

Triad India Vs. Tribal Cooperative Marketing and Development Federation of India Limited and anr.

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Court : Delhi

Decided On : Feb-15-2007

Reported in : 2007(1)ARBLR327(Delhi); 138(2007)DLT104; 2007(94)DRJ435; (2007)146PLR34

Judge : Sanjay Kishan Kaul, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 4, 13, 16, 16(2), 16(3), 16(5), 16(6), 34, 34(4), 37 and 37(2); [Arbitration Act, 1940](#)

Appeal No. : OMP No. 27 of 2007

Appellant : Triad India

Respondent : Tribal Cooperative Marketing and Development Federation of India Limited and anr.

Advocate for Def. : Jose P. Verghese, Adv.

Advocate for Pet/Ap. : Rajiv Talwar, Adv

Disposition : Petition dismissed

Judgement :

Sanjay Kishan Kaul, J.

1. The present petition has been filed under Section 34 of the [Arbitration and Conciliation Act, 1996](#) ('the said Act' for short) seeking to challenge an Order passed by Mr. Wilfred Lakra, Sole Arbitrator on 09.01.2007. The dispute between the parties has a past history. An agreement was stated to be entered into between the parties on 15.03.1995 which contained an arbitration clause. This agreement was subsequently stated to be replaced by an agreement dated 16.12.1995 which also contained an arbitration clause but provided that only the Managing Director of the respondent could act as a sole arbitrator.

2. An arbitrator was earlier appointed being Mr. N.L.Kakkar to adjudicate upon the disputes between the parties who made and published an award dated 18.01.1999. This award was challenged by the petitioner by filing a petition under Section 34 of the said Act in OMP No. 367/99 which was decided on 26.09.2001. It was held that the petitioner did not have notice of the arbitration proceedings or the award and thus the award was liable to be set aside. It was also held that since the subsequent agreement provided only for the Managing Director to be the arbitrator and not a nominee of the Managing Director, as was permissible under the earlier agreement, the appointment of Mr.N.L.Kakkar was bad in law.

3. The respondent aggrieved by the same filed an appeal being F.A.O (OS) 123/2001 before a Division Bench of this Court which was dismissed by the Order dated 23.09.2002. A Special Leave Petition thereafter filed being SLP (Civil) No. 1811/2003 was also dismissed on 10.02.2003. It is thereafter that a fresh letter of invocation was sent and the Managing Director proceeded to act as the sole arbitrator.

4. On the second round of arbitration commencing, the petitioner took an objection that there was no remission or remand by the Court, the arbitrator was functus officio and the proceedings are barred by law of limitation. The arbitrator came to the conclusion that since the merits of the claim of the parties were never examined and the award was set aside inter alias on the ground that the earlier arbitrator was not duly appointed in terms of the arbitration clause, nothing prevented an arbitration in accordance with the arbitration clause from

commencing afresh. It is this order which is now sought to be challenged by the petitioner.

5. Learned Counsel for the respondent has raised a preliminary objection to the maintainability of the present petition under Section 34 of the said Act. This plea is based on the provision of Section 16 of the said Act which reads as under:

16. Competence of arbitral tribunal to rule on its jurisdiction

1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose

a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

4) The arbitral tribunal may, in either of the cases referred to in Sub-section (2) or Sub-section (3), admit a later plea if it considers the delay justified.

5) The arbitral tribunal shall decide on a plea referred to in Sub-section(2) or Sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34.

6. Learned Counsel for the respondent submits that in terms of Section 16(5) of the said Act, if the Arbitral Tribunal rejects the plea in respect of arbitral tribunal, the arbitral tribunal proceedings must continue and result finally in an arbitral award on merit. The remedy of a party in such a case in terms of Section 16(6) of the said Act is by challenging the final award under Section 34 of the said Act by which such an aspect of competency of the arbitrator can also be challenged. However, if arbitral tribunal was to rule that it did not have any jurisdiction and that it was not properly constituted then an appeal would lie under Clause (a) of Section 37(2) of the said Act, which provision reads as under:

Appealable orders .

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

7. Learned Counsel for the respondent also seeks to draw strength from the provisions of Section 13 of the said Act which deals with the aspect of challenge to procedure and contends that even under the said provision where an arbitral award is made under Sub-section 4, the party challenging the award has to make an application under Section 34 of the said Act in terms of Sub-section (5).

8. The substratum of the submissions of the learned Counsel for the respondent is that the Legislature in its wisdom has provided a remedy of an appeal only in case the arbitrator finds that it is not competent to proceed with the arbitration, but where the arbitrator comes to the conclusion that he is competent to do so, the remedy would be only at the stage of final challenge to the award under Section 34 of the said Act.

9. Learned Counsel for the petitioner on the other hand contends that since no appeal is provided under Section 37 of the said Act where an arbitral tribunal rules to its competency existing, the only remedy is of the petitioner is under Section 34 of the said Act which must arise at that stage. In that behalf, learned Counsel referred to Section 16(6) to contend that the same provides that an aggrieved

party may make an application for setting aside of the arbitral award in accordance with Section 34 of the said Act which implies that the decision under Section 16 of the said Act rejecting the plea of competency is actually an award which is liable to be challenged.

10. The second aspect raised by the learned Counsel for the petitioner arises from the provisions of Section 34(4) of the said Act to contend that the respondent having not sought a remission of the matter earlier when the award was challenged, cannot now be permitted to commence fresh arbitration proceedings. However, this would require the merits of the impugned order to be gone into and since the matter is being considered on a preliminary objection, I do not deem it appropriate to consider this aspect.

11. On consideration of the submissions of the learned Counsel for the parties, I find force in the preliminary objection of the learned Counsel for the respondent. This is so on a plain reading of the provision of the said Act.

12. It cannot be lost sight of that the said Act came into force to get over some of the difficulties which arose under the Indian [Arbitration Act, 1940](#). The object was to make the arbitration proceedings more efficacious with less intervention by the Court. The scheme of the Act also envisages a continuation of the arbitration without periodic interdicts by any Court. Section 16 of the said Act carves out an exception to the general rule inasmuch as the provision specifically provides in respect of the plea of objection to the competency of an arbitral tribunal. The reason is that if an arbitrator is himself of the view that he is not competent, no purpose would be served by continuation of the arbitration proceedings. If the arbitrator finds lack of competency, the arbitral proceedings would come to an end. It is in view thereof that an appeal has been provided under Section 37 of the said Act.

13. The position would be however different where the arbitral tribunal finds that it is competent to proceed with the arbitration. No appeal has been provided in such a case. The consequences of such a decision are provided in Section 16(5) of the said Act is that the arbitral proceedings would continue resulting in an arbitral award. The remedy is provided in Section 16(6) of the said Act which is to

challenge the ultimate award under Section 34 of the said Act. There is no segregated challenge permissible only on the question of the competency of the arbitral tribunal.

14. In this behalf, reference may be made to the judgment of the Apex Court in *Pandey & Company, Builders Pvt. Ltd. v. State of Bihar and Anr.* : AIR 2007 SC465 , wherein the Court observed that in the event the Arbitrator opines that he has jurisdiction in the matter, he may proceed therewith which Order can be challenged along with the Award in terms of Section 34 of the said Act.

15. In *Keti Construction (I) Ltd v. Gas Authority of India Ltd and Ors.* , a Division Bench of this Court found from the facts of the case that the appellant had been questioning the jurisdiction of the arbitrator at all stages and in spite of the protests regarding jurisdiction, the arbitrator had proceeded with the matter and had given a 'no claim' award. It was observed that the only remedy left with the appellant was to wait till the award was given as per Sub-section 6 of Section 16 of the said Act and thereafter challenge the award pursuant to Sub-section 6 of Section 16. Learned Single Judge of the Gujarat High Court in *Executive Engineer, Sardar Sarover Narmada Nigam v. Bhaven Construction, Vadodara and Anr.* : AIR2006 Guj74 & learned Single Judge of this Court in *Nav Sansad Vihar Cooperative Group Housing Society Ltd (Redg.) v. Ram Sharma & Ass.* 2000(4) AD (Delhi) 614 observed that where the Arbitrator finds that he has jurisdiction in the matter, the arbitrator would continue with the proceedings and make an arbitral award. The only remedy available in such a case is to wait till the award is made and to challenge the same under Section 34 of the said Act and no separate remedy has been given under the said Act against such order.

16. In *Union of India and Anr. v. East Coast Boat Builders and Engineers Ltd.* (1998) 2 Delhi 797, wherein an order ruling that the disputes raised are arbitrable was challenged, learned Single Judge of this Court observed as under:

19. If an Order on the point of jurisdiction of the arbitral tribunal was to be an interim award under the Act, Section 37 of the Act would not have provided for appeal against an order whereby the arbitral tribunal holds that it has no jurisdiction. While enacting Section 16 of the Act, the legislature was conscious

that the arbitral tribunal could hold in its favor or against itself on the point of jurisdiction. If the legislature had to treat an order under Section 16 to be an interim award, it would not have provided for an appeal under Section 37 where the arbitral tribunal allows the plea that the arbitral tribunal does not have jurisdiction and the legislature would have left challenge to such order as well under Section 34 of the Act. It cannot be accepted that the order under Section 16 would change its nature upon two different contingencies, that is to say, where the order rejects the plea of no jurisdiction it becomes an interim award and where the arbitral tribunal allows the plea of no jurisdiction it is not an interim award and only appealable. thereforee, it can easily be interpreted that in either case it is only an interim order and not an interim award. Analogy of British Law on the subject cannot be pressed into service because under the British Arbitration Act such order has been specifically terms as award whereas in the Indian Arbitration act such order has not been so specifically termed.

20. From the scheme of the Act, it is apparent that the legislature did not provide appeal against the order under Section 16(5) where the arbitral tribunal takes a decision rejecting the plea that the arbitral tribunal has no jurisdiction. The intention appears to be that in such case, the arbitral tribunal shall continue with the arbitral proceedings and make an award without delay and without being interfered in the arbitral process at that stage by any Court in their supervisory role.

17. In view of the aforesaid, I am unable to accept the plea of the learned Counsel for the petitioner that the reference to 'arbitral award' in Sub-section 6 implies that a decision under Section 16 of the said Act is an award. The expression is used in the context of Section 16(5) of the said Act which provides that where such a plea is rejected, the proceedings must continue and an arbitral award made. It is that ultimate arbitral award which would be subject matter of challenge under Section 34 of the said Act. The object of the said provision is that an aggrieved party is not without remedy but the stage of remedy is when the final award is made.

18. Learned Counsel for the petitioner did try to support his case by the observations made in para 54 of the judgment in *Mcdermott International Inc. v.*

Burn Standard Co. Ltd. which reads as under:

After the 1996 Act came into force, under Section 16 of the Act the party questioning the jurisdiction of the Arbitrator has an obligation to raise the said question before the Arbitrator. Such a question of jurisdiction could be raised if it is beyond the scope of his authority. It was required to be raised during the arbitration proceedings or soon after initiation thereof. The jurisdictional question is required to be determined as a preliminary ground. A decision taken thereupon by the arbitrator would be subject matter of challenge under Section 34 of the Act. In the event, the arbitrator opined that he had no jurisdiction in relation thereto an appeal thereagainst was provided for under Section 37 of the Act.

19. The sentence which is sought to be emphasized by the petitioner and underlined aforesaid, in my considered view, only lays down a proposition that the rejection of a plea of competency is subject matter of challenge under Section 34 of the said Act. It does not say that such an Order become an Order to be challenged at that stage. In fact it shows that the stage of challenge is when the award is made. No other judgment has been cited by the counsels on this question of law.

20. In view of the aforesaid legal position, I am of the considered view that the petition is not maintainable. It is open to the petitioner to take objections raised in the present petition at the stage when he seeks to challenge the final award made, if so advised.

21. Dismissed.