IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

COMMERCIAL ARBITRAITON APPEAL (LODG) NO.166 OF 2018
IN
COMMERCIAL NOTICE OF MOTION (L) NO.733 OF 2018
IN
COMMERCIAL ARBITRATION PETITION (L) NO.327 OF 2018

Oil and Natural Gas Corporation Limited. ...Appellant.

vs.

Consortium of Sime Darby Engineering Sdn.Bhd.
And Swiber Offshore Construction Pte.Ltd. ...Respondents

Mr.Janak Dwarkadas, Senior Advocate with Mr.Zubin Behram Kamdin, Mr.Rohit Gupta with Mr.Nishit Dhruva, Mr.Prakash H.Shinde, Ms.Khushbu Chhajed, Mr.Rohan B.Agrawal i/b. MDP & Partners, for the Appellant.

Mr.Kevic Setalwad, Senior Advocate, Mr.Dinesh Pednekar, Ms.Renu Gupta, Mr.Changez Keswani i/b.Economic Laws Practice, for the Respondents.

CORAM : NARESH H.PATIL AND G.S.KULKARNI, JJ.

DATE : 28 MARCH 2018

***P.C.* :**

1. Before the learned Single Judge the appellant is the original petitioner in a petition under Section 34 of the Arbitration and Conciliation Act,1996 (for short 'the Act') filed against the respondent challenging the award of the arbitral tribunal dated 22 March 2018. By

the impugned award, adjudicating the disputes between the parties arising under a contract which pertained to the '*construction and commissioning of a offshore platform with a gas processing unit*', the arbitral tribunal held that the respondent/claimant is entitled to an amount of US$ 20,792,980.20 and the appellant was held to be entitled to an amount of US$ 15,665,064.80. The arbitral tribunal held that on a balance, the appellant is liable to pay to the respondent/claimant a sum of US$ 5,127,915.40 in full and final settlement of the rival claims, with a further direction that the amount shall carry interest at the rate of 14% per annum from the award till the full payment is made to the respondent/claimant. In consequence of the said award, the arbitral tribunal issued further directions as under:-

> "This being the final adjudication of all the disputes between the parties, and the Claimant having been found entitled to receive from the Respondent the afore-mentioned amount the Claimant it is no longer liable to maintain and keep alive any of the bank guarantees submitted by it in connection with the project under consideration. The Respondent is, accordingly, restrained from invoking and en-cashing any bank guarantee furnished by the Claimant."

2. The appellant being aggrieved by the award, has approached the learned Single Judge in the petition in question invoking Section 34 of the Act. In this petition the appellant filed a notice of motion seeking the following reliefs:-

> "(a) That this Hon'ble Court be pleased to waive/dispense

> with the pre-deposit (if any);
> (b) that pending the hearing and final disposal of the Arbitration Petition, the operation and/or implementation and/or execution of the award dated 22nd March 2018 passed by the learned Majority Arbitrators being Exhibit "A" to the Arbitration Petition be stayed;
> (c) that pending the hearing and final disposal of the Arbitration Petition, the respondents, their servants, agent, and/or assignees, any such persons on behalf of the respondents be restrained from taking any further coercive steps pursuant to the award dated 22nd March 2018 being Exhibit "A",
> <u>(d) that pending the hearing and final disposal of the Arbitration Petition, the respondents be directed to extend the bank guarantees expiring on 31st March 2018 and 30th April 2018;</u>
> (e) Ad-interim reliefs in terms of prayers (a) and (d) above;
> (f) for such further and other reliefs as nature and circumstances of the case may require." (emphasis supplied)

3. On the said notice of motion, the appellant moved an urgent application before the learned Single Judge at 3 p.m. on 27 March 2018 seeking ad-interim reliefs in terms of prayer clause (d) of the notice of motion namely, seeking extension of bank guarantees expiring on 31 March 2018.

4. By the impugned order, the learned Single Judge has rejected the prayer of the appellant for the said ad-interim relief, observing that the bank guarantees were furnished by the respondent against the claim of the appellant for liquidated damages. It was observed in the impugned award the arbitral tribunal has partly rejected the counter claim of the petitioner towards liquidated

damages, and that even if the appellant succeeds in the said petition under Section 34 of the Act, the Court cannot make an award in favour of the petitioner, in respect of the rejected claim for liquidated damages as made by the arbitral tribunal. It was observed that since the claim of the petitioner was partly rejected, a prayer seeking direction against the respondent to extend the period of bank guarantee beyond 31 March 2018 could not be granted. The relevant observations of the learned Single Judge can be found in paragraph 2 of the impugned order which read thus:-

> " The matter is placed on board for ad-interim relief at the instance of petitioner in this notice of motion. It is not in dispute that the bank guarantee was furnished by the respondents against the claim of liquidated damages claimed by the petitioner. By the impugned award, the Arbitral Tribunal has partly rejected the counter claim of the applicant towards liquidated damages rejected by the Arbitral Tribunal. Even if the petitioner succeeds in this petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, this Court cannot make any award in favour of the petitioner, in respect of such rejected claim for liquidated damages by the Arbitral Tribunal. Since, the claim of the petitioner is partly rejected, prayer seeking a direction against the respondents to extend the period of bank guarantee beyond 31st March, 2018 cannot be granted by this Court. Ad-interim relief is accordingly rejected in so far as the extension of bank guarantee is concerned."

5. Mr.Kevic Setalwad, learned Senior Counsel for the respondent has raised a preliminary objection to the maintainability of this appeal on the ground that the notice of motion as filed by the appellant was under the provisions of Section 36(2) of the Act and

hence, against an order passed on such a notice of motion an appeal under Section 37 of the Act would not be maintainable. Mr.Setalwad also opposed the reliefs on merits.

6. Mr.Dwarkadas, learned Senior Counsel for the appellant on the other hand submits that the impugned order deserves interference inasmuch as the notice of motion in question is required to be considered as an application under Section 9 of the Act. It is submitted that the appellant was entitled to seek a relief under Section 9 of the Act as sub-section (1) of Section 9 of the Act would permit such an application, after the arbitral tribunal making the arbitral award and before the enforcement of the award, under Section 36 of the Act. Mr.Dwarkadas submits that the appellant was entitled for a relief of extension of bank guarantees, inasmuch the arbitral tribunal has awarded in favour of the respondent an amount of US$ 20,792 980.20 against the appellant, which is the subject matter of challenge in the Section 34 petition and if the appellant succeeds in the Section 34 petition, then necessarily the bank guarantee in question becomes relevant qua the execution of the award of US$ 15,665,064.80 granted in favour of the appellant. Thus, the bank guarantees are required to be extended in aid of the execution. It is submitted that a prejudice will be caused to the appellant if the prayer for a relief of extension of the bank

guarantees is not granted to the appellant pending the adjudication of the Section 34 petition.

7. The submission of Mr.Dwarkadas that the notice of motion of the appellant before the learned Single Judge, on which the impugned order is passed, is an application under Section 9 of the Act, is opposed by Mr.Kevic Setalwad, learned Senior Counsel for the respondent. Mr.Setalwad would submit that a party whose claim has been rejected in the arbitral proceedings cannot maintain such an application even under Section 36 of the Act. In supporting this submission Mr.Setalwad has relied on the decision of the Division Bench of this Court in "***Dirk India Pvt.Ltd. & Anr. Vs. Maharashtra State Electricity Generation Company Ltd. & Anr."***[1] and the decision of the Division Bench of Delhi High Court in "***Nussli Switzerland Ltd. Vs. Organizing Committee Commonwealth Games***"[2].

8. Having heard the learned Counsel for the parties and having perused the record, it is quite clear that as a consequence of the monetary award the arbitral tribunal has directed that in view of final adjudication of all the disputes between the parties, the bank guarantees submitted by the respondent were no longer liable to be

1 2013(7) BCR 493
2 2014(145) DRJ 399

maintained which were in connection with the project under consideration. The arbitral tribunal accordingly restrained the appellant from invoking or encashing any bank guarantee furnished by the respondents-claimants. It can be thus seen that the appellant by making a prayer in the notice of motion in terms of prayer clause (d) was necessarily making a prayer seeking a stay on the part of the award namely the directions of the arbitral tribunal qua the bank guarantees. Thus, the contention of Mr.Dwarkadas that the notice of motion of the appellant ought to be treated as an application under Section 9 of the Act, cannot be accepted. In our opinion, Mr.Setalwad would be correct in referring to ground (c) of the appeal memo where the appellant clearly has distanced itself from the applicability of Section 9 of the Act to the appellants notice of motion in raising the following contention in ground (c) of the appeal memo:-

> "c. The impugned order is contrary to the settled law and the learned Judge has erroneously applied the Bombay High Court Judgment to a section 34 petition wherein the judgment clearly applies to a section 9 application."

It is thus clear that the notice of motion of the appellant was necessarily an application under Section 36(2) of the Act and against an order passed on such an application, an appeal under Section 37(1) of the Act would surely be not maintainable.

9. In the context of the reliefs as sought by the appellant, Mr.Setalwad would be correct in relying on the decision of the Division Bench of this Court in "***Dirk India Pvt.Ltd. & Anr. Vs. Maharashtra State Electricity Generation Company Ltd. & Anr.***" (supra) and the decision of the Division Bench of Delhi High Court in "***Nussli Switzerland Ltd. Vs. Organizing Committee Commonwealth Games***" (supra).

10. The Division Bench of this Court in ***Dirk India Pvt.Ltd. (supra)*** has held that the enforcement of an award enures to the benefit of the party who has secured an award in the arbitral proceedings and the party whose claim has been rejected in the course of arbitral proceedings cannot have arbitral award enforced in accordance with Section 36 of the Act. The Court to which the arbitration petition challenging the award under Section 34 of the Act lies does not pass an order decreeing the claim. Where an arbitral claim has been rejected by the arbitral tribunal, the Court under Section 34 of the Act either may dismiss the objection to the arbitral award or in exercise of its jurisdiction may set aside the arbitral award. The setting aside of the arbitral award in rejecting the claim does not result

in the claim which was rejected by the arbitral tribunal being decreed as a result of the judgment of the Court in a petition under Section 34. It was held that the interference by the court to grant a mandatory order will negate the sanctity and efficacy of the arbitration as a form of alternate dispute redressal. Dr.Justice D.Y.Chandrachud (as his Lordship then was) speaking for the Division Bench, made the following observations:-

> 14. The Court which exercise jurisdiction under section 34 is not a Court of first appeal under the provisions of the Code of Civil Procedure. An Appellate Court to which recourse is taken against a decree of the trial Court has powers which are co-extensive with those of the trial Court. A party which has failed in its claim before a trial Judge can in appeal seek a judgment of reversal and in consequence, the passing of a decree in terms of the claim in the suit. The Court to which an arbitration petition challenging the award under section 34 lies does not pass an order decreeing the claim. Where an arbitral claim has been rejected by the Arbitral Tribunal, the Court under section 34 may either dismiss the objection to the Arbitral award or in the exercise of its jurisdiction set aside the Arbitral award. The setting aside of an Arbitral award rejecting a claim does not result in the claim which was rejected by the Arbitrator being decreed as a result of the judgment of the Court in a petition under section 34. To hold that a petition under section 9 would be maintainable after the passing of an Arbitral award at the behest of DIPL whose claim has been rejected would result in a perversion of the object and purpose underlying section 9 of the Arbitration and Conciliation Act, 1996. DILP's application under section 9, if allowed, would result in the grant of interim specific performance of a contract in the teeth of the findings recorded in the Arbitral award. The interference by the Court at this stage to grant what in essence is a plea for a mandatory order for interim specific performance will negate the sanctity and efficacy of arbitration as a form of alternate disputes redressal. What such a litigating party cannot possibly obtain even upon completion of the proceedings under section 34, it cannot possibly secure in a petition under section 9 after the

> award. The object and purpose of section 9 is to provide an interim measure that would protect the subject-matter of the Arbitral proceedings whether before or during the continuance of the Arbitral proceedings and even thereafter upon conclusion of the proceedings until the award is enforced. Once the award has been made and a claim has been rejected as in the present case, even a successful challenge to the award under section 34 does not result an order decreeing the claim. In this view of the matter, there could be no occasion to take recourse to section 9. Enforcement for the purpose of section 36 as a decree of the Court is at the behest of a person who seeks to enforce the award.

11. The above judgment of the Division Bench of this Court has been followed with approval by the Division Bench of Delhi High Court in "***Nussli Switzerland Ltd. Vs. Organizing Committee Commonwealth Games,2010***"(supra). The facts in the said case were quite similar to the facts in hand, where the arbitral tribunal had discharged the bank guarantees and had required the guarantee bond to be returned by the respondent therein. The interim prayer of the respondent therein was to seek a direction against the appellant to extend the validity of the bank guarantee, till the conclusion of the proceedings which the respondent would initiate under Section 34 of the Act. In repelling the said contention and following with approval the decision of the Division Bench of this court in "***Dirk India Pvt.Ltd."*** (supra) the Court in paragraph 32 to 34 observed thus:-

> 32. Guided as aforesaid, we agree that the reasoning by the Division Bench of the Bombay High Court is correct and thus we adopt the same as our reasoning.

> 33. The criticism of the view taken in Dirk's case (supra) by the learned counsel for the respondent, premised on Article 9 of the UNCITRAL Model Law which reads : 'Arbitral agreement an interim measures by Court. It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a Court an interim measure or protection and for a Court to grant such measure.' is noted by us and rejected for the reason the legislative intent in India to confer power on a Court post award by way of an interim measure does not mean that the legislative intent was to vest an all embracing, all pervading power in favour of any party, irrespective of it being the loosing party.
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> 34. A party like the Organizing Committee which has its claims rejected, except a part, but which subsumes into the larger amount awarded in favour of the opposite party, even if succeeds in the objections to the award would at best have the award set aside for the reason the Arbitration and Conciliation Act, 1996 as distinct from the power of the Court under the Arbitration Act, 1940, does not empower the Court to modify an award. If a claim which has been rejected by an Arbitral Tribunal is found to be faulty, the Court seized of the objections under Section 34 of the Arbitration and Conciliation Act, 1996 has to set aside the award and leave the matter at that. It would be open to the party concerned to commence fresh proceedings (including arbitration) and for this view one may for purposes of convenience refer to sub-Section (4) of Section 43 of the Arbitration and Conciliation Act, 1996. ………"

12. We are in complete agreement with the position in law as laid down in the aforesaid decisions. As clearly seen from the award in question, in our opinion, the appellant was not entitled to seek a relief of extension of bank guarantee, the award of the arbitral tribunal, being against the appellant to make payment of amount of US$ 5,127,915.40 and the interest thereon at 14% per annum from the award till full payment to the claimants. Even otherwise in view of the foregoing

reasons, we find ourselves in agreement with Mr.Kevic Setalwad, learned Senior Counsel for the respondent, that the appeal itself is not maintainable under Section 37 of the Act. An appeal under Section 37 would be maintainable against orders as referred to in sub clause (a), (b) and (c) of sub-section (1) of Section 37 namely against an order refusing to refer the parties to arbitration under Section 8; against an order granting or refusing to grant any measure under Section 9, against an order setting aside or refusing to set aside an arbitral award under Section 34.

13. For the above reasons, in our opinion, the learned Single Judge is correct in making the observations as made in paragraph 2 of the impugned order as noted by us above, that the appellant in the facts of the case would not be entitled for a relief of extension of bank guarantees.

14. Resultantly we find no merit in the appeal. It is accordingly rejected. No costs.

(G.S.KULKARNI, J.) ***(NARESH H.PATIL, J.)***