

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

% *Judgment pronounced on: 27th January, 2016*

+ **Arb. A. (Comm) 3/2015**

ARAVALI INFRAPOWER LIMITED Appellant
Through Mr. S.K.Dubey, Adv. with Mr.
Rajmangal Kumar & Aman Singh,
Advs.

versus

MICHIGAN ENGINEERS PVT. LTD. & ANR.
..... Respondents
Through Mr. S.Ganesh, Sr. Adv. with Mr.
Firdosh Puniwala, Ms. Banoo
Kapadia & Mr. Anuj Sarma, Adv.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The appellant has filed the abovementioned appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") against the impugned order dated 1st October, 2015 passed by the sole Arbitrator in the application filed by the appellant for suspension of the arbitral proceedings on the ground that the appellant company's reference was registered under Section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as "SICA") and the arbitration proceedings are liable to be suspended under Section 22 (1) of SICA.

2. Brief facts for the adjudication of the present appeal are that the appellant is a company incorporated under the Companies Act, 1956 having its registered office at G-29, 3rd Floor, Vardhman Tower,

Community Centre, Vikaspuri, New Delhi-110018. The respondent Nos.1 and 2 are companies incorporated under the Companies Act, 1956 having their registered office at D-7, Commerce House, 78, Javji Dadaji Marg, Tardeo, Mumbai - 400034 and A-83, 1st Floor, Okhla Industrial Estate, Phase-II, New Delhi-110020 respectively.

3. The appellant awarded a contract dated 2nd July, 2011 to the respondents on turnkey basis *inter alia* for designing, supply, installation and commissioning of a photovoltaic power plant project in Dhank, Gujarat, as per the terms, conditions and technical specifications under the said agreement. Certain disputes and differences had arisen between the parties and therefore, the disputes were referred to the sole Arbitrator. The respondents have preferred their claim whereas the appellant has denied the said claims and had also filed its counter claims, which are pending for final adjudication. In the arbitral proceedings, the respondents' evidence was concluded, whereas the appellant's cross examination was to commence. At this stage, the said application was filed.

4. It is alleged by the appellant that the appellant company was registered under Section 15 (1) of SICA vide order dated 10th August, 2015 passed by the Secretary, Board for Industrial and Financial Reconstruction, Ministry of Finance, Jawahar Vyapar Bhawan, 1, Tolstoy Marg, New Delhi and in view of the above said registration the appellant preferred an application dated 1st September, 2015. It is the admitted position that in the said application the words 'Section 17 of the Act' were not mentioned. However, now the appellant is alleging that the same was under Section 17 of the Act before the sole Arbitrator on 1st September, 2015 seeking suspension of arbitration proceedings under Section 22 of SICA praying *inter alia* to adjourn the

present proceedings sine die till the outcome of the reference registered under the Sick Industrial Companies (Special Provisions) Act, 1985 or till the consent of the Board, if any, granted by the Board as envisaged under Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985.

5. The respondents filed its reply dated 16th September, 2015 to the said application stating *inter alia* "that the provision of Section 22 (1) of SICA do not affect the arbitration proceedings". On 5th October, 2015, the appellant received the order dated 1st October, 2015 whereby the Arbitrator by passing the detailed order had dismissed the application of the appellant.

6. The impugned order dated 1st October, 2015 has been challenged in the present appeal. It is stated in the appeal that the impugned order is erroneous, contrary to the established law and thus, liable to be set aside on the grounds as stated in the appeal. Mr. Dubey, learned counsel appearing on behalf of appellant by referring to the grounds of the appeal submits that the appellant has a strong case on merit as the arbitration proceedings are liable to be stayed as per settled law. He submitted that the appellant should not wait for passing of final award and it also should not spend time and money to challenge or to raise such plea at the stage of filing of objections under Section 34 of the Act, if any. He has referred to the following decisions:-

- a) ***Paramjeet Singh Patheja v. ICDS Ltd.*** 2006 (13) SCC 322.
- b) ***Morgan Securities & Credit (P) Ltd. v. Modi Rubber Ltd.*** 2006 (12) SCC 642.
- c) ***KSL & Industries Ltd. v. Arihant Threads Ltd.*** 2015 (1) SCC 166.
- d) ***Ankur Drugs & Pharma Ltd. & Anr. v. S.E. Investment Ltd.*** 2015 (217) DLT 781.

e) ***S.E. Investment Ltd. v. Ankur Drugs & Pharma Ltd. & Anr.*** in SLP(Civil) No.12938/2015.

7. Mr. S.Ganesh, learned Senior counsel for the respondents has raised a preliminary objection to the maintainability of the appeal. According to him, since the arbitral tribunal has rejected the plea of jurisdiction who is now to continue with the proceeding and make an arbitral award. The plea of the appellant can only be raised after the award is passed and at the stage of filing of objection under Section 34 of the Act if such situation would arise. The appellant at this stage is estopped to challenge the impugned order under the scheme of the Act.

8. Mr. Dubey, learned counsel for the appellant submitted that the order rejecting the prayer by the arbitral tribunal amounts to an interim award, in particular an interim award within the meaning of Section 2(1)(c), therefore, an appeal shall lie under Section 37 of the Act as the decision of the Arbitrator even if the issue of jurisdiction is decided against the appellant as the interim arbitral award as contemplated by Section 31(6) of the Act can be challenged in appeal at this stage.

9. Let me deal with the issue in hand. Section 16 of the Act 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 defence; 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."

10. It appears from the said provision which has been interpreted by various Courts to the effect that the Section empowers an arbitral tribunal to rule on its own jurisdiction *vide* sub-section (1). Where the arbitral tribunal decides to reject the plea regarding its jurisdiction, Sub-Section (5) empowers the tribunal to continue with the arbitral proceedings and make an arbitral award. Sub-Section (5) provides for the manner in which such an arbitral award may be challenged. It provides that such an award can only be challenged in accordance with Section 34. On the other hand, if the arbitral tribunal decides to accept the plea that it is has no jurisdiction, then such an order is appealable under Section 37(2) of the Act.

11. Thus, in my considered view, the impugned order is not an interim award. It is simply an order passed in the application for stay of proceedings whereby the request of the appellant has been rejected. The Arbitral Tribunal inclines to continue with the proceedings as mandated under sub Rule 5 and 6 of Section 16 of the Act.

No doubt, Section 37 stipulates the remedy for appeals, however, sub-section (2) of the said Section expressly states that an appeal shall lie against an order accepting the plea referred to in sub-sections (2) and (3) of Section 16, meaning thereby that where the Arbitrator has come to the conclusion that it has no jurisdiction, an appeal would lie, otherwise if Arbitral Tribunal holds that it has jurisdiction, the appeal does not lie. At this stage of appeal, it cannot be concluded that it is illegal or without jurisdiction because Legislature has conferred the power on arbitral tribunal "to rule on its own jurisdiction." Such an order can be challenged only in the manner laid down in Sub-Sections (5) and (6) of Section 16 of the Act, i.e. after the arbitration proceedings are over and the award is made. Such challenge is to be postponed and an aggrieved party would be entitled to raise after the award is passed. On the other hand, if it is held that it has no jurisdiction, an order can be challenged under sub-section (2) of Section 37 of the Act.

12. In ***Centrotrade Minerals and Metals Inc. v. Hindustan Copper Ltd.*** (2006) 11 SCC 245 it has been held as under:-

"46. 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. Such a question was required to be raised during arbitration proceedings or soon

after initiation thereof as a preliminary issue. Such a decision would be subject to challenge under Section 34 of the Act. In the event, the arbitrator opined that he had no jurisdiction in relation thereto an appeal there against was provided for under Section 37 of the Act."

13. Lastly, Mr. Dubey, learned counsel for the appellant has referred the decision of this Court in the case of **Ankur Drugs** (supra) by stating that the said decision was rendered under the similar circumstances by allowing the appeal. Therefore, it should be applied in the facts of the present case too. It is a matter of fact that in the said decision of **Ankur Drugs** (supra) there was no challenge made by the respondent about the maintainability of the appeal. The objection raised in the present appeal has not been discussed. It is admitted position in law that mere casual expression, without reference of the objection and citing of judgment would carry no weight.

14. In **Municipal Corporation of Delhi v. Gurnam Kaur** (1989) 1 SCC 101 in para 12 it has been held as under:-

"12. In *Gerard v. Worth of Paris Ltd. (k)*. [1936] 2 All E.R. 905, the only point argued was on the question of priority of the claimant's debt, and, on this argument being heard, the Court granted the order. No consideration was given to the question whether a garnishee order could properly be made on an account standing in the name of the liquidator. When, therefore, this very point was argued in a subsequent case before the Court of Appeal in *Lancaster Motor Co. (London) Ltd. v. Bremith, Ltd.* [1941] 1 KB 675, the Court held itself not bound by its previous decision. Sir Wilfrid Greene, M.R., said that he could not help thinking that the point now raised had been deliberately passed sub silentio by counsel in order that the point of substance might be decided. We went on to say that the point had to be decided by the earlier court before it could make the order which it did; nevertheless, since it was decided "without argument, without reference to the crucial words of the rule, and without any citation of authority", it was not binding and would not be followed. Precedents sub silentio

and without argument are of no moment. This rule has ever since been followed. One of the chief reasons for the doctrine of precedent is that a matter that has once been fully argued and decided should not be allowed to be reopened. The weight accorded to dicta varies with the type of dictum. Mere casual expressions carry no weight at all. Not every passing expression of a Judge, however eminent, can be treated as an ex cathedra statement, having the weight of authority."

Thus, the referred decision does not help the case of the appellant as specifically the issue in hand has not been discussed and decided. In the case of ***Malanpur Steel Ltd.***'s case (supra) referred by Mr. Dubey, the Division Bench has merely given its opinion that the remedy could lie under Section 37 of the Act. As far as other decisions referred on merit of the application filed by the appellant before the Arbitral Tribunal are concerned, since this Court is deciding the present appeal and once, I have come to the conclusion that the appeal is not maintainable, the said aspect cannot be touched. However, the appellant would be entitled to raise such plea after the award is passed and the same would be considered as per its own merit.

15. Under these circumstances, the appeal filed by the appellant cannot be entertained and the same is dismissed as the same is not maintainable under the Act.

16. No costs.

(MANMOHAN SINGH)
JUDGE

JANUARY 27, 2016