

Simplex Engineering and Foundry and ors. Vs. Ministry of Railways and ors.

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Court : Delhi

Decided On : Sep-09-2011

Judge : Vikramajit Sen; Siddharth Mridul, Jj.

Acts : [Arbitration And Conciliation Act, 1996](#) - Sections 34, 11, 36; Code of Civil Procedure (CPC) - Section 115

Appeal No. : FAO(OS) No.252/2010; FAO(OS) No.437/2010 & CM No.11636/2010; FAO(OS) No.655/10 & CM Nos.20061-62/10, 20064/10; FAO(OS) No.178/2011; FAO(OS) No.383/2011

Appellant : Simplex Engineering and Foundry and ors.

Respondent : Ministry of Railways and ors.

Advocate for Def. : Dr. Ashwani Bhardwaj; Dr. S.P. Sharma, Advs.

Advocate for Pet/Ap. : Mr. Pramod B. Agarwala; Mr. P.J. Mehta, Advs.

Judgement :

1. In these Appeals, a neat question of law has been raised which is of grave general importance. Some learned Single Judges have adopted the practice, while dealing with Objections under Section 34 of the Arbitration & Conciliation Act, 1996 (A&C Act for short), to consider all the grounds at the threshold, but restrict issuance of notice in respect of only some of them. While doing so, our learned Brothers have diligently disposed of some of the Objections by articulating reasons

which have prompted the Court to reject them at the very threshold. The reason for adopting this practice is manifestly clear. One of the avowed objectives of the A&C Act is to expedite the culmination of arbitral proceedings. Unfortunately, the provisions of the A&C Act postulate, under Section 36, that where the time for making an application to set aside the arbitral award under Section 34 has expired, or such application having been made, has been refused, the award shall be enforced under the Code of Civil Procedure (CPC for short) in the same manner as if it were a decree of the Court.

2. Well intended and conscientious, as it may be, the practice of restricting notice to only some of the grounds ventilated in the Objections, in actuality, proves to be futile unless the application under Section 34 of the A&C Act is refused. Obviously, in totality, the Award cannot be enforced by initiation of execution proceedings. Despite the best intentions of the Judges, the award does not ripen to fruition unless such time as the application under Section 34 of the A&C Act is refused.

3. Yet another practical problem has made itself obvious. Section 37 of the A&C Act provides that an appeal (obviously only one) shall lie from an order setting aside or refusing to set aside an arbitral award under Section 34 of the A&C Act. If the party filing Objections is aggrieved by the refusal of the Court to issue notice on some of the grounds on which the award has been assailed by him, would he have to file an appeal within the period specified in Section 34 of the A&C Act, that is, three months and thirty days from the passing of such order. If that party would do so, would it be precluded from filing a second appeal in the event that the grounds were also rejected for the reason that Section 37 of the A&C Act envisages only "an appeal". Assuming that only one appeal is postulated by the said Section, would not the failure to file an appeal within the prescribed time in respect of the grounds rejected at the threshold be barred by limitation. It is palpably clear that myriad complexities are created in the practice of issuance of restricted notice in respect of an application under Section 34 of the A&C Act.

4. Our attention has been drawn to Section 2(e) of the A&C Act which defines "Court" to mean the principal Civil Court of original jurisdiction in a district, including the High Court in exercise of its 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. Mr. B.K. Singh, learned counsel for the Appellant in FAO(OS) No.178/2011, has drawn the inference from the said definition as indicating that the CPC would apply unless contrary provisions are contained in the statute itself. Learned counsel for the Respondent has endeavoured to dilute this argument by drawing attention to Section 5 of the A&C Act which states that notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part. We are unable to find any logic in the Respondent's argument since Section 5 of the A&C Act contains a prohibition on the intervention of a judicial authority and does not speak directly or obliquely of the applicability of the CPC. In *ITI Ltd. -vs- Siemens Public Communications Network Ltd.*, 2002 (5) SCC 510, Their Lordships have enunciated that there is no specific exclusion of the CPC in the A&C Act; that the jurisdiction of a Civil Court can be circumscribed in the statute. *Bhatia International Ltd. -vs- Bulk Trading S.A.*, (2002) 4 SCC 105 was pressed into service. A similar exposition of the law had earlier been expressed by the Coordinate Bench in *Nirma Ltd. -vs- Lurgi Lentjes Energietechnik GMBH*, (2002) 5 SCC 520 wherein it was observed that only "because a second appeal against an appellate order is barred by Section 37(3), the remedy of revision does not cease to be available to the petitioner, for the City Civil Court deciding an appeal under Section 37(2) remains a Court subordinate to the High Court within the meaning of Section 115 CPC". This is especially so since several provisions of the A&C Act, in terms, refer to the CPC. Section 19 of the A&C Act, for instance, ordains that the Arbitral Tribunal shall not be bound by the CPC or the Indian Evidence Act, 1872 which does not mean that either or both of these statutes must be ignored. We have already mentioned that Section 36 of the A&C Act, in terms, refers to the CPC. A learned Single Judge, in *Jindal Steel & Power Ltd. -vs- N.S. Atwal*, 2010 (117) DRJ 358, has rejected the argument that a Review is impermissible in the context of Section 11 of the A&C Act on the dialectic that the Court exercises ordinary original civil jurisdiction even under Section 11 of the A&C Act. The Division Bench has opined in *Goel Associates -vs- Jivan Bima Rashtriya Avas Samati Ltd.*, 114(2004) DLT 478(DB) that whilst "the provisions like Order 38 Rule 5, Code of Civil Procedure are not

contained in the Arbitration & Conciliation Act but its principles are to be applicable as such. However, one cannot lose sight of that the provisions of Code of Civil Procedure would be the guiding principles as has been held by the Supreme Court in ITI Ltd. -vs- Siemens Public Communications Network Ltd., 2002 (5) SCC 510."

5. We will proceed on the foundation that the provisions of the CPC are available unless the A&C Act provides to the contrary. On this assumption, the observations of the Full Bench in Krishnaji Shrinivas Jalvadi -vs- Madhusa Appansa Ladaba, AIR 1934 Bombay 207 are apposite inasmuch as it prescribes that where "an appeal is severable it is open to the Judge, hearing the appeal under R. 11, to dismiss it in part and admit it in part; just as at the final hearing the court may dismiss the appeal in part and allow in part. But it is not open to a Judge hearing an appeal under R.11, O.41 to admit it and at the same time to restrict the grounds on which the appeal is to be heard." An example of severability that immediately comes to mind is that of a decree for mesne profits as well as for possession. Where both the reliefs are granted, it may be possible that the Appellate Court finds no error in the grant of the relief of possession and accordingly chooses to sever it from the relief of mesne profits. The CPC does not expressly bar the executability of the decree for possession as Section 36 of the A&C Act does. In such cases, therefore, the dicta in Krishnaji would become relevant. The opinion of the Full Bench in Vattipalle Eswariah -vs- Vattipalle Rameshwarayya, AIR 1940 Madras 483 has been the foundation of several subsequent decisions. The Full Bench encapsulates the issue before it in these words :- "This second appeal has been placed before this Full Bench as it raises the important question whether the Court in dealing with an appeal under O.41, R.11, Civil P.C., can direct that it be admitted in part only." Disagreeing with Krishnaji, the answer to the question was that - "There is nothing in O.41 which permits of severance. It may be desirable to provide for such a course but as the question has to be decided on the present wording of O.41 in my judgment there are only two courses open to the Court, namely to dismiss or admit the appeal as a whole". So far as this Court is concerned, the opinion in Eswariah was applied by the learned Single Judge in Motia Kaur -vs- Shanti Devi, 1974 RLR 231 (Delhi). We affirm the reasoning of the learned Single Judge which is to the effect that if only a restricted notice is issued in an appeal, when it comes up for final determination all the points raised therein

can be agitated, a decision thereon must be pronounced by the court. This conundrum is no longer *res integra* in view of *Ramji Bhagala -vs- Krishnarao Karirao Bagre*, AIR 1982 SC 1223 where concurrent opinions of the learned Single Judges and of the Division Benches were not affirmed and Their Lordships remanded the matter to the High Court with a view to considering "whether the appeal should be admitted wholly or rejected wholly". Mr. B.K. Singh, learned counsel for the Appellant, is also right in relying on *Bolin Chetia - vs- Jogadish Bhuyan*, (2005) 6 SCC 81 in that the Supreme Court has opined that where "the appeal is admitted, the appellate court may not, except in very exceptional cases, restrict any grounds on which the appeal should be heard."

6. Learned counsel for the Respondents have relied on the Division Bench decision in *National Buildings Construction Corpn. Ltd. -vs- Lloyd Insulations India Ltd.*, AIR 2004 Delhi 235 wherein it had been held that if only a part of the award was not under challenge, which had not been assailed, become final and, therefore, enforceable under Section 36 of the A&C Act regardless of the pendency of the application under Section 34 of the A&C Act challenging and seeking the setting aside of the other part of the award which was under challenge. Even if this decision was still holding the field, it would be distinguishable so far as the purposes before us are concerned. This is for the reason that the uncontested segments of the Award would be impervious to any further appeal. A complex question which has arisen before us would then be absent. However, the Division Bench did not have the benefit of perusing *National Aluminium Co. Ltd. -vs- Pressteel & Fabrications (P) Ltd.*, (2004) 1 SCC 540. Their Lordships have firstly explained that because of the mandatory language employed in Section 34 of the A&C Act, no sooner a challenge is filed under Section 34 of the A&C Act, the award becomes unexecutable as the statute leaves no discretion with the Court to pass any interlocutory order; the statute expects the Court to adjudicate on the correctness of the award. Secondly, it was pithily noted that the automatic suspension of the execution of the award upon the filing of Objections under Section 34 of the A&C Act defeats the very objective of arbitration. Although eight years have passed since Their Lordships had expressed the hope that this provision of the Act would be amended, the requisite steps have not been taken. This decision has been followed in *National Buildings*

Construction Corporation Ltd. -vs- Lloyds Insulation India Ltd., (2005) 2 SCC 367 by the Three-Judge Bench which allowed the Appeal against the decision of the Division Bench rendered between the same parties. Their Lordships held that the Court is powerless to direct execution of an award when an application under Section 34 of the A&C Act challenging the award is still pending; the Court cannot go behind the awarded amount as the Award as a whole, remains unenforceable. For pragmatic reasons, therefore, no useful purpose is served in directing notice, pursuant to an application under Section 34 of the A&C Act, limited to only some grounds articulated therein.

7. It seems to us that this opinion would fortify us in taking the view that the principles contained in the CPC with regard to appeals should be applied, and if so applied, would dictate that unless all the grounds raised in the application under Section 34 of the A&C Act are dismissed at the threshold, a composite notice comprehending all the grounds must be issued.

8. We need to consider one more aspect which has been raised before us concerning the maintainability of the Appeals. Learned counsel for the Respondents contend that a perusal of Section 37(1)(b) of the A&C Act will make it manifestly clear that the present Appeals are not maintainable for the reason that so far as application under Section 34 of the A&C Act is concerned, the Court has neither set aside the Arbitral Award nor has refused or declined to set it aside. This objection, in fact, fortifies our view that a limited notice is impermissible in law. Learned counsel for the Appellants have endeavoured to rely on Section 96 read with Order XLI of the CPC. Cogitation on this question helps to clarify the view expressed by us above, which is that the provisions and principles of the CPC can always be pressed into action so long as their operation does not stand excluded by the statute. Section 37(1)(b) specifies circumstances in which an appeal is maintainable. Hence, it excludes the operation of Section 96 or Order XLI of the CPC. The Constitution Bench of this Court in *Union of India -vs- A.S. Dhupia*, AIR 1972 Delhi 108 applied the landmark decision of the Supreme Court in *Union of India -vs- The Mohindra Supply Co.*, AIR 1962 SC 256 which, with regard to Arbitration Act, 1940, lays down that Section 39(1) of the A&C Act specifies situations which can lead to an appeal. Their Lordships have held that - "The

legislature has plainly expressed itself that the right of appeal against the order passed under the Arbitration Act may be exercised only in respect of certain orders. The right of appeal against other orders is expressly taken away. If by express provision contained in S.39(1) a right to appeal from a judgment which may otherwise be available under the Letters Patent is restricted, there is no ground for holding that clause (2) does not similarly restrict the exercise or appellate power granted by the Letters Patent." This reasoning was once again upheld by the Supreme Court in *Fuerst Day Lawson -vs- Jindal Exports Ltd.*, 2011(7) SCALE 513 which, in fact, dismisses the appeal against the decision of a Division Bench of this Court in *Shivnath Rai Harnarain India Company -vs- Glencore Grain Rotterdam*, 2009 X AD (Delhi) 357, of which one of us (Sen, J.) was the author. We reiterate that an appeal is not possible unless the Court seised with the application/Objections under Section 34 of the A&C Act has either set aside the Award or has refused to set aside the Award. However, the question which has been raised before us is of such grave general importance that we do not think it advisable but rest on legal punctilio to dismiss these Appeals. The issue of non- maintainability of the Appeals has been raised at the fag end of the hearings by the Respondents.

9. In the circumstances of the case, we dispose of the Appeals as well as pending applications by clarifying that it is impermissible for the Court to issue notice on an application under Section 34 of the A&C Act restricted to only some or one of the grounds for the assailment of the Award articulated therein. The quandary or impasse is solved by adopting the approach by further directing that in all circumstances where only a limited or restricted notice has been issued, at the time when Objections under Section 34 of the A&C Act are taken up for Final Disposal, all grounds raised therein would not be traversed and decided.

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