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BHARAT SANCHAR NIGAM LTD.

Through: Mr. Chandan Kumar, Advocate

KAVVERI TELECOM PRODUCTS LTD. & ANR. ... Respondents

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may be allowed to see the judgment? YES
2. To be referred to the reporter or not? YES
3. Whether the judgment should be reported in the Digest? YES

RAJIV SAHAI ENDLAW, J.

1. A petition under Section 9 (ii) (e) of the Arbitration Act, 1996 is preferred challenging inter-alia the order of the arbitral tribunal holding that as per its mandate it could not entertain the counter claims preferred by the petitioner before it. It is the contention of the counsel for the petitioner that the court under Section 9 (ii) (e) is empowered to issue any interim measure of protection as may appear to be just and convenient and not necessarily in the form of protection of any property or asset or for securing the amounts due in arbitration. The contention of the petitioner if accepted would lead to this court under Section 9 (ii) (e) exercising the jurisdiction as exercised by this court under Article 227 of the Constitution of India qua proceedings before courts/tribunals inferior to this court.

2. The disputes between the parties arose out of an agreement containing an arbitration clause. As per the said clause, any question, dispute or difference arising under the agreement or in connection therewith was to be referred to sole arbitration of the Director General, Deptt. of Telecommunication or of an officer holding the equivalent designation. The Director General, under the said clause, if unwilling to act as the arbitrator, was also empowered to appoint any other person as the arbitrator.

3. Disputes and differences having arisen between the parties the respondent applied to the petitioner for appointment of the arbitrator. Upon failure of the petitioner to appoint the arbitrator the respondent preferred writ petitions No.30700-701 of 2004 before the High Court of Karnataka at Bangalore. The said writ petitions were rejected, however with a direction that the petitioner herein shall nominate the arbitrator within two weeks therefrom and the arbitrator so appointed shall dispose of the claims of the parties expeditiously. Directions were also issued with respect to the bank guarantees furnished by the respondent to the petitioner.

4. The Chairman & Managing Director of the petitioner vide order dated 27th January, 2005, referring to the order aforesaid of the High Court of Karnataka, appointed one Shri V.P. Sinha as the arbitrator to settle the disputes so arbitrable.

5. The respondent filed its claim before the arbitrator and the petitioner filed its counter claim. The respondent filed replies to the counter claim of the petitioner. Even though there was no objection

by the respondent to the maintainability of the counter claim of the petitioner before the arbitrator or of the jurisdiction of the arbitrator to entertain the same, the arbitrator vide his letter, Annexure R-1 to the petition, date whereof is disclosed by counsels for both the parties to be 29th August, 2005 inter-alia ordered that the scope of his mandate was in terms of the order dated 27th January, 2005 (Supra) i.e. to arbitrate to settle the disputes with regard to the balance bills & performance bank guarantee against the supply of HDSL equipment and the counter claim preferred by the petitioner could not be taken on record. It was further ordered that either a fresh mandate is to be given for the arbitrator to entertain the said counter claim or the petitioner can go to any other court/arbitrator for redressal of its grievance.

6. The petitioner after nearly one year of the date of the aforesaid letter, on 13th July, 2006 filed the present petition. The relief claimed herein is for setting aside of the aforesaid order of the arbitrator and for a direction to the arbitrator to consider the counter claim of the petitioner already filed.

7. The respondent has in its reply to this petition raised a plea as to the maintainability of the petition.

8. The counsel for the petitioner has urged that the language of Section 9 (ii) (e) is very wide. Reliance is placed on ***Maharashtra State Elect. Board Vs. Datar Switchgears Ltd.*** 2003 (Suppl.) Arb. LR 39 (Bomb.) & on ***BLB Institute of Financial Markets Ltd. Vs. Ramakar Jha*** 154 (2008) DLT 121 in support of the wide amplitude of Section 9 (ii) (e). However, the counsel for the petitioner, on inquiry as to whether any of the said judgments lay down that the

powers thereunder can be invoked to set aside any errors in the arbitral proceedings, even if necessary to provide protection to any of the parties, the counsel for the petitioner has fairly stated that in none of the judgments such proposition has been laid down. I may however notice that the single judge of Bombay High Court in ***Maharashtra State Electricity Board***, though holding the powers of the court under Section 9 (ii) (e) to be very wide, made the said observations only in the context of ensuring compliance of interim order of the Arbitral Tribunal. Else therein also, relying on ***Bhatia International Vs. Bulk Trading SA*** (2002) 4 SCC 105, it was held that the Act does not contemplate the interference of courts at the interim stage in matters of jurisdiction of the Arbitral Tribunal and that the court would in such cases not be entitled to exercise powers under Section 9.

9. The counsel has further argued that unless the present petition is held to be maintainable, the petitioner would be remediless. He has further explained the delay in filing the present petition by submitting that after the letter dated 29th August, 2005 (Supra) review was applied for before the arbitrator and which was ultimately dismissed on 10th May, 2006, copy of the order of which date was received by the petition on 6th June, 2006 and immediately whereafter this petition was preferred.

10. Per contra, the counsel for the respondent has while reiterating his submissions as to the non-maintainability of the present petition drawn attention to ***NTPC Ltd. Vs. Siemens Atkeingesellschaft*** 2007 (3) SCALE 657 whereunder with reference to Section 16 of the Act it has been laid down that the remedy of appeal is available to a party against the order allowing the objection

taken thereunder.

11. The counsel for the petitioner has in rejoinder submitted that no objection under Section 16 had been raised by the respondent qua the counter claim of the petitioner and hence the remedy of appeal was not available to the petitioner.

12. The present is a classic case of how the arbitral proceedings can be derailed. It is informed that the arbitration qua the claims of the respondent is also held up before the arbitrator owing to the pendency of the present petition since 2006.

13. The arbitrator appears to have treated the proceedings before him as a reference under the 1940 Act whereunder the disputes had to be referred to the arbitrator for adjudication and the arbitrator was empowered to settle/adjudicate only the referred disputes and none else. The 1996 Act, does not envisage reference of disputes to arbitrator and only provides for the appointment of the arbitrator. The arbitration clause in the present case also names the Director General of the Deptt. of Telecommunications or officer of equivalent rank/designation as the arbitrator, also empowers him, if unwilling, to appoint any other arbitrator. All that was thus required was for the claims to be raised by either party before the named arbitrator or his nominee and no reference was to be made. The order dated 27th January, 2005 of appointment of the arbitrator is also with reference to the agreement and the order in the writ petitions. The order is further for adjudication by arbitration of disputes so arbitrable.

14. Even though in the opinion of the court the arbitrator ought

not to have rejected the counter claim of the petitioner but the fact remains that the remedy, if any, of the petitioner against the said order is not by way of the present petition. In fact the arbitrator himself had shown the way to the petitioner which the petitioner failed to follow. The simplest step for the petitioner to take was to again approach the appointing authority for clarification that the counter claim also could be entertained by the arbitrator. However, the petitioner instead of doing so after following the route of review before the arbitrator ultimately invoked wrong remedy for its genuine/correct grievance.

15. The contention of the counsel for the petitioner that Section 9 (ii) (e) ought to be read/interpreted so as to vest power in this court to correct such errors committed by the arbitrator cannot be permitted. Section 9 (ii) (e) empowers the court only to pass orders of interim nature. The said power cannot be said to be encompassing within itself the right to correct the errors committed during the course of arbitral proceedings and with respect whereto the party may be needing protection.

16. The contention of the petitioner that the petitioner has no other remedy against the order aforesaid of the arbitrator is also not found correct. The said order of the arbitrator amounts to dismissal of the counter claim of the petitioner and has a finality about it and is in the nature of an award and the remedy thereagainst under Section 34 was available to the petitioner.

17. I also find that Section 16 empowers the arbitral tribunal to rule on its jurisdiction suo moto also without any plea being taken in that regard. Section 16 (1) empowers the arbitral tribunal to do so,

including ruling on any objections with respect to the existence or validity of arbitration agreement. Thus, it appears that the remedy of an appeal under Section 37 (2) (a) was also available to the petitioner.

18. I have also toyed with the idea of treating the present petition under Section 34. However, in view of the bar of limitation as laid down in *UOI Vs. M/s Popular Construction Co.* AIR 2001 SC 4010 the same is not possible. I have also suggested to the counsel for the respondent to, for the sake of expediency, consent to treating the present petition as an appeal under Section 37 (2) (a) of the Act in as much as no period of limitation appears to have been prescribed therefor. However, the counsel for the respondent states that he is unable to give any consent and the petitioner may prefer the appropriate remedy if so advised.

19. Since the powers exercised by this court are under the Arbitration Act, 1996 and Section 5 whereof limits the extent of interference by the court, it is not felt appropriate, to without any prayer in this regard, treat the present petition as an appeal under Section 37 (2) (a) of the Act.

20. The petition is accordingly dismissed as not maintainable. However, in the facts of the case the parties are left to bear their own costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

**August 10th, 2009
PP**

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