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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 1st March, 2018

+ ARB. A. (COMM.) 8/2018

SHREE TIRUPATHI UDYOG

..... Appellant

Through: Mr.Raman Kapoor, Sr. Adv. with
Mr.Neeraj Gupta, Adv.

versus

INDRAPRASTHA GAS LIMITED

..... Respondent

Through: Mr.Saurav Agrawal, Mr.Aditya
Singhal, Ms.Meera Murali &
Mr.Satyawan Shekhawat, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

IA No. 2999/2018 (Exemption)

Allowed, subject to all just exceptions.

IA No. 3000/2018 & ARB. A. (COMM.) 8/2018

1. This appeal has been filed by the Appellant under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the order dated 19.01.2018 and the reasons thereof communicated by Sole Arbitrator vide e-mail dated 20.01.2018, passed by the Sole Arbitrator by which the Arbitrator has dismissed the application of the appellant seeking stay of the arbitral proceedings till the final disposal of the arbitration proceedings between the respondent and one M/s Swastik Aluminum, which is pending before another Arbitrator and the criminal

investigation that has been lodged against the petitioner vide FIR no. 1426 dated 05.12.214.

2. The Arbitrator by his Impugned Order has dismissed the above application on the grounds that were communicated to the parties vide e-mail dated 20.01.2018.

3. The Arbitrator in his order records that an earlier application seeking stay of the proceedings on the ground that another arbitration proceeding is pending between the respondent and M/s Swastik Aluminium had been dismissed by the earlier Arbitrator on 29.01.2016 and the present application had been filed by the appellant belatedly and only to stall the arbitration proceedings that were pending between the parties before the Sole Arbitrator.

4. At the outset, it is to be noted that the present appeal has been filed under Section 37(2)(b) of the Act, which grants a right to a party to an arbitration to challenge the order of an Arbitrator granting or refusing to grant an interim measure under Section 17 of the Act. The application filed before the Arbitrator did not seek any interim measure as contemplated under Section 17 of the Act.

Section 17 of the Act prior to its amendment by way of Arbitration and Conciliation (Amendment) Act, 2015 is reproduced herein under:-

*“17. Interim measures ordered by the arbitral tribunal.- (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.
(2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered*

under sub-section (1).”

5. Section 17 of the Act after the amendment is also reproduced herein under:-

“17. Interim measures ordered by arbitral tribunal – (1) A party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to the arbitral tribunal-
(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or
(ii) for an interim measure of protection in respect of any of the following matters, namely:-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient,

And the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

(2) Subject to any orders passed in an appeal under Section 37,

any order issued by the arbitral tribunal under this section shall be deemed to be an order of the court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the Court.”

6. A reading of the Section 17 of the Act will clearly show that the interim measure provided for in Section 17 of the Act relates to the protection of the property or the amount in dispute in the arbitration proceedings and not to the arbitration proceedings itself. In fact, there is no provision in the Act which provides for the stay of the arbitration proceedings upon its commencement.

7. In relation to Section 9 of the Act, Supreme Court in ***Bhatia International v. Bulk Trading S.A. and Anr.*** (2002) 4 SCC 105, has held as under:-

“29. We see no substance in the submission that there would be unnecessary interference by courts in arbitral proceedings. Section 5 provides that no judicial authority shall intervene except where so provided. Section 9 does not permit any or all applications. It only permits applications for interim measures mentioned in clauses (i) and (ii) thereof. Thus there cannot be applications under Section 9 for stay of arbitral proceedings or to challenge the existence or validity of the arbitration agreements or the jurisdiction of the Arbitral Tribunal. All such challenges would have to be made before the Arbitral Tribunal under the said Act.”

8. The above judgment was followed by this Court in ***National Highways Authority of India v. Bel-Acc Joint Venture*** (2009 SCC Online Del 3498) wherein this Court reiterated as under:-

“9. I may at this stage refer to the decision of the Supreme Court in the case of Bhatia International v. Bulk Trading S.A.,

(2002) 4 SCC 105 : AIR 2002 SC 1432 : 2002 (1) Arb. LR 675 (SC), where the Supreme Court has held that Section 9 of the Act does not allow every type of application and only that application can be filed as envisaged under Section 9 for interim measures or a direction with respect to the substantive arbitration proceedings. The Supreme Court referred to Section 5 to state that judicial authorities shall not intervene except where so provided. It is clearly laid down in the judgment that Section 9 does not permit filing of an application for stay of arbitral proceedings or challenge to the existence or validity of arbitration agreements or the jurisdiction of the arbitral tribunal. Accordingly, in view of the above, without expressing any opinion as to whether such application is or is not maintainable in the subsequent arbitration proceedings or otherwise, whether under Section 10, CPC or by initiation of any substantive proceedings, I dismiss this application as not maintainable which has been filed in a proceeding under Section 34 of the Act with respect to an earlier award dated 31.01.2009, The application is dismissed with costs which are quantified at Rs. 50,000 to be deposited in the Delhi High Court Legal Services Authority, as no notice has been issued to the petitioner. The costs be deposited within a period of two weeks from today, failing which it will carry further interest at 18% per annum.”

9. Therefore, the application filed by the petitioner before the Arbitrator was clearly not maintainable under Section 17 of the Act and has been rightly dismissed.

10. In view of the above, in my opinion, the present appeal is clearly not maintainable and is liable to be dismissed as such.

11. Even on merits, it is noted that the disputes between the parties are in relation to the Gas Sales Agreement dated 22.03.2011 and 01.11.2014. The said agreement contains an Arbitration Agreement between the parties. The arbitration proceedings between the parties

commenced prior to 12.03.2015 when the earlier Arbitrator was appointed by the respondent in terms of the Arbitration Agreement between the parties. The appellant filed an application before the earlier appointed Arbitrator seeking stay of the arbitration proceedings on the ground that the above referred FIR raised same allegations against the appellant. This application was dismissed by the earlier Arbitrator vide order dated 29.01.2016. The said Arbitrator thereafter, resigned on 02.11.2016 resulting in the appointment of the present Arbitrator on 19.12.2016. The proceedings continued before the newly appointed Arbitrator and the same were fixed for cross-examination of the respondent(s) witnesses on 19.01.2018, when the application which has resulted in the Impugned Order was filed by the appellant.

12. The primary contention in the application was that the arbitration proceedings should be stayed as there is another arbitration proceedings pending between the respondent and M/s Swastik Aluminium arising out of the same cause of action and there is a likelihood of conflict of decisions in the two arbitration proceedings. The learned senior counsel for the appellant, however, contends that this was not the primary contention for seeking a stay of the arbitration proceedings and the ground for seeking stay was the pendency of the criminal investigation. He submits that even the issues that have been framed by the Arbitrator on 31.10.2017 showed that the criminal trial would involve the same issues. In fact, two witnesses that have been listed in the Criminal Trial are the same who were sought to be produced by the respondent in the arbitration

proceedings. The learned senior counsel for the appellant places reliance on the judgment of the Supreme Court in *A. Ayyasamy vs. A. Paramasivam & Ors.* (2016) 10 SCC 386 to contend that the disputes relating to the rights and liabilities which give rise to or arise out of criminal offence are non-arbitral. He further places reliance on the judgment of the Supreme Court in *M.S. Sheriff vs. The State of Madras and Others* AIR 1954 SC 397, that as between the civil and the criminal proceedings, criminal matters should be given precedence.

13. On being enquired as to why the application was filed at this belated stage, the learned counsel for the appellant submits that as the issues were framed in the present arbitration proceedings on 31.10.2017 and in the other two arbitration proceedings that are pending between the respondent and M/s Swastik Aluminium and M/s Ideal Udyog, only on 15.12.2012, wherein similar issues have been framed, and all the three parties are also mentioned in the FIR, the present application was filed upon framing of the said issues in the other two arbitration proceedings. It is strange that on the one side the appellant is contending that the primary ground for moving the application before the Arbitrator was not the pendency of the other two proceedings, however, on the other hand, it is wanting to rely on the order in the other two proceedings to justify the delay in moving the application. This clearly shows that the application was filed by the appellant only to somehow put spokes in the early adjudication of the disputes by the arbitrator.

14. As noted above, the arbitration proceedings are pending since

March, 2015. Till date there is no application filed by the appellant under Section 16 of the Arbitration and Conciliation Act, 1996 before the Arbitrator. The reasons for the same are obvious, as the rights claimed by the respondent in the arbitral proceedings flow out of the agreement between the parties. Merely because there may be some criminal offence also committed or alleged against the appellant, the same cannot be a bar on the respondent claiming its civil remedies under the contract that has been executed between the parties

15. In *A. Ayyasamy (Supra)*, Supreme Court held that where allegations of fraud etc. are raised, the focus of the Court has to be on the question as to whether jurisdiction of the Court has been ousted instead of focussing as to whether the Court has jurisdiction or not. It has to be kept in mind that insofar as the statutory scheme of the Act is concerned, it does not specifically exclude any category of cases as non-arbitrable. Paragraphs 25, 43, 45.2 and 53, are very instructive in this regard and are reproduced herein below:-

“25. In view of our aforesaid discussions, we are of the opinion that mere allegation of fraud simpliciter may not be a ground to nullify the effect of arbitration agreement between the parties. It is only in those cases where the court, while dealing with Section 8 of the Act, finds that there are very serious allegations of fraud which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by the civil court on the appreciation of the voluminous evidence that needs to be produced, the court can sidetrack the agreement by dismissing the application under Section 8 and proceed with the suit on merits. It can be so done also in those cases where there are serious allegations of forgery/fabrication of documents in support of the plea of fraud

or where fraud is alleged against the arbitration provision itself or is of such a nature that permeates the entire contract, including the agreement to arbitrate, meaning thereby in those cases where fraud goes to the validity of the contract itself of the entire contract which contains the arbitration clause or the validity of the arbitration clause itself. Reverse position thereof would be that where there are simple allegations of fraud touching upon the internal affairs of the party inter se and it has no implication in the public domain, the arbitration clause need not be avoided and the parties can be relegated to arbitration. While dealing with such an issue in an application under Section 8 of the Act, the focus of the court has to be on the question as to whether jurisdiction of the Court has been ousted instead of focusing on the issue as to whether the court has jurisdiction or not. It has to be kept in mind that insofar as the statutory scheme of the Act is concerned, it does not specifically exclude any category of cases as non-arbitrable. Such categories of non-arbitrable subjects are carved out by the courts, keeping in mind the principle of common law that certain disputes which are of public nature, etc. are not capable of adjudication and settlement by arbitration and for resolution of such disputes, courts i.e. public fora, are better suited than a private forum of arbitration. Therefore, the inquiry of the Court, while dealing with an application under Section 8 of the Act, should be on the aforesaid aspect viz. whether the nature of dispute is such that it cannot be referred to arbitration, even if there is an arbitration agreement between the parties. When the case of fraud is set up by one of the parties and on that basis that party wants to wriggle out of that arbitration agreement, a strict and meticulous inquiry into the allegations of fraud is needed and only when the Court is satisfied that the allegations are of serious and complicated nature that it would be more appropriate for the Court to deal with the subject-matter rather than relegating the parties to arbitration, then alone such an application under Section 8 should be rejected.

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43. Hence, the allegations of criminal wrongdoing or of

statutory violation would not detract from the jurisdiction of the Arbitral Tribunal to resolve a dispute arising out of a civil or contractual relationship on the basis of the jurisdiction conferred by the arbitration agreement.

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45. The position that emerges both before and after the decision in N. Radhakrishnan is that successive decisions of this Court have given effect to the binding precept incorporated in Section 8. Once there is an arbitration agreement between the parties, a judicial authority before whom an action is brought covering the subject-matter of the arbitration agreement is under a positive obligation to refer parties to arbitration by enforcing the terms of the contract. There is no element of discretion left in the court or judicial authority to obviate the legislative mandate of compelling parties to seek recourse to arbitration. The judgment in N. Radhakrishnan has, however, been utilised by parties seeking a convenient ruse to avoid arbitration to raise a defence of fraud:

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45.2 Allegations of fraud are not alien to ordinary civil courts. Generations of judges have dealt with such allegations in the context of civil and commercial disputes. If an allegation of fraud can be adjudicated upon in the course of a trial before an ordinary civil court, there is no reason or justification to exclude such disputes from the ambit and purview of a claim in arbitration. The parties who enter into commercial dealings and agree to a resolution of disputes by an arbitral forum exercise an option and express a choice of a preferred mode for the resolution of their disputes. The parties in choosing arbitration place priority upon the speed, flexibility and expertise inherent in arbitral adjudication. Once parties have agreed to refer disputes to arbitration, the court must plainly discourage and discountenance litigative strategies designed to avoid recourse to arbitration. Any other approach would seriously place in uncertainty the institutional efficacy of arbitration. Such a consequence must be eschewed.

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53. The Arbitration and Conciliation Act, 1996, should in my view be interpreted so as to bring in line the principles underlying its interpretation in a manner that is consistent with prevailing approaches in the common law world. Jurisprudence in India must evolve towards strengthening the institutional efficacy of arbitration. Deference to a forum chosen by parties as a complete remedy for resolving all their claims is but part of that evolution. Minimising the intervention of courts is again a recognition of the same principle.”

16. In view of the above, I find no merit in the present appeal and the same is accordingly dismissed, with no orders as to costs.

NAVIN CHAWLA, J

MARCH 01, 2018/rv