sg

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION (L) NO.471 OF 2018

Oil And Natural Gas Corporation Limited ...Petitioner
vs
Consortium of Sime Darby Engineering
Sdn. Bhd And Anr. ...Respondents

.....

Mr. Zubin Behramkamdin, a/w. Mr. Nishit Dhruva, Ms. Khushbu Chhajed, Mr. Rohan Agrawal, i/b. MDP & Partners, for the Petitioner.

Mr. Gaurav Panchnanda, Senior Advocate, a/w. Ms. Renu Gupta, Ms. Sushma Nagaraj, Ms. Kinjal Patel, Ms. Eshna Kumar and Mr. Devashish Tiwari, I/b. Converse Law LLP, for the Respondents.

......

CORAM : S.C. GUPTE, J.

DATED: 27 APTIL, 2018

P.C. :

. Heard learned Counsel for the parties. This application is made under Section 9 of the Arbitration and Conciliation Act, 1996 post award.

2. It is the Petitioner's case that the arbitration reference, which was decided in terms of the impugned award, contains claims and counter-claims of both parties, i.e. the Petitioner and the Respondents herein. It is submitted that the Petitioner herein had filed counter-claims, which included not only claims for liquidated damages on account of the Respondents' delay in completing the project, but also for breach of performance of the contract by the Respondents. It is submitted

that for liquidated damages and for performance, separate bank guarantees were issued by the Respondents to the Petitioner. It is submitted that though the Petitioner's case on liquidated damages generally has been disallowed by the arbitral tribunal, a part of the claim of liquidated damages together with various other counter-claims of the Petitioner arising out of the performance of the contract has been allowed. It is submitted that the impugned award holds the Petitioner to be entitled to a total amount of USD 15,665,064.80, whilst the Respondents' claims awarded by the arbitral tribunal add up to USD 20,792,980.20. It is submitted that, on this basis, the net amount of USD 5,127,915.40 (INR 333724734.00) in full and final settlement of the rival claims arising from the contract has been awarded to the Respondents herein. It is submitted that the Petitioner has come in a challenge to the award under Section 34 of the Act. The Respondents have not challenged the award, though the time to challenge the award is still subsisting. In the premises, it is submitted that by an order under Section 9 of the Act, this Court must protect the Petitioner's interest by directing the Respondents to extend the performance bank guarantee, which is due to expire on 30 April 2018 and keep the same alive till the hearing and final disposal of the Petitioner's challenge under Section 34, i.e. Arbitration Petition (L) No.327 of 2018.

3. Originally, when the arbitration petition challenging the impugned award, i.e. Arbitration Petition (L) No.327 of 2018, was filed, an application was moved by way of notice of motion before the arbitration court. The Court, vide order dated 27 March 2018, observed that since the claim of the Petitioner was partly rejected and the award

was against the Petitioner herein, a prayer seeking direction against the Respondents to extend the bank guarantee could not be granted by the Court. Ad-interim relief was, accordingly, rejected so far as the extension of bank guarantee was concerned. Learned Counsel for the Petitioner submits that this order was restricted to the bank guarantee furnished by the Respondents towards liquidated damages and did not cover the bank guarantee given towards performance by the Respondents. It is pertinent to note in this behalf that the original notice of motion preferred in Arbitration Petition (L) No.327 of 2018 claimed reliefs in respect of both bank guarantees. Though ad-interim order of the learned Single Judge expressly refers to the bank guarantee furnished against the claim of liquidated damages, this question was squarely raised by the Petitioner herein before the appeal Court in a challenge to the ad-interim order of the learned Single Judge on the notice of motion. It was in terms argued before the Division Bench that the Appellant was entitled to the relief of extension of bank guarantees including the performance guarantee inasmuch as the arbitration tribunal had awarded in favour of the Petitioners herein an amount of USD 15,665,064.80 against the Respondent. It was submitted that the present petition challenged the award of USD 20,792,980.20 made by the arbitral tribunal in favour of the Respondents, holding the net amount of USD 5,127,915.40 as payable by the Petitioner to the Respondents, and if the Petitioner succeeded in its petition, then necessarily the bank guarantee in question would become relevant qua the execution of the award of USD 15,665,064.80 granted in favour of the Petitioner. It is on this express footing, which is the only basis on which the present application is made, that the appeal court was called upon to grant the prayer renewal of "bank guarantees". This plea having been rejected by the Court, it would be impermissible for the Petitioner herein to once again come before the Court by way of a separate application and seek the same ad-interim relief, which was refused by the Division Bench in the abovementioned appeal.

4. Learned Counsel for the Petitioner submits that the relief was refused by the Division Bench in the appeal on an express footing that the original application before the learned Single Judge could not be treated as an application under Section 9 of the Act. It is submitted that the Division Bench treated the application as an application under Section 36(2) of the Act. It is submitted that the Petitioner, in the premises, can come up with a specific application under Section 9 of the Act for the relief denied to it by the Division Bench under Section 36(2) of the Act. There is no substance in this submission. Whatever the learned Single Judge did and the Division Bench upheld in a challenge from his order was done on the basis of the law declared by this Court in the case of **Dirk India Private Limited vs. Maharashtra State Electricity Generation Company Limited**[1]. That was a case expressly under Section 9 of the Act and at the stage of a challenge under Section 34 of the Act to an award. The award was against the Appellant before the Court. The Appellant before the Court was asking for a relief under Section 9 of the Act in its challenge to the award. The Division Bench held that there was no warrant for allowing such application. The object and purpose of Section 9 was to provide an interim measure that would protect the subject matter of arbitral proceedings whether before or

1 2013(7) Bom.C.R. 493

during the continuance of the arbitration proceedings or, even thereafter, upon conclusion of the proceedings until the award was enforced. The Division Bench held that once the award had been made and a claim had been rejected, as in the present case, even a successful challenge to the award under Section 34 would not result in an order decreeing the claim and, in the premises, in such a case there would be no occasion to take recourse to Section 9. Today, it is the Respondents, who may alone enforce the award. Insofar the Petitioner is concerned, it is the judgment debtor before the Court and as a judgment debtor, under the law stated by this Court in **Dirk India**, it cannot possibly apply for interim relief in aid of what it lost before the arbitral tribunal.

5. Learned Counsel for the Petitioner thereupon submits that this is so in a case, where the challenger to the award is a loosing party. It is submitted that here the Petitioner is not exactly the loosing party; even some of the Petitioner's counter claims have in fact been allowed by the arbitral tribunal and it is after taking into account the net effect of the awarded rival claims and counter claims that the arbitral tribunal has worked out the differential amount due and payable by the Petitioner to the Respondents. I am afraid even in a case where there have been claims and counter claims and a final declaration of the amount payable by one party to the other after netting of them as part of the award, the unsuccessful party cannot apply for interim relief in aid of its challenge to the award. Even in a case where there are claims and counter-claims by the parties, and the arbitrator awards a net amount payable by one party to the other after adjustment of accounts, the award is one composite award, which awards the successful party's claim on the basis

of such netting. There is on record in such a case one award for the net amount found due in favour of the successful party. The Petitioner as an unsuccessful party in that case can always come to the Court under Section 36 of the Act to restrain enforcement of the award passed by the arbitral tribunal against it. It is impermissible for him to apply for interim relief under Section 9 requiring the successful party to do something to protect his own claims, which have been considered for arriving at the net figure.

6. Learned Counsel for the Petitioner relies on the judgment of the Full Bench of this court in the case of **R.S. Jiwani vs. Ircon International Ltd.**[2] and submits that the doctrine of severability can be applied to the various parts of the impugned award, since these parts which deals with the claims of the Petitioner and the Respondent separately are severable. In **Ircon International Ltd.,** the Full Bench was dealing with an order of a learned Single Judge of our court in a challenge petition concerning an award. The learned Judge found eleven out of fifteen claims allowed by the arbitrator as sustainable and yet relying on a Division Bench judgment of this court in the case of **Pushpa P. Mulchandani vs. Admiral Radhakrishin Tahiliani**[3]**,** the learned Judge set aside the entire award holding that under the law stated by the Division Bench in **Pushpa Mulchanani,** the 1996 Act reserved the power to set aside a part of the award unto the court only in one contingency, which is to be found in Section 34(2)(iv) of the Act, namely, where (i) the arbitral award deals with a dispute not contemplated by or falling within the terms of the submission to arbitration or contains a decision

2 2010(1) Mh.L.J. 547
3 2008(7) LJ Soft, 161

on a matter beyond the scope of the submission and (ii) such part can be separated from the decision on matters submitted to arbitration. The Full Bench held that the effective and expeditious disposal by recourse to the provisions of 1996 Act would be frustrated if the entire award is required to be set aside if only a part of the award is vitiated. The Full Bench held that what was stated by the Division Bench in the case of **Pushpa Mulchandani** was not the correct exposition of law. The Full Bench held that the judicial discretion vested in the court under the provisions of Section 34 of the Act takes within its ambit power to set aside an award partly or wholly depending on the facts and circumstances of a given case. Relying on this decision, it is submitted by learned Counsel that to the extent the award deals with individual claims and counter-claims, respective parts of the award dealing within such claims and counter claims should be treated as severable and if the Petitioner succeeds in its challenge to those parts of the impugned award which grant the Respondents' claims, whilst sustaining the counter claims awarded in favour of the Petitioner, the award would result in a net plus in favour of the Petitioner. It is submitted that in that case, the Petitioner is entitled to apply for securing such net plus by a bank guarantee.

7. The Supreme Court, in the case of **National Buildings Construction Corporation Ltd. Vs. Lloyds Insulation India Ltd**[4]., was concerned with a similar award where there were claims and counter-claims made by the parties before the arbitrator. By his award, the arbitrator held a net amount of Rs.4,11,756 as due and payable by the appellant to the respondent. That was after deducting a sum of Rs.9,85,316 (held as payable by the respondent to the appellant) from

4 (2005) 2 Supreme Court Cases 367

the sum of Rs.13,97,072 (held as payable by the appellant to the respondent). In his execution application, the respondent contended that since he alone had challenged the award (allowing the appellant's claim in the sum of Rs.9,85,316 against him), it was open to him to execute the award of Rs.13,97,072 in his favour. His contention was that there were in fact two awards : one which allowed the respondent's claim upto Rs.13,97,072 and the second which allowed the appellant's counter-claim of Rs.9,85,316; since there was no challenge by the appellant to the first award, the respondent could execute the entire award of Rs.13,97,072 in his favour. The Supreme Court held that the award before it clearly stated that after adjustment of accounts, the only amount payable by the appellant to the respondent was Rs.4,11,756; how the arbitrator arrived at this figure was not for the court to see. For the purposes of Section 36 of the Act, the court cannot be called upon to go behind the awarded amount and deal with the processes by which the amount was arrived at. The court observed that there was no record only one award for the amount of Rs.4,11,756; and since it was challenged under Section 34, it was unexecutable. This statement of law applies even to the facts of our case. It may be that the two figures of USD 20,792,980.20 and USD 15,665,064.80 respectively payable by the petitioner and the respondents to each other have been considered to arrive at the net payable amount of Rs.4,11,756 by the petitioner to the respondents, but that does not mean that there are two separate awards, one in favour of the Petitioner and the other in favour of the Respondents. There is only one award and that is the award of USD 5,127,915.40 in favour of the Respondents. No doubt the figures of USD 20,792,980.20 and USD 15,665,064.80 are matters considered by the arbitrator to arrive at this net figure. But these matters pertain to the process by which the arbitrator made the award. This court cannot go behind the awarded amount and look into this process for the purpose of applying the law of **Dirk India**. The Full Bench decision of our court on severability in the case of **Ircon International Ltd**. (supra) was in a different context. There the arbitrator had awarded fifteen claims, eleven of which were found to be sustainable by the court. These eleven claims could have been upheld, since these were severable from the four others which were found to be unsustainable. Entirely different considerations would apply when claims and counterclaims are considered whilst arriving at a net figure payable by one party to the other. The severability principle cannot be extended in a manner so as to convert an award in favour one party (by the process of netting of claims and conterclaims) into an award in favour of the other party (by arriving at different figures of claims and counterclaims and netting them accordingly differently). That would be making of an altogether new award which is not permissible to a court hearing a challenge to the award. The court is not expected to do that and since that is not likely to be the result of the current challenge under Section 34, the law of **Dirk India** would make it impermissible to create a security for such result.

8. In the premises, there is no merit in the application. The commercial arbitration petition is, accordingly, rejected.

(S.C. GUPTE, J.)