

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment reserved on: 25.4.2017

Judgment delivered on: 17.5.2017

Arbitration Appeal No.19 of 2016

Steel Authority of India Limited Bhilai Steel Plant Through
Executive Director (M.M.), S.A.I.L., Bhilai Steel Plant, Bhilai, District
Durg (CG)

----Appellant

Versus

M/s Kumaon Refractories , through Sole Proprietor Shri R.C. Binjola,
Forest Department, Binjola House, Mahesh Nagar, Nawabi Road,
Haldwani-263139, District Nainital (Uttarakhand)

---- Respondent

For Appellant : Mr.Kashif Shakeel, Advocate
For Respondent : Mr.S.K.Sinha and Mr.Anand Dadariya,
Advocates

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Order

1. Invoking the Appellate jurisdiction of this Court under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter called as "Act of 1996"), the appellant herein/Steel Authority of India Limited has preferred this appeal questioning the order passed by the Principal District Judge, Durg dated 5.1.2016, by which application filed by the respondent herein under Section 34 of the Act of 1996 has been allowed and award has been set aside and the matter has been remitted to the arbitrator for fresh consideration.

2. The appellant Company is Government of India Enterprises having its plants in different parts of India engaged mainly in manufacturing of Iron & Steel products. One of such plant is in Bhilai town of the State of Chhattisgarh known as Bhilai Steel Plant. The respondent is one of the supplier of raw materials to the appellant company.
3. In the year 2001 the appellant company floated a tender for supply of Dead Burnt Magnesite (DBM) of 1-6 mm. 2650 MT and 0-2mm 360 MT and awarded tender to the respondent firm vide purchase order No.A/T No.01/BHI-00/85.4(152)/20106912 dated 1.2.2002 and A/T No.01/BHI-00/85.4(152)/20106910 dated 1.2.2002. Pursuant thereto, a concluded contract was entered into between the appellant and the respondent. Thereafter, dispute has arisen between the parties leading to appointment of arbitrator. The Arbitrator passed an award on 11.5.2013 holding that the respondent firm is entitled for ₹ 4,75,175.19 along with interest at the rate of 6% per annum from April, 2005 till payment of the same.
4. Feeling aggrieved and dissatisfied with the award passed by the sole arbitrator, the respondent herein filed an application under Section 34 of the Act of 1996 for setting aside the arbitral award. The District Judge, Durg while allowing the application set aside the award passed by the sole arbitrator and remitted the matter for fresh consideration, against which, this arbitration appeal has been filed.

5. Mr.Kashif Shakeel, learned counsel appearing for the appellant, would submit that the Principal District Judge has exceeded its jurisdiction in allowing the application under Section 34 of the Act of 1996 by remitting the matter to the sole arbitrator as there was no application filed by the respondent for resuming the arbitration proceeding under Section 34(4) of the Act of 1996, therefore, the order passed by the Principal District Judge deserves to be set aside.
6. Mr.S.K.Sinha and Mr.Anand Dadariya, learned counsel appearing for the respondent, would support the impugned order.
7. I have heard learned counsel appearing for the parties, considered their rival submissions made hereinabove and also gone through the record with utmost circumspection.
8. In order to judge the correctness of the plea raised at the Bar, it would be appropriate to notice Section 34 of the Act of 1996 which reads as under:-

“34. Application for setting aside arbitral award.—(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have

subjected it or, failing any indication thereon, under the law for the time being in force; or
(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation.—Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award

was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal: Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.”

9. In the matter of **Mcdermott International Inc. Vs. Burn Standard Co. Ltd. and others**¹, Their Lordships of the Supreme Court while dealing with Section 34(4) of the Act of 1996 have held as under:-

“52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the

¹ (2006) 11 SCC 181

arbitration again if it is desired. So the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."

10. The issue involved herein is no longer res-integra and stands adjudicated authoritatively very recently in the matter of **Kinnari Mullick and another Vs. Ghanshyam Das Damani**², in which the Supreme Court has framed the following issue for consideration:-

"1. This appeal raises a short question as to whether Section 34(4) of the Arbitration and Conciliation Act, 1996 (for short "the Act") empowers the Court to relegate the parties before the Arbitral Tribunal after having set aside the arbitral award in question and noresuo suo moto in absence of any application made in that behalf by the parties to the arbitration proceedings?"

The said Issue was considered and answered by the Supreme Court in following words:-

"14. On a bare reading of this provision, it is amply clear that the Court can defer the hearing of the application filed under Section 34 for setting aside the award on a written request made by a party to the arbitration proceedings to facilitate the Arbitral Tribunal by resuming the arbitral proceedings or to take such other action as in the opinion of Arbitral Tribunal will eliminate the grounds for setting aside the arbitral award. The quintessence for exercising power under this provision is that the arbitral award has not been set aside. Further, the challenge to the said award has been set up under Section 34 about the deficiencies in the arbitral award which may be curable by allowing the Arbitral Tribunal to take such measures which can be eliminate the grounds for setting aside the arbitral award. No power has been invested by the Parliament in the Court to remand the matter to the Arbitral Tribunal except to adjourn the proceedings for the limited purpose mentioned in sub-section 4 of Section 34. This legal position has been

² 2017 SCC Online SC 528

expounded in the case of **McDermott International Inc.** (supra). In paragraph 8 of the said decision, the Court observed thus:

“8.Parliament has not conferred any power of remand to the Court to remit the matter to the arbitral tribunal except to adjourn the proceedings as provided under sub-section (4) of Section 34 of the Act. The object of sub-section (4) of Section 34 of the Act is to give an opportunity to the arbitral tribunal to resume the arbitral proceedings or to enable it to take such other action which will eliminate the grounds for setting aside the arbitral award.”

(emphasis supplied)

15. In any case, the limited discretion available to the Court under Section 34(4) can be exercised only upon a written application made in that behalf by a party to the arbitration proceedings. It is crystal clear that the Court cannot exercise this limited power of deferring the proceedings before it suo moto. Moreover, before formally setting aside the award, if the party to the arbitration pending before it, then it is not open to the party to move an application under Section 34(4) of the Act. For, consequent to disposal of the main proceedings under Section 34 of the Act by the Court, it would become functus officio. In other words, the limited remedy available under Section 34(4) is required to be invoked by the party to the arbitral proceedings before the award is set aside by the Court.”

11. Thus, it is quite vivid that the Principal District Judge has only power and jurisdiction to adjourn the proceeding under sub-section (4) of Section 34 of the Act of 1996 at the instance of the party to award to facilitate the Arbitral Tribunal to resume the arbitral proceeding and to wipe out the ground (if any) for setting aside the award, but such power and jurisdiction can be exercised only before the award is finally set aside. Once the arbitral award is set aside, such jurisdiction cannot be exercised by learned District Judge

while deciding an application under Section 34(2) of the Act of 1996.

12. Thus, from principles of law laid down by the Supreme Court in the above-stated judgments (*supra*), it is quite vivid that the Principal District Judge has no power and jurisdiction to remit the matter to the arbitral tribunal under Section 34(4) of the Act of 1996 after setting aside an arbitral award in absence of application under Section 34(4) of the Act of 1996 by the parties. No such application was moved by either of the parties particularly by the respondent herein before the arbitral tribunal, therefore, the Principal District Judge has no jurisdiction to remit the award for fresh consideration by the arbitral tribunal. Thus, learned District Judge has committed illegality in setting aside an arbitral award and remitting the matter to the arbitral tribunal without examining the matter strictly as laid down in Section 34 (2) of the Act of 1996.

13. In view of above, the arbitration appeal is allowed and the impugned order is set aside. The matter is remitted to the Principal District Judge, Durg for consideration afresh in accordance with law. All contentions of both the parties are kept open. The trial Court is directed to decide the dispute expeditiously preferably within a period of four months from the date of receipt of copy of this order. No cost(s).

Sd/-

(Sanjay K.Agrawal)
Judge