

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ OMP No.455/2009 (U/s.34 of the Arbitration Act, 1996) with IA No. 10038/2009 (u/S 33(2) r/w Section 14(1)(a) of the Arb. Act, 1996).

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Date of decision: 11th August 2009

National Highways Authority of India

....Petitioner

Through : Mr. Chetan Sharma, Sr. Advocate with
Mr. Vikas Goel, Mr. R.N. Sharma and
Mr. S.K. Tyagi, Advocates

Versus

M/s. ITD Cementation India Ltd.

... Respondent

Through: None.

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. The petition raises the question of maintainability of a petition under Section 34 of the Arbitration Act, 1996 during the pendency of applications under Section 33 of the Act before the Arbitral Tribunal and as to the interpretation of Section 33 (6) of the Act.

2. The OMP under Section 34 of the Act is accompanied with IA No.10038/2009 under Section 33 (2) r/w Section 14 (1)(a) of the Act for restraining the Arbitral Tribunal from considering the applications under Section 33 of the Act.

3. The OMP U/s.34 of the Act is preferred with respect to an arbitral award dated 22nd April, 2009 signed copy whereof is stated to have been received by the petitioner on 27th April, 2009. It is the

case of the petitioner that the petitioner on 15th May, 2009 i.e. well within the time prescribed in Section 33 (1) of the Act applied to the Arbitral Tribunal for correction of the alleged computation clerical/typographical errors in the award. The petitioner further informs that the respondent herein also on 19th May, 2009 made an application to the Arbitral Tribunal under Section 33 (4) of the Act for an additional award.

4. The senior counsel for the petitioner has contended that the time prescribed under Section 33(2) of the Act for the Arbitral Tribunal to make the correction or to give any interpretation sought under Section 33(1) is 30 days from the receipt of the request; that the time for making the additional award as stated to have been sought by the respondent is 60 days from the receipt of such request as provided in Section 33(5) of the Act. The senior counsel for the petitioner has contended that the arbitral tribunal in the present case neither within 30 days of 15th May, 2009 nor within 60 days of 19th May, 2009 corrected the typographical errors or pronounced the additional award. It is argued, that the Arbitral Tribunal having not done so, under Section 32 of the Act became functus officio. Reliance in this regard is placed on the judgment of a single judge of the Punjab & Haryana High Court in ***Executive Engineer, H.S.A.M. Board Vs. Dharam Pal*** 2000 (Suppl.) Arb. LR 375.

5. It is further contended by the senior counsel for the petitioner that after the petitioner had first filed the OMP in this court on 27th July, 2009, on 28th July, 2009 a communication was received by the petitioner from the Arbitral Tribunal, proposing to hold five meetings for consideration of the two applications aforesaid dated 15th May, 2009 and 19th May, 2009 filed under Section 33 of the Act; the

Arbitral Tribunal proposed the said meetings between 25th July, 2009 and 20th August, 2009. The petitioner notwithstanding the receipt of the said letter has re-filed the OMP and has contended that the Arbitral Tribunal having not dealt with the application under Section 33 of the Act within the prescribed time, is now not empowered to do so and as such the OMP under Section 34 of the Act is maintainable. Application as aforesaid is also filed for restraining the Arbitral Tribunal from considering the applications under Section 33.

6. I have inquired from the senior counsel for the petitioner as to whether there is any proof on record of the date when the requests dated 15th May, 2009 and 19th May, 2009 were served on the Arbitral Tribunal. Though it was earlier informed that the same is not available, at the time of dictating it was submitted that the said proof can be furnished. I have also inquired as to whether there is any proof on record of the petitioner having received the communication from the arbitral tribunal on 28th July, 2009, in the form of the envelope in which the same was received etc. Though earlier it is indicated otherwise, at the time of dictating it has been stated that the same can also be looked at. It is further pointed out that the said letter which is filed as Annexure A at Page 37 (I) is undated and is not signed by one of the three arbitrators.

7. Since the letter aforesaid fixes the meetings with effect from 25th July, 2009; it was put to the senior counsel for the petitioner that the date of issuance thereof appears to be of prior thereto. However it was informed that it was received by the petitioner on 28th July, 2009 only. The letter fixes the second hearing on 29th July, 2009, thereafter on 30th July, 2009, 11th August, 2009 and 20th August, 2009. On inquiry it is informed that the petitioner

did not appear/participate in the hearings on 29th July, 2009 and 30th July, 2009 also inspite of receipt of the communication on 28th July, 2009; it is stated that since according to the petitioner, the Arbitral Tribunal was functus officio the petitioner did not deem it proper to appear before the arbitral tribunal and also did not pay the fee demanded by the Arbitral Tribunal.

8. Attention of the senior counsel for the petitioner has been drawn to Section 33(6) which permits the Arbitral Tribunal to extend if necessary the period of time within which it shall make the correction or due interpretation or make an additional award under Section 33(2) or 33(5) of the Act. The Punjab and Haryana High Court in the case supra has also not noticed the said provision and has in fact proceeded on the erroneous premise that there is no provision in the Act whereby the time provided under Section 33(2) and 33(5) of the Act can be extended.

9. The senior counsel for the petitioner has argued that the extension of time under Section 33(6) of the Act can only be with the consent of the parties and not in the discretion of the Arbitral Tribunal itself. Strength in this regard is sought to be drawn from Section 33 (1) which provides for the period of 30 days from the receipt of the arbitral award for filing an application for correction of an error in the award, unless another period of time has been agreed upon by the parties. It is further urged that arbitration being consensual in nature, the Arbitral Tribunal ought not to be held entitled to extend the time itself without the parties agreeing so. It is also sought to be suggested that the extension of time if any under Section 33 (6) of the Act can only be before the expiry of the time provided in Section 33(2) or Section 33(5) of the Act and not

thereafter.

10. As far as the first of the aforesaid contentions is concerned, the literal construction of Section 33(6) does not permit inference of the Arbitral Tribunal being empowered to extend time only with the consent of the parties. Had it been the legislative intent, nothing prevented the legislature from providing so in Section 33 (6): The time provided in Section 33(1) is for making of applications by the parties. The same has been made subject to agreement of the parties. On the contrary the time provided in Section 33 (6) is for the Arbitral Tribunal to decide the said applications. The Arbitral Tribunal in carrying out the correction or in making the additional award is to perform an adjudicatory function and cannot be put under any constraints of time. In this regard it may be noticed that the 1996 Act does away with the time of four months for making of the award provided under 1940 Act and unless the agreement itself between the parties provides for the award to be made within a particular time, places no restrictions whatsoever on the Arbitral Tribunal qua time for making of the award. The same is the position under Section 33(6) of the Act.

11. Similarly, the other contention of the senior counsel for the petitioner of the arbitral tribunal being entitled to extend the time only before the expiry of the time fixed/provided under Section 33(2) or 33(5) of the Act does not find favour with me. The language of Section 33 (6) does not permit any such limitation to be imposed on the Arbitral Tribunal. Section 32 also does not provide for termination of arbitration proceedings on expiry of time mentioned in Section 33 (2) or Section 33(5) of the Act. Interpreting Section 33(6) as contended by petitioner would make it onerous and give rise

to other contentious issues.

12. The senior counsel for the petitioner has also argued that the petitioner cannot be left waiting endlessly for the Arbitral Tribunal to adjudicate applications under Section 33 and in the meanwhile the time provided under Section 34(3) may run out.

13. That however does not appear to be the position. Section 34(3) provides for the application under Section 34(1) of the Act to be made not after three months from the date the parties have received the arbitral award or if a request has been made under Section 33 from the date on which request has been disposed of by the Arbitral Tribunal. In the present case before the OMP under Section 34 of the Act came up for consideration before this court, the Arbitral Tribunal has communicated extension of time for disposal of the applications preferred before it under Section 33 of the Act. The said applications are still pending.

14. The Act does not appear to permit the party to pursue two remedies i.e. under Section 33 as well as under Section 34 of the Act. The Supreme Court also in ***Amba Lal Sarabhai Enterprises Ltd. Vs. Amrit Lal & Co.*** AIR 2001 SC 3580 has provided for election and held that a party ought to choose one of the two alternative remedies which may be available to it. The petitioner in the present case has not withdrawn the application under Section 34 of the Act till date. Even today during the course of hearing no statement has been made for withdrawing the said application. In any case, even if any such statement is to be made, the same would not change the position in as much as application filed by the respondent under Section 33 of the Act is still pending and is not

informed to have been disposed of.

15. That being the position, the OMP is found to be pre-mature. In view of Section 33(6) of the Act, the relief claimed in the IA No.10038/2009 of restraining the Arbitral Tribunal from considering the applications under Section 33 of the Act, also cannot be granted. The OMP as well as the applications are dismissed. Needless to state that the OMP having been dismissed as pre-mature, the petitioner if required to prefer an OMP after the disposal of the applications under Section 33 of the Act shall be entitled to urge all the grounds including those taken in the present OMP. No order as to costs.

+IA No.10037/2009 (of the petitioner u/s. 151 CPC) in OMP No.455/2009 (U/s.34 of the Arbitration Act, 1996)

Allowed subject to just exceptions.

**RAJIV SAHAI ENDLAW
(JUDGE)**

August 11, 2009
J