeal against it. According to him, the order marked as Annexure R/I is in the nature of interim award and the same could not have been challenged in appeal before the Court of District Judge, Jabalpur. Relying upon the Division Bench decision rendered in the case of Madan Lal v. Jainarayan reported as 1971 MPLJ 916 and the Full Bench decision in the case of Ramarao v. Shantibai reported as 1977 MPLJ 364, it is contended that although the order Annexure R/I is stated to have been passed in exercise of the power under Section 17 of the Act yet the same is liable to be treated as having been passed under Section 31(6) of the Act.

7. Shri H.K. Upadhyaya, learned Counsel for the respondent submitted that the order contained in Annexure R/I has rightly been treated by the District Judge as an order passed in exercise of power under Section 17 of the Act and no interference is warranted in the impugned order.

8. The moot question for consideration in the writ petition is that whether the order contained in Annexure R/I is to be construed as an order passed under Section 17 or under Section 31(6) of the Act or is to be treated as a composite order under the said provisions.

9. The 'award', obviously 'arbitral award' has not been defined in the Act with any preciseness or exactness. The definition of arbitral award as contained in Section 2(1)(c) of the Act is of inclusive nature. It has been defined in the Black's Law Dictionary as follows:

Award, the decision or determination rendered by arbitrators or commissioners, or other private or extra judicial deciders, upon a controversy submitted to them;

10. Although an interim award is included in the definition of 'arbitral award' contained in Section 2(1)(c) of the Act, in order to treat the order dated 06.05.2006 (Annexure R/1) as an interim award it should fulfil the requisites of an award. The Division Bench decision in the case of Uttam Singh Duggal & Co. Pvt. Ltd., New Delhi v. Hindustan Steel Ltd., Bhilai Steel Project, Bhilai reported as : AIR 1982 MP206 has held 'before an order of the arbitrators may be held to be an interim award, it must decide a part of the claim or an issue of liability. What the arbitrators did in this case was to decide a preliminary issue relating to their jurisdiction. As the order of the arbitrators does not decide the claim or even any part of the claim or any issue of liability, it cannot be held to be an interim award'.

11. Now, it is to be seen that whether the arbitration tribunal vide its order contained in Annexure R/I has made any adjudication of the liability of the parties. In paragraph 15, the tribunal has clearly mentioned-'We make it clear that we are not entering into the merits of the controversy in the sense of recording any final finding'.

It is further observed in paragraph 17-'It is, however, clarified that this is an interim relief and does in no way conclude the claim of the claimant or the respondent either way'.

In the concluding paragraph of the order it has been clearly mentioned- 'Since the claim is not related to the contract of supply of material as such, therefore, it would be just to grant the entire amount of Rs. 10,80,059.00 in favour of the claimant in addition to Rs. 22,00,000.00 under Section 17 of the Act. We, therefore, direct that the aforesaid amount, i.e. Rs. 32,80,059.00 be paid by the respondent to the claimant within six weeks from today on furnishing solvent security and on furnishing an undertaking that this amount shall be refunded if this tribunal so directs at the time of passing of final award'.

12. From the aforesaid, it is clear that the arbitral tribunal has not given any decision on the entitlement or liabilities of the parties. Instead, it exercised power under Section 17 of the Act for grant of interim relief. Had there been an adjudication of the liability, the arbitral tribunal would not have demanded the solvent security from petitioner and would not have asked the petitioner to furnish

an undertaking that it would refund the money in case, if, the tribunal so directs at the time of passing of final award. Thus, the arbitral tribunal was not precluded from deciding the liability even contrary to the interim relief granted vide Annexure R/1 at the time of dealing with the arbitral proceedings on merits. In the cases of Madan Lal and Ramarao this court was dealing with Rules 2 and 3 of Order 17 of the Civil Procedure Code. It was held that Order 17 Rule 2 of Civil Procedure Code applies to every case of non-appearance of the parties. It has been further held that where the court proceeds under Order 17 Rule 3 of Civil Procedure Code in the absence of party, the order must be construed as one under Order 17 Rule 2 of the Civil Procedure Code for the reason that the court had no power to proceed under Order 17 Rule 3 of Civil Procedure Code. It is not the situation in the present case because the arbitral tribunal had the necessary power to grant interim relief under Section 17 of the Act and in the absence of any adjudication or liability, the order contained in Annexure R/1 cannot legally be treated as an interim award in view of the Division Bench decision of this court in the case of Uttam Singh Duggal. The case of Uttam Singh Duggal has been referred to by the Allahabad High Court in the case of Deepak Mitra v. District Judge, Allahabad reported as AIR 2000 Allahabad 9 :1999 (Suppl.) Arb. LR 329 (All.), wherein it has been held (para 6 of Arb. LR):

In view of the definition given under Section 2(1)(c) of the Act, an interim arbitral award is also an award and has, therefore, to be made in the same way as an award after hearing the parties, and on consideration of the evidence adduced. In Anand Prakash v. Assistant Registrar, Co-operative Societies : AIR1968 All22 it was made clear that by an interim award, the arbitrator has to decide some of the issues or some of the claims. He may determine the issue of liability by leaving the question of the amount or damages to be dealt with later. In order to be an interim award, arbitral tribunal must determine some part of the disputes referred to it.

13. Since the order Annexure R/I has been held to be an order in the nature of interim measure under Section 17 of the Act and not an interim award within the meaning of Section 31(6) of the Act, obviously an appeal would lie under Clause (2)(b) of Section 37 of the Act which is reproduced below:

37(2) An appeal shall also lie to a court from an order of the arbitral tribunal

(a) accepting the plea referred in Sub-section (2) or Sub-section (3) of Section 16;
or

(b) granting or refusing to grant an interim measure under Section 17.

The court has been defined under Section 2(1)(e) of the Act as follows: 2(1)(e) 'Court' means the principal civil court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not include any civil court of a grade inferior to such principal civil court, or any court of small causes;

14. This point is no more unsettled in view of the law laid down recently on 10.11.2006 by the Hon'ble Supreme Court in the case of Pandey & Co. Builders Pvt. Ltd. v. State of Bihar and Anr., Civil Appeal No. 4780/2006 reported as 2006 (4) Arb. LR 192 (SC), wherein it has been held as under (paras 17 to 21 and 23 to 26 of Arb. LR):

It is not disputed before us that the Patna High Court does not exercise any original civil jurisdiction. The definition of 'court' as noticed hereinbefore means the principal civil court of original jurisdiction in a district and includes the High Court which exercises the original civil jurisdiction. If a High Court does not exercise the original civil jurisdiction, it would not be a 'court' within the meaning of the said provision. Constitution of the courts vis-a-vis the hierarchy thereof is governed by the 1887 Act, Section 3 whereof reads as under:

3. Classes of courts-There shall be the following classes of civil courts under this Act, namely

(a) The Court of the District Judge;

(b) The Court of the Additional Judge;

(c) The Court of the Subordinate Judge; and

(d) The Court of the Munsif.

Chapter III of the 1887 Act relates to ordinary jurisdiction of the civil courts. Section 18 provides for extent of original jurisdiction of District and Subordinate Judge in the following terms:

18. Extent of original jurisdiction of District or Subordinate Judge- Save as otherwise provided by any enactment for the time being in force, the jurisdiction of a District Judge or Subordinate Judge extends, subject to the provisions of Section 15 of the Code of Civil Procedure, 1908 to all original suits for the time being cognizable by civil courts. The rules framed by the Patna High Court in exercise of its jurisdiction under Article 225 of the Constitution of India also do not authorize it to entertain a suit as a court of original jurisdiction.

Section 37 of the 1996 Act reads as under:

37. Appealable orders

(1) An appeal shall lie from the following orders (and from no others) to the court authorised by law to hear appeals from original decrees of the court passing the order, namely

(a) granting or refusing to grant any measure under Section 9;

(b) setting aside or refusing to set aside an arbitral award under Section 34.

(2) An appeal shall also lie to a court from an order of the arbitral tribunal

(a) accepting the plea referred to in Sub-section (2) or Sub-section (3) of Section 16; or

(b) granting or refusing to grant an interim measure under Section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

An appeal in terms of Sub-section (2) of Section 37 is a statutory appeal. It may be true that Sub-section (3) of Section 37 of the 1996 Act debars a second appeal from an appellate order under Sub-sections (1) and (2) thereof but having regard to Section 5 of the 1996 Act, the provisions for second appeal may be held to be superfluous.

xxx xxx xxxIn this case, it is not necessary for us to go into the question as to whether Sub-section (3) of Section 37(1) of the 1996 Act would debar an appeal from appellate order passed under Sub-section (2) of Section 37 thereof. The consequences of the statutory embargo would ensue but then the question will have to be considered as and when occasion arises therefor. Sub-section (2) of Section 37 of the 1996 Act prescribes for an appeal to a court. We do not see any reason as to why having regard to its plain language, the definition of 'court' shall not be put into service. It may be true that the interpretation clause provides for 'unless the context otherwise requires'. If application of the interpretation clause contained in Section 2 of the 1996 Act shall lead to anomalous and absurd results, one may not stick to the definition but we do not think that such a case has been made out.

Section 42 of the 1996 Act, to which our attention has been drawn by the learned Counsel appearing for appellant, in the instant case has no application. The said provision reads, thus:

42. Jurisdiction-Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a court, that court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that court and in no other court. An order passed by a Chief Justice or his nominee under Sub-section (6) of Section 11 of the 1996 Act may be a judicial order, as has been held by a Seven Judge Bench of this court in *S.B.P. & Co. v. Patel Engineering Ltd. and Anr.* (2005) 8 SCC 618 : 2005(3) Arb. LR 285 (SC) but the same does not take away the effect of the appellate jurisdiction to be exercised by a court under Sub-section (2) of Section 37 of the 1996 Act.

Section 42 of the 1996 Act refers to applications and not to appeals.

15. Likewise, original civil jurisdiction is not exercised in the State of Madhya Pradesh by the High Court. This being so, the decision of the Apex Court in the case of Pandey & Co. squarely covers the issue involved herein.

16. In view of the aforesaid contention of Shri Sanghi, learned senior counsel that an appeal ought to have been preferred by the respondent before this court and the Court of District Judge has no jurisdiction, is without any substance.

17. In the result, the writ petition being devoid of merits is hereby dismissed, however, without any order as to costs.

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