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***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION***

ARBITRATION APPEAL (ST.) NO. 3026 OF 2019

with

CIVIL APPLICATION (St.) NO. 3028 OF 2019

and

CIVIL APPLICATION (St.) NO. 3706 OF 2019

and

CIVIL APPLICATION (St.) NO. 6891 OF 2019

(Not on Board)

in

ARBITRATION APPLICATION NO. 2 OF 2016

SMS Limited

... Appellant/Applicant

V/s.

The Director General (RD) & S.C. & Anr.

... Respondents

Mr. M.M. Vashi, Senior Advocate a/w. Ms. Aparna Devkar, Joined
Vashi I/b. M.P. Vashi & Associates for the Appellant/Applicant.

Mr. Sudhir G. Loney for Respondents 1 and 2.

***CORAM : NARESH H. PATIL, C.J. &
N.M. JAMDAR, J.***

DATE : 5 MARCH 2019.

P.C. :-

The Appeal is directed against the judgment and order
dated 19 October 2018 passed by the learned District Judge - I,

Sindhudurg in Arbitration Application No. 2 of 2016. The learned District Judge passed the following order :-

- “(a) Impugned award dated 15 September 2016 is quashed and set aside and the matter is remanded back for rehearing.*
- (b) The Arbitral Tribunal to allow the amendment in statement of defence.*
- (c) The Arbitral Tribunal to give full opportunity to both the parties and pass the award in accordance with law.*
- (d) The parties to take steps.*
- (e) All the points are kept open.*
- (f) No order as to costs.*
- (g) The record and proceeding be sent back.”*

2. The learned Counsel for the Appellant submitted that under the provisions of Section 34 of the Arbitration and Conciliation Act, 1996, the learned Judge has no jurisdiction to remand the matter to the Arbitrator for re-hearing or for a fresh decision. Reliance is placed on the judgment of the Supreme Court in the case of *Kinnari Mullick and Anr. V/w. Ghanshyam Das Damani*¹. Paragraphs 15 and 16 of the said judgment read as under :-

¹ (2018) 11 SCC 328

“15. 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 the Arbitral 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 eliminate the grounds for setting aside the arbitral award. No power has been invested by 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 McDermott International Inc. In para 8 of the said decision, the Court observed thus : (Bhaskar Industrial case SCC OnLine Kar)

“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.”

“16. 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 motu. Moreover, before formally setting aside the award, if the party to the arbitration proceedings fails to request the Court to defer the proceedings 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.”

Reliance is also placed on the order passed by the Supreme Court in *Radha Chemicals v/s. Union of India*² (Civil Appeal No. 10386 of 2018). Paragraphs 5 & 6 of the said order reads as under :-

“5. This Court in a series of judgments culminating in Kinnari Mullick and Anr. V/s. Ghanshyam Das Damani, (2018) 11 SCC 320 held that the Court while deciding a Section 34 Petition has no jurisdiction to remand the matter to the Arbitrator for a fresh decision. It is, therefore, clear that the learned Single Judge's judgment is contrary to this judgment as a result of which both the judgments of the Single Judge as well as the Division Bench have to be set aside.”

“6. We, therefore, set aside both the judgment and relegate the matter to the stage of the original Section 34

petition, which now has to be heard, on its merits in accordance with the parameters laid down by this Court for decision under Section 34 of the Arbitration and Conciliation Act, 1996.”

Reliance is also placed on the order of the Supreme Court in the case of *Aayush Chauhan v/s. Chandigarh Industrial and Tourism Development Corporation Ltd. and Anr.*³. Paragraph 8 of the said order reads as under :-

“8. Indeed, the High Court was right in opining that the District Court could not have remanded the matter to the Arbitrator in view of the decision of this Court in 'Kinnari Mullick & Anr, v/s. Ghanshyam Das Damani' reported in (2018) 11 SCC 328. However, the High Court should have then relegated the parties before the District Court for reconsideration of petition(s) under Section 34 of the Arbitration and Conciliation Act, 1996 to be decided on its own merits in accordance with law. We order accordingly.”

3. The learned Counsel for the Respondents concurs that the proposition of law which is pressed into service by the learned Counsel for the Appellant is reflected in the Judgments cited above.

4. We have perused the impugned judgment and order. We find that the learned District Judge, while quashing the award dated 15 September 2016 has remanded the matter back for rehearing.

³ Civil Appeal No.2376/19

5. In para 43 of the judgment, the learned District Judge observed that it will not be proper to discuss the matter further on merits of the claims. Para 43 of the judgment reads as under :-

“43. The rejection of amendment application, and thereafter the observation of tribunal regarding deemed admission of claims and facts alleged by the claimant cause miscarriage of Justice and which goes into the root of matter. Admittedly, if amendment in statement of defence is allowed the claimant has to prove its case independently without any inference of deemed admission. Therefore, it will not be proper to discuss the matter further on merit of the claims. Therefore, it will be inappropriate to consider the other part of arguments on merits of the claim as well as to refer the citation cited by the both the parties in respect of merits of the claim.”

6. In our considered opinion, the matter needs to be remanded back to the learned District Judge for fresh consideration of the same on merits.

7. Hence, we pass the following order :-

(a) The impugned judgment and order dated 19th October 2018 is quashed and set aside.

(b) The Arbitration Application No.2 of 2016 is restored to the file.

(c) The learned District Judge shall hear the parties and decide the Application under Section 34 of the Arbitration and Conciliation Act, 1996.

(d) The District Judge shall dispose of the Application as expeditiously as possible not later than six months from the date of receipt of the order of this Court.

8. All issues are kept open. It is clarified that we have not expressed any opinion on the rival contentions.

9. For the present, on the issue of the encashment of the bank guarantee, the parties shall not disturb the bank guarantee for the period of four weeks, for any orders in that regard, the parties may apply to the concerned Court.

10. The Arbitration Appeal stands disposed of in the above terms.

11. In view of disposal of the Arbitration Appeal, Civil Application (St.) Nos. 3028 of 2019, 3706 of 2019 and 6891 of 2019 are also stand disposed of.

N.M. JAMDAR, J.

CHIEF JUSTICE