

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
ARBITRATION PETITION NO.1737 OF 2015

Punj Lloyd Limited and Anr. .. Petitioners
Versus
Oil and Natural Gas Corporation Ltd. .. Respondents

Mr. Simil Purohit with Mitesh Naik with Ms. Neha Bhatt i/b. Dhru & Co. for petitioners

Mr. Pradeep Sancheti, Senior Advocate with Nishit Dhru with Prakash Shinde with Chirag Bhavsar i/b. MDP Partners for respondents.

CORAM : R.D.DHANUKA, J

DATE : 16th March 2016.

P.C.

1] By this petition, filed under section 34 of the Arbitration and Conciliation Act, 1996 (for short referred to as "Act"), the petitioners have impugned the decision of the arbitral tribunal dated 25th July 2015 rejecting an application made by the petitioners praying for amendment of the claim No.XXII in the existing statement of claim before the arbitral tribunal.

2] By an application dated 1st October 2015 the petitioners applied for clarification of the said decision, which was objected to by the respondents on 12th October 2015. On 14th October 2015,

the arbitral tribunal rejected petitioners' application for seeking clarification of the impugned decision dated 25th July 2015.

3] Mr. Sancheti, learned Senior Counsel for the respondents raises a preliminary objection about maintainability of this petition under section 34 of the Act on the ground that the impugned decision taken by the arbitral tribunal refusing to allow amendment to the claim is neither an interim award nor a final award and thus the proceedings filed under section 34 of the Act by the petitioners is not maintainable.

4] The petitioners and the respondents had executed an agreement on 9th February 2007 for redevelopment of Heera project. The dispute arose between the parties. Petitioners invoked the arbitration agreement recorded in the contract entered between the parties. On 7th October 2011, the Arbitral tribunal was constituted. Statement of claim was filed by the petitioners. In January 2012, the petitioners agreed for conciliation proceedings and requested the arbitral tribunal to keep the arbitral proceedings in abeyance. The parties referred the matter to the conciliation of an outside expert

committee. The committee was appointed by the respondent to look into the claim of petitioners. The committee gave its recommendations. The respondents rejected the recommendations of the said outside expert committee and appointed another expert committee for conciliation. However, the recommendations of both the committees not being accepted by one or the other party, the conciliation proceedings were closed.

5] On 29th January 2015 the arbitral proceedings re-commenced. On 9th February 2015, the petitioners filed an application for amendment to the statement of claim, whereby they proposed to amend the statement of claim i.e. Claim No.XXII apart from other claims. Respondents filed reply to the amendment application objecting to the proposed amendments. Insofar as the claim No.XXII is concerned respondents objected the said amendment on the ground that the same included interest for the conciliation period. On March 12, 2015 the petitioners filed an affidavit of rejoinder and agreed to vary the proposed amendment in respect of claim XXII by reducing the interest amount for the conciliation period. On 24th July 2015, petitioners amended the varied claim

XXII under a bonafide belief that the arbitral tribunal had allowed the application for amendment of Claim XXII as varied. According to the petition no objection was raised by the respondent to such an amendment.

6] On 25th July 2015, the arbitral tribunal passed the impugned award rejecting the application for amendment in respect of claim XXII. On 1st October 2015, the petitioners applied for clarification of the said decision dated 25th July 2015. The said application for clarification was rejected by the arbitral tribunal respondent on 12th October 2015 on various grounds. On 14th October 2015, the Arbitral Tribunal rejected petitioners' application seeking modification/ clarification of the earlier decision dated 25th July 2015.

7] Being aggrieved by the said decision dated 25th July 2015 and clarificatory order dated 14th October 2015, the petitioners have filed this petition under section 34 of the Act.

8] Mr. Purohit, learned Counsel appearing for the petitioners invited my attention to the application for amendment filed by the

petitioners, the objections raised by the respondents to the said application for amendment and more particularly in respect of claim No.XXII and also the decision taken by the Tribunal on 25th July 2015. He also invited my attention to the order passed by the Tribunal on 14th October 2015 clarifying that the amendment in respect of claim No.XXII was rejected. It is submitted by the learned Counsel for the petitioners that it was not the case of the respondents that the application for amendment made by the petitioners in respect of the claim No.XXII was not maintainable on the ground that the same was beyond the scope of arbitration agreement. He submits that the only objection raised before the Tribunal by the respondents was that the petitioner could not have made any claim for interest during the period when the proceedings were pending before the conciliator. He submits that pursuant to the said objections by the respondents, the petitioners had restricted their application for amendment only in respect of the interest on the principal amount under different heads and had reduced the proposed enhanced claim, which originally included interest amount during conciliation period also. He submits that the respondents did not raise any objection on the ground of limitation.

9] It is also submitted by the learned Counsel for the petitioner that by rejecting the application for amendment of Claim No.XXII, the Tribunal has rendered an award in view of the fact that insofar as the additional claims made by the petitioners are concerned, the said decision of the arbitral tribunal has attained finality. He submits that since the right of the petitioners to make additional claims by making an application under section 23 of the Act is concluded, in view of the dismissal of the said application, the decision taken by the arbitral tribunal would have trapping as a final decision and thus, such a decision would be an award within the meaning of section 2(1)(c) of the Act.

10] It is also submitted by the learned Counsel for the petitioners that since the petitioners have no other remedy but to challenge the decision of the arbitral tribunal before this Court as the application for amendment is rejected and at this stage, the petitioners cannot even file a suit for the claim covered under the amendments. In support of his submissions, that the decision taken by the arbitral tribunal rejecting the application for amendment has attained finality and has

a trapping of a final adjudication and, therefore, the decision has to be construed as an award, he placed reliance upon a decision of Supreme Court in the case of Shah Babulal Khimji Vs. Jayaben D. Kania and Anr., reported in A.I.R. 1981 S.C. 1786 and in particular paras 91 and 113 thereof. He submits that the Supreme Court in the said judgement has held that interlocutory order passed by a court in a pending suit, which attain finality is construed as judgement and appellable under clause 15 of the Letters Patent. He further submits that the law laid down by the Supreme Court in the case of Shah Babulal Khimji (supra) can be extended to the present situation where an application for amendment of a claim under section 23 of the Act is rejected and has attained finality.

11] Learned Counsel for the petitioner also places reliance on the judgement of Calcutta High Court in the case of M/s. Tara Properties Pvt. Ltd. Vs. M/s. Allied Resins and Chemicals Ltd. , reported in A.I.R. 1989 Calcutta 192 and in particular paras 6 and 10 thereof, in support of his submissions as stated above.

12] Mr. Sancheti, learned Senior Counsel appearing for

respondents on the other hand would submit that the decision taken by the arbitral tribunal on 25th July 2015, thereby rejecting the application for amendment of the claim No.XXII is neither an interim award nor a final award. He submits that under section 34 of the Act, recourse to a court can be made by an application for setting aside an Arbitral Award. He submits that since the decision taken by the Tribunal in refusing to grant amendment is not an award, the petition filed under section 34 of the Act is not maintainable.

12] Reliance is also placed on section 5 of the Act and it is submitted that the Court can intervene only in the proceedings which are specifically permitted under the provisions of the Act. He submits that since the decision taken by the arbitral tribunal is not an award, there is no recourse available to a party affected by such an order of rejection of the application for amendment under the provisions of the Act and therefore, in view of the limited judicial intervention permitted under the said provision of section 5, this petition under section 34 is not maintainable. In support of his submission, the learned Senior Counsel invited my attention to the judgement of Delhi High Court in case of Container Corporation of

India Vs. Texmaco Limited, reported in 2009(6) R.A.J. 283(Del) and more particularly para 3 thereof. He submits that there is no provision under the Act for approaching a court against an order allowing or dismissing an amendment application. It is submitted that if the petitioner is finally aggrieved by a final award as may be rendered by the Arbitral tribunal, the petitioner can assail the decision taken by the arbitral tribunal refusing to grant an amendment along with final award under section 34 of the Act.

14] Insofar as the judgement of the Supreme Court in Shah Babulal Khimji (supra) and the judgement of Calcutta High Court in M/s. Tara Properties (supra) relied upon by the petitioners is concerned, it is submitted that the principles laid down by the Supreme Court and Calcutta High Court in the above referred judgements were considering the provisions of clause 15 of Letters Patent. He submits that in both these decisions, the courts had held that interim orders passed in any pending suit which has a trapping of final judgement could be challenged by an appeal under clause 15 of the Letters Patent. He submits that the principles laid down by the Supreme Court and the Calcutta High Court while dealing with

clause 15 of the Letters Patent would not apply to the proceedings filed under the provisions of Arbitration Act.

15] Mr. Purohit in rejoinder would submit that if the petitioner can be allowed to challenge the decision of the arbitral tribunal at the stage of final award under the Act, the petitioners can be certainly entitled to challenge the said decision even at this stage.

16] There is no dispute that the petitioners have already filed statement of claim before the arbitral tribunal. At the request of petitioners, the matter was referred to the outside expert committee for conciliation. The recommendations made by the two outside expert committees were not accepted by either party. The petitioners, thereafter, made an application for amendment of existing claim before the tribunal. The application for amendment was resisted by the respondent on various grounds. Mr. Purohit learned Counsel for the petitioner is right in his submission that the application for amendment was not opposed on the ground that the said application was beyond the scope of arbitration agreement or that the same was barred by limitation. The question, however, that

arises for consideration of this Court is whether the decision rendered by the tribunal refusing to permit the amendment to claim No.XXII can be construed as an award either interim award or final award, which can be amenable to challenge under section 34 of the Act.

17] Section 2(1)(c) of the Act provides that the arbitral award includes an interim award. A conjoint reading of section 2(1)(c) of the Act with section 34 clearly indicates that an application for setting aside an arbitral award under section 34 can be only made only if the award is final or interim. Insofar as the application for amendment is concerned, the said application was made under section 23 of the Act. The decision was taken by the arbitral tribunal under section 23(3) of the Act. Insofar as submission of learned Counsel for the petitioner that in view of the rejection of the application for amendment by the arbitral tribunal with regard to additional claims proposed to be made by the petitioners, the same has attained finality and thus, such a decision has to be construed as an award within the meaning of section 2(1)(c) of the Act is concerned in my view, since there was no adjudication of the claim

made by the petitioners on merits, which is an essential requirement for construing any decision as an award within the meaning of section 2(1)(c) of the Act, such a decision rejecting an application for amendment of the claim cannot be construed either as an interim award or as a final award.

18] Merely because there is no other remedy available under the provisions of the Act to challenge such a decision at this stage in view of the limited judicial intervention permitted under section 5 of the Act, such decision cannot be construed as an award within the meaning of Section 2(1)(c) of the Act.

19] The Delhi High Court in the case of Container Corporation (supra) has considered a similar situation where application of the original respondent in the arbitration proceedings for amendment of the written statement so as to make a counter claim was rejected. Such a decision of the arbitral tribunal was challenged by the respondents therein under section 34 of the Act. The Delhi High Court has held that the arbitral tribunal has wide discretion to allow or dismiss an application for amendment of claim or written statement

filed before it, during the arbitral proceeding. It is held that there is no provision under the Arbitration Act for approaching the court against an order of allowing or dismissing the amendment application. It is held that the petitioner would be at liberty to assail the final award and can take all grounds of challenge as available to it as and when final award is passed by the Tribunal. It is further held that the application for amendment of the written statement whereby the petitioner was not allowed to include the counter claim cannot be termed as interim award so as to allow a challenge such an order under section 34.

20] The Delhi High Court has also considered the effect of section 5 of the Act and has held that the purpose of enactment of the Arbitration Act was to minimise intervention of the court with the arbitral proceedings and that is why section 5 of the Act prohibits the courts from interfering with the arbitration process. It is further held that judicial intervention during arbitration proceedings is not permissible unless it is specifically provided by Part-I of the Act.

21] In my view, in view of the minimum intervention of the courts

permitted under section 5 of the Arbitration Act during the arbitration proceedings and in view of the fact that the impugned decision of the arbitral tribunal rejecting the application for amendment of the claim is neither an interim award nor a final award, the present petition filed under section 34 of the Act is not maintainable. In my view, the judgement of the Delhi High Court in the case of Container Corporation (supra) squarely applies to the facts of this case. I am in respectful agreement with the view formulated by the Delhi High Court in case of Container Corporation (supra).

22] Insofar as the judgement of the Supreme Court in the case of Shah Babulal Khimji (supra) and of Calcutta High Court in the case of M/s. Tara Properties (supra) are concerned, a perusal of both these decisions clearly indicates that they were rendered while considering the provisions of clause 15 of Letters Patent. Both the Courts have held that certain orders passed in a pending suit which had attained finality would be considered as judgement appealable under clause 15 of Letters Patent. In my view, considering the provisions of the Arbitration Act and more particularly in view of the minimal judicial intervention permitted in view of section 5 of the Act,

only the interim award or final award as the case may be, can be challenged under section 34 of the Act.

23] A perusal of other provisions of the Arbitration Act such as section 8, 9, 11, 14, 27, 34 and 37 also indicates that a very limited intervention is permitted by the court. Insofar as, Part -I is concerned, in no other proceedings other than the above referred provisions, described in the Arbitration Act, the court can intervene in view of minimal intervention permitted under section 5 of the Act. In my view, the principles laid down by the Supreme Court in the case of Shah Babulal Khimji (supra) and the M/s.Tara properties are based on the provisions of clause 15 of Letters Patent and thus, they would not assist the case of the petitioner in the present proceedings filed under the provisions of Arbitration Act. In my view, the principles laid down by the Supreme Court in the case of Shah Babulal Khimji (supra) and by Calcutta High Court in case of Tara Properties (supra) relating to clause 15 of the Letters Patent, cannot be extended to the proceedings filed under section 34 or any other proceedings permissible under the provisions of the Arbitration Act, in view of provisions of section 5 of the Act. Arbitration and

conciliation Act, 1996 is a self contained code.

24] At this stage, Mr. Purohit invited my attention to the Supreme Court judgement in case of McDermott International Inc. Vs. Burn Standard Co. Ltd. and Ors., reported in (2006) 11 S.C.C. 181, particularly paras 68 and 69 thereof. Relying on these two paragraphs, it is submitted that an interim award in terms of section 2(c) of the Act is not in respect of which a final award can be made but it may be a final award on the matters covered thereby but made at an interim stage. He submits that since the additional claims proposed to be made by the petitioner by seeking an amendment to the original claim had been rejected by the tribunal, it would be an interim award insofar as these additional claims are concerned.

25] A perusal of the judgement of the Supreme Court in the case of McDermott (supra) clearly indicates that the Supreme Court had considered a situation where parties before the tribunal had agreed that the some of the claims would be argued at the first instance and on that a award can be made by the arbitral tribunal instead of making a final award in respect of these claims. In view of these

facts, the Supreme Court held that in respect of the part of the claims which were argued before the tribunal in respect of which a decision was rendered by the tribunal finally would be considered an interim award within the meaning of section 2(1)(c) read with Section 34 of the Arbitration Act. In my view this facts of case are totally different. The ratio in the judgement of Supreme Court in case of McDermott (supra), thus would not assist the case of the petitioner and is clearly distinguishable in the facts of this case.

26] It is made clear that if the petitioner is aggrieved by the final award, which will be made by the tribunal, the petitioner will be at liberty to take all the grounds of challenge as available in law including on the decision rendered by the arbitral tribunal rejecting the application for amendment of claim at that stage.

27] Arbitration petition is accordingly dismissed as not maintainable. No orders as to costs.

(R.D.DHANUKA, J)