

Arbitration Appeal No.02 of 2006

----Appellant

South Eastern Coal Fields Limited (A subsidiary of Coal India Limited)
through its Chairman-cum-Managing Director, Seepat Road, Bilaspur
(Chhattisgarh)

---- Respondent

For Appellant : Mr.Pramod Verma, Senior Advocate
with Mr.Qamrul Aziz, Advocate

For Respondent : None present

Hon'ble Shri Justice Sanjay K. Agrawal

Order on Board

26.06.2018

1. Jurisdiction of this Court under Section 37 (1) (b) of the Arbitration and Conciliation Act, 1996 (hereinafter called as “Act of 1996”) has been invoked by the appellant herein calling in question the order passed by learned District Judge granting the application under Section 34 (2) of the Act of 1996 filed by the respondent herein and thereby setting aside the award and remitting the matter to the Arbitrator for fresh consideration.
2. The respondent herein invited tenders for the work of design, drawing, supply, engineering, construction, erection and commissioning of sewerage and sewage treatment plan for Bishrampur Project Colonies/Township on Turn-Key basis and its

operation, maintenance and running of system for six months after completion of one month guarantee test run under package No.EAP/BSR/CE/017. Pursuant to which, the appellant submitted its tender, which was accepted. The agreement was entered into between the parties on 12.1.2000. The agreement contained a condition for settlement of all disputes by Adjudicator and Arbitrator as per sub-clause 24 of clause 3 of the agreement.

3. In order to get the dispute resolved, the appellant sought the dispute to be referred to the Adjudicator under sub-clause 24.1 of clause 3 of the agreement, which was referred and thereafter learned Arbitrator after giving full opportunity to both the parties passed the arbitral award on 3.5.2002 whereby claim of the appellant has been allowed and counter-claim filed by the respondent was rejected.
4. The respondent herein filed an application under Section 34(2) of the Act of 1996 before the learned District Judge. Learned District Judge by its impugned order held that the appellant is not entitled for any claim, set aside the arbitral award and remitted the matter to the Arbitrator for decision afresh, which has been challenged by the appellant herein.
5. Mr.Pramod Verma, learned Senior Counsel along with Mr.Qamrul Aziz, learned counsel for the appellant, would submit that arbitral award has been set aside on perverse ground whereas it can only be set aside on the ground mentioned in Section 34(2) of the Act of 1996. He would further submit that on going through the various provisions of the agreement i.e. clause 3.'1,

sub-clause 2 14, 44 of clause 3 and Technical information clause '1, 3 & 7 of clause of the agreement, it would be clear that the parties never intended that nature of the contract will be turn key and contract price as mentioned in tender document will remain static and firm and therefore, the interpretation of the terms of the contract by learned Arbitrator must be accepted and could not be subject-matter of challenge under Section 34 of the Act of 1996. Therefore, learned District Judge committed grave legal error in setting aside the award. He would also submit that the matter could not have been remanded by learned District Judge in absence of application under Section 34(4) of the Act of 1996.

6. None for the respondent though appeared.
7. I have heard learned counsel appearing for the appellant and gone through the records 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 arbitration again if it is

¹ (2006) 11 SCC 181

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 noreso 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 Arbitraal 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 expounded in the case of

² 2017 SCC Online SC 528

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 learned 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 eliminate the grounds (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 judgment **Kinnari Mullick** (supra), it is quite

vivid that the learned 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 contrary to Section 34 (4) 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 learned District Judge, Bilaspur 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

B/-