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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 10th December, 2018

+ **FAO(OS) (COMM) 268/2018**

M/S CHANDOK MACHINERIES

..... Appellant

Through: Mr.Avi Singh, Advocate

versus

M/S S.N. SUNDERSON & CO.

..... Respondent

Through: Mr.Jayant K.Mehta, Mr.Pulkit
Agarwal and Mr.Rahul Kukreja,
Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J.

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CAV No.1070/2018

Since learned counsel for the caveator has put in appearance, the caveat stands discharged.

FAO(OS)(COMM) 268/2018 with CM Nos.48573-74/2018

1. This appeal is directed against a judgment dated 28.08.2018 passed by a learned Single Judge, whereby the appellant's petition under Section 34 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as the "Act"] has been dismissed. By the said petition, the appellant had sought setting aside of an award dated 12.06.2017, passed by a three-

member Arbitral Tribunal [hereinafter referred to as “the Tribunal”] in respect of disputes which arose between the parties.

Facts

2. The facts necessary for adjudication of this appeal are these: The parties entered into two sets of Memorandums of Understanding [hereinafter referred to as “MOU”] in respect of work to be carried out at two mines in Katni District in the State of Madhya Pradesh. By two MOUs dated 04.09.2012, one for services and the other for re-imbusement of expenses [hereinafter collectively referred to as “the first MOU”] the parties agreed to carry out de-watering, excavation, crushing and transportation of lime stone/dolomite extracted at the said mines. It is the appellant's case that it began to work on one of the mines [Ahmeta Mine] and lump sum payments were made by the respondent to it from time to time. On 31.08.2014, following a change in the management of the respondent, the parties agreed to settle their accounts for the work already done and to carry on further work under fresh agreements to be executed on 01.09.2014. Consequently, two MOUs were executed on 01.09.2014 [hereinafter collectively referred to as “the second MOU”] whereunder the appellant was entrusted with the task of crushing, gitti breaking, transportation, loading and related works at both the mines, for a term of 18 months i.e. until 29.02.2016. The respondent sought to terminate the second MOU dated 01.09.2014 by a letter dated 15.12.2014, which gave rise to the disputes between the parties.

3. Both the first and the second MOU contained arbitration clauses. The litigation between the parties commenced with the appellant filing a petition

under Section 9 of the Act before the District Court at Katni District, Madhya Pradesh. The said Court disposed of the petition holding that the appropriate forum for relief, was the courts in Delhi as the seat of the proposed arbitration was Delhi. Although this order was challenged before the Madhya Pradesh High Court, that appeal was rendered infructuous, as the appellant had in the meanwhile filed OMP No.99/2015 in this Court. In that petition, directions were given for quantifying/measuring the materials extracted by the appellant, both crushed and uncrushed, and for removal of its machines. The appellant invoked arbitration by a notice dated 27.12.2014. The final constitution of the Tribunal took place on 27.11.2015 when this Court appointed Hon'ble Mr. Justice Anil Kumar, a former Judge of this Court, as the presiding Arbitrator, in addition to the arbitrators nominated by the parties. Although claims and counterclaims were filed before the Tribunal by the appellant and respondent herein respectively, the Tribunal ultimately adjudicated only the counterclaims as the appellant did not deposit the fees fixed by the Tribunal in respect of the claims sought to be urged by it.

4. The Tribunal's proceedings culminated in an award which bears the date 12.06.2017, just prior to the date on which the mandate of the Tribunal would have terminated under Section 29A of the Act i.e. 13.06.2017. It is undisputed that on 12.06.2017 the award was in fact signed by two of the three arbitrators. The third arbitrator signed the award only on 28.06.2017. By a subsequent order dated 05.08.2017, while disposing of an application filed by the respondent under Section 33(1)(a) of the Act, the Arbitral Tribunal has given the reason for the later signing of the award by the third arbitrator.

5. The appellant approached this Court under Section 34 of the Act for setting aside of the award. It appears from the impugned judgment of the learned Single Judge that the appellant urged the following principal grounds:

- a. That the mandate of the Tribunal having terminated on 13.06.2017, the award which was signed by the third arbitrator on 28.06.2017 and dispatched to the parties on 07.07.2017 was *non est*.
- b. That the award ought to be set aside on the ground that the fees fixed by the Tribunal were exorbitant and in excess of the fees prescribed in the Fourth Schedule to the Act.
- c. That the claims granted by the Tribunal were beyond the terms of reference as the Tribunal had considered claims for the period prior to 01.09.2014, when the second MOU was executed.
- d. That the Arbitral Tribunal has accepted export figures given by the respondent without requiring proof of the same.

6. The learned Single Judge has rejected each of these contentions in the impugned order, which has led the appellant to file the present appeal. In this appeal, arguments were advanced mainly on two issues, viz. (i) making of the award after termination of the Tribunal's mandate, and (ii) the scope of the reference before the Tribunal. In addition, brief submissions were also made on the merits of the award of the Tribunal.

Re: Making of the award after termination of the Tribunal's mandate

7. The resolution of the first of these issues turns on an interpretation of Sections 29, 29A, 31 and 33 of the Act, the relevant provisions of which are set out below:

“29. Decision making by panel of arbitrators.—

(1) Unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members.

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29A. Time limit for arbitral award—*(1) The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.*

Explanation.— For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment.

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(3) The parties may, by consent, extend the period specified in subsection (1) for making award for a further period not exceeding six months.

(4) If the award is not made within the period specified in subsection (1) or the extended period specified under subsection (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:

Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent for each month of such delay.

(5) *The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.*

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31. Form and contents of arbitral award.—(1) *An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.*

(2) *For the purposes of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.*

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(5) *After the arbitral award is made, a signed copy shall be delivered to each party.*

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33. Correction and interpretation of award; additional award.—

(1) *Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties—*

(a) *a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;*

(b) *if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.*

(2) If the arbitral tribunal considers the request made under subsection (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.

(3) The arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.

(4) Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

(5) If the arbitral tribunal considers the request made under subsection (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.

(6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under subsection (2) or sub-section (5).

(7) Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section. ”

8. Mr.Avi Singh, learned counsel for the appellant submitted that Section 31(1) lays down a general rule that an award must be signed by all the members of the Tribunal, and the exception engrafted in Section 31(2) is conditional - in the event of any arbitrator not signing the award, the reasons for the same must be given. It is his contention that such reason must be given at the time of making the award itself, and cannot be

subsequently supplied by the Tribunal. Mr. Jayant Mehta, learned counsel for the respondent, on the other hand, submitted that a procedural defect in the form of an award, which too was subsequently rectified, does not vitiate an award and the parties ought not to be relegated to a fresh round of litigation.

9. As far as the substantive decisions of an arbitral tribunal are concerned, Section 29(1) of the Act clearly provides that an award made by a majority of the members prevails. Although Section 31(1) requires the award to be signed by the members of the tribunal, Section 31(2) provides for a contingency where the award is not signed by all the members of the of the tribunal, but a majority thereof. The purpose, in our view, is to ensure that the absence of a minority of the members of the tribunal, for whatever reason, does not necessitate a fresh round of litigation; if a majority of the tribunal [whose decision would, in any event, prevail by virtue of Section 29(1)] is available to sign the award, that is regarded as sufficient. A learned Single Judge of the Bombay High Court held in *Moti vs. Sheroo* (2009) 6 Maharashtra Law Journal 535 (paragraph 16) as follows:

“Where an award has been signed by a majority of the arbitral Tribunal that award constitutes in fact and in law an award of the arbitral Tribunal. The omission of one of the Arbitrators to sign the award, or for that matter, to deliver his or her award would not affect the legitimacy or validity of the award of the majority. Nor for that matter does the fact that one of the Arbitrators has delivered a dissenting award affect the validity of the award of the majority. The Act now places the matter beyond doubt by providing that what is required in law for a valid award is an award of the majority constituting an arbitral tribunal. The reasons for the

omission of the signature of an Arbitrator have to be stated.

The general rule of Section 31(1), and the requirement in Section 31(2) that reasons be given for the absence of the signature of any member of the tribunal, are more in the nature of procedural safeguards to ensure that all members of the tribunal had the opportunity to participate in the decision-making process.

10. In this view of the matter, it is not of great significance that the reasons for the absence of one of the signatures on the award are supplied later, rather than at the time the award is signed by the majority of the tribunal. In general, a procedural irregularity of this nature ought not to vitiate the entire decision-making process, particularly when it is capable of being cured subsequently. The learned Single Judge has, in the impugned judgment, noticed the discussion on the draft arbitration rules before the concerned United Nations Committee, while considering the corresponding clause of the UNCITRAL Model Law, upon which the Act is based:

“16.....The relevant quotation from the discussions of the United Nations Committee as held in the 328th meeting and recorded in the Year Book of the United Nations Commission International Trade Law, 1985, Vol. XVI is reproduced herein below:

“Article 31. Form and contents of award.

Article 31(1)

25. Mr.LAVINA (Philippines) said that the words “provided that the reason for any omitted signature is stated” should be deleted. In his view, whether the reason for an omitted signature was stated or not, the

signatures of the majority of the members of the arbitral tribunal should be sufficient to validate the award. He asked what the position would be if the reason for an omitted signature was not given.

26. The CHAIRMAN said that paragraph (1) represented a compromise between two extreme positions: on the one hand, that the majority of the arbitrators could take any decision they wished; on the other, that all the arbitrators must sign an award. The latter position could lead to difficulties in the event of an arbitrator's death, illness, prolonged absence or refusal to sign. If the reason for an omitted signature was not given, the users of the arbitral award should request the reason from the arbitrators. He noted that a similar provision to paragraph (1) was found in article 32 (4) of the UNCITRAL Arbitration Rules. He suggested that the Commission should retain the existing wording."

This discussion too supports the conclusion that a belated supply of reasons for a missing signature on the award is permissible.

11. We are also unable to accept the appellant's argument that the despatch of the award on 07.07.2017 would be the relevant date for determination of the date of making the award. The requirement of Section 31(5) of the Act – that a signed copy of the award be delivered to each party – expressly arises only *after* the award is made. The date of making the award is to be determined by reference to Sections 31(1) and 31(2), and the date of despatch to the parties is not of any significance for that purpose.

12. In the present case, the third arbitrator has in fact signed the award, *albeit* belatedly. The reason for his inability to sign the award at the same

time as the other two arbitrators has also been disclosed by a subsequent order of the Tribunal, which was passed on an application by the respondent under Section 33(1) of the Act. In our view, these steps are sufficient to cure the original lacuna in the award dated 12.06.2017 and constitute sufficient compliance with Section 31(2) of the Act. We note that a Division Bench of the Andhra Pradesh High Court has reached a similar conclusion in its judgment dated 30.08.2017 in *Superintendent Engineer vs. P.Ramaiah* (2018) 1 Andhra Law Times 39 (DB) (although the reason for the omission of one of the arbitrators' signatures in that case was communicated in advance of the award, and not later). We therefore hold that the award was properly made within the time limit stipulated under the Act, and affirm the findings of the learned Single Judge to this effect.

13. In the impugned judgment, the learned Single Judge has also considered the power of the Court under Section 29A(4) to extend the time limit for making the award and observed that this power can be exercised even on an oral application of one of the parties. In the view we have taken, it is not necessary to examine this issue.

Re: Scope of reference before the Arbitral Tribunal

14. To determine whether the Tribunal has acted beyond the scope of its reference, we note at the outset that both the MOUs contained arbitration clauses, and claims arising out of both agreements were raised by the appellant before the same three-member arbitral tribunal. The appellant contends, however, that the award under challenge was made in respect of disputes arising under the second MOU, and its grievance is that a sum of

Rs.2,27,36,444.88 awarded to the respondent was in respect of an advance given by the respondent to the appellant under the first MOU. The appellant therefore urges that the award, to this extent, be set aside as it is beyond the subject matter of the reference. The respondent's case, on the other hand, is that the reference initiated by the appellant under the first MOU [which was initiated later in point of time] was not maintainable, and the respondent made its counterclaims only in the first reference.

15. The course of the arbitral proceedings, as noticed by the learned Single Judge, demonstrate that the appellant was itself ambivalent about the scope of the respective proceedings. It filed an amendment application in the first reference [arising out of the second MOU], which was allowed by the Tribunal vide order dated 10.06.2016 subject to payment of costs. The appellant thereafter filed an application for review of the order of costs, but this was filed in the second reference [arising out of the first MOU]. The record reveals that the review was dismissed, but the costs remained unpaid, and the amended claim was therefore not considered by the Tribunal. The appellant thereafter filed applications for amendment of the second reference, and for consolidation of the proceedings, which were also dismissed.

16. In this factual background, the Tribunal rejected the objection of the appellant as to the scope of the reference before it, on the ground that the appellant had not challenged the jurisdiction of the Tribunal in respect of the claim in question, either in its pleadings or by way of an application under Section 16 of the Act. The Tribunal found that the pleadings of the appellant in the first reference [arising out of the second MOU] also

referred to transactions that took place prior to 01.09.2014 and that the appellant has maintained a single account in respect of transactions under both the MOUs, which has been debited and credited continuously by the appellant in respect of both the MOUs.

17. In these circumstances, the learned Single Judge has rejected the contentions of the appellant, observing that the appellant's conduct in the proceedings was intended to cause confusion rather than ventilate a genuine grievance. The learned Single Judge has declined to interfere with the finding of the Tribunal based on appreciation of evidence before it, holding that such interference would be beyond the scope of Section 34 of the Act.

18. The appellant's contentions regarding the scope of the reference are, in our view, untenable in view of its own conduct during the arbitral proceedings. As noticed above, the appellant itself failed to maintain a clear distinction between the proceedings arising out of each of the MOUs. It did not challenge the jurisdiction of the Tribunal in respect of the counterclaim in question. On facts, the Tribunal found the transactions under the second MOU to have been accounted for by the parties in continuation of the transactions under the first MOU. The factual findings of the Tribunal are not susceptible to interference under Section 34 of the Act on any of the grounds enumerated therein. We therefore agree with the reasoning and the conclusion of the learned Single Judge and reject the appellant's contention that the award of the Tribunal was beyond the scope of the reference before it.

Merits of the award:

19. Before the learned Single Judge, the appellant had also challenged the award on the ground that export figures given by the respondent had been accepted without formal proof thereof. The learned Single Judge has repelled this challenge on the ground that the Arbitral Tribunal is the final judge of the evidence led before it. In our view, the impugned judgment does not call for interference on this ground. The relevant evidence was discussed in detail by the Tribunal, as extracted in the impugned judgment. The adequacy, materiality and quality of evidence are not matters which the Court can revisit under Section 34 of the Act, as held by the Supreme Court *inter alia* in *Associated Builders vs. Delhi Development Authority* (2015) 3 SCC 49 (paragraph 33).

Conclusion

20. In the facts and the circumstances aforesaid, we are of the opinion that the impugned order of the learned Single Judge, upholding the award, does not call for interference. The appeal is accordingly dismissed.

PRATEEK JALAN, J.

S. RAVINDRA BHAT, J.

DECEMBER 10, 2018

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