

ORDER SHEET
IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
[Via Video Conference]

AP/103/2021

JAGDISH KISHINCHAND VALECHA
VERSUS
SREI EQUIPMENT FINANCE LIMITED AND ANR.

BEFORE:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

Date : 12th April, 2021 & 13th April, 2021.

Appearance:

Mr. Tilak Kumar Bose, Sr. Adv.

Ms. Urmila Chakraborty, Adv.

Mr. Amit Meharia, Adv.

Ms. Paramita Banerjee, Adv.

Ms. Subika Paul, Adv.

Ms. Ishika Chattopadhyay, Adv.

...for the petitioner

Mr. Raghunath Ghose, Adv.

Ms. Pritha Ghosh, Adv.

...for the respondents

The Court : The point for consideration in the present application under Section 34 of The Arbitration and Conciliation Act, 1996 (The Act) is whether a Court can appoint an Arbitrator different to the one who has passed the impugned award for deciding the dispute between the award-debtor and the award-holder.

The parties before this Court, namely the award-debtor/petitioner and the award-holder agree that a different Arbitrator should be appointed to decide the claim between the parties afresh and that the matter should not be remanded to the same Arbitrator who delivered the Award.

Mr. Tilak Kumar Bose, learned Senior counsel appearing for the petitioner, has challenged the award primarily on the ground that the petitioner was not being given an opportunity to represent himself in the arbitration proceedings. Counsel has pointed to several procedural lapses in the manner in which the arbitration was conducted by the learned Sole Arbitrator. Counsel seeks that the Award dated 5th October, 2020 be set aside primarily on that and other grounds.

The tricky issue is finding the permissible statutory route where the award-holder also expresses discomfort with the Award and wants a different arbitrator to decide the matter afresh.

The provisions of the 1996 Act which would not apply in such a situation should first be pointed out. Since both the parties are agreeable to a different Arbitrator being appointed, Section 11 of the Act would have no manner of application. Section 11 is premised on the condition of parties failing to agree on the choice of Arbitrator whereupon the Court is invited to step in and appoint an Arbitrator or fix the appointment procedure for the parties.

Section 34(4) of the Act applies upon an application being made (usually) by the award-holder and before the award is set aside under Section 34, in which the Court can remand the matter to the Arbitrator who had delivered the award for giving an opportunity to the Arbitrator to eliminate the grounds for setting aside the arbitral award. The word “resume” used in Section 34(4) makes it clear that the Arbitrator who had decided the dispute in the first place would simply take up the proceedings once again for the purpose of dealing with the grounds of challenge to the award. Since Section 34(4)

contemplates resumption of proceedings by the same arbitrator who had passed the Award, this provision would not be relevant to the present application.

The question would then be : what is the course of action to be charted for getting the present Award out of the way and transmitting the dispute to a new Arbitrator? The language used in Section 34 – “*Application for Setting aside Arbitral Award*” – particularly in Section 34(2)(b) is “*if the Court finds that*” and is repeated in Section 34(2A) indicating that the mandate on the Court is to test the award against the available grounds under Section 34 for deciding whether the recourse against the award should fail or succeed. It also means that the arena of decision-making is limited only to whether an award should be set aside or sustained.

Since both the parties before this Court have approached the Court within the framework of a Section 34 application, there must first be an adjudication on the grounds under Section 34 for setting aside the impugned Award.

The essential ground of challenge in this application is breach of the principles of natural justice. Learned counsel appearing for the petitioner submits that the petitioner was not given the opportunity to address the learned Arbitrator. The ground taken is of Section 18 and 34(2)(a)(iii) of the Act. Mr. Raghunath Ghose, learned counsel appearing for the respondent, however, urges that the petitioner had all along participated in the arbitration proceedings and had sufficient opportunity to make its case before the Arbitrator.

Even if this Court were to disregard the aforesaid ground on the objection taken, the ground on the perception of bias needs to be addressed. The

Arbitrator has admittedly acted as arbitrator in other arbitration proceedings instituted at the instance of the respondent award-holder. This Court has also been shown instances where the Arbitrator has been engaged as counsel for the respondent group of companies in several other instances including as consultant for the respondent. The Amendment Act of 2016 precisely sought to address such instances and eliminate all possible apprehension of bias and conflict of interest on the part of the arbitrator by introduction of Section 12 to the 1996 Act. Section 12(1)(a) requires an Arbitrator to disclose in writing any direct or indirect relationship with or interest in any of the parties or the subject-matter in dispute. The fine print in this regard has been codified in the Seventh Schedule to the Act, clauses 2 and 3 of which take into account an Arbitrator's relationship with the parties to the arbitration. Read together, the fundamental objective is to ensure that the arbitrator is impartial and independent. The facts in the present case fall directly within the safeguards introduced in Section 12 read with the Seventh Schedule and the impugned award is thus liable to be set aside on this ground alone.

Since this Court is of the view that the impugned award should be set aside, the next issue is the way forward for the appointment of a new Arbitrator without prejudicially affecting the rights of either of the parties before this Court.

Learned counsel for the petitioner has shown a few decisions which would be relevant in this context. In *Kinnari Mullick Vs Ghanshyam Das Damani* : (2018) 11 SCC 328, the Supreme Court upon setting aside the order of remand of the arbitration proceedings under section 34(4), granted liberty to the parties to pursue their remedies in accordance with law. *McDermott International Inc. Vs*

Burn Standard Co. Ltd.: (2006) 11 SCC 181 reinforced the limited supervisory role of the Court in matters of arbitration. The facts in *Taruna Vaid Vs Rakesh Kumar:* (2005) 12 SCC 235 can be equated somewhat with the present case where the Supreme Court, in order to do complete justice between the parties, directed the judicial authority in Delhi to appoint another independent Arbitrator to continue with the proceedings. In *State of West Bengal Vs Bharat Vanijya Eastern Private Limited;* a Division Bench of this Court gave liberty to the respondent contractor to pursue its claim by reviving a pending suit in accordance with law. A Division Bench of the Kerala High Court in *Sulaikha Clay Mines Vs Alpha Clays* : AIR 2005 Ker 3, considered a situation where an award is to be set aside for procedural violation and whether the Court has power to remit the award to a different Arbitrator de hors the power under Section 34(4) of the Act. The Court in that decision was reluctant to remit the matter to the same Arbitrator in view of the unequal treatment meted out to the parties. The Court was also of the view that since there was no arbitration clause in the agreement, civil remedy was not barred and the appellant could therefore approach the civil Court for redressal of its grievances.

In the present case, although the award-holder has disputed the grounds of challenge, the parties have consented to a different Arbitrator being appointed to consider the claim anew.

The Arbitration and Conciliation Act, 1996, ensures party autonomy at all levels right through the dispute resolution process and even to the procedure for challenge to the award. The freedom of the parties to decide on the next course of action must therefore be preserved in the facts of the present case. The statutory

recognition to keeping all redressal-doors open for the parties post setting aside of an award is secured in Section 43(4) of the 1996 Act which provides that upon setting aside of an arbitral award, the period between the commencement of the arbitration and the date of the order of setting aside of the award shall be excluded for the purpose of computing the time prescribed by the Limitation Act, 1963 for commencement of the proceeding with respect to the dispute submitted. Section 43(4) reads as:

“..... shall be excluded in computing the time prescribed by the Limitation Act, 1963 for commencement of the proceedings (including arbitration) with respect to the dispute so submitted.”

The inclusive nature of the parenthesis makes it evident that the remedies available to the parties shall not be restricted only to those under the 1996 Act.

The free rein given to parties also finds resonance in Section 89 of The Code of Civil Procedure – *“Settlement of disputes outside the Court”* – which encourages the Court to participate in the formulation of the settlement terms and ensure that the process of settlement is a collaborative exercise before the dispute is referred to one of the alternative forums under the section.

The above provisions have been highlighted as enablers for the Court to chart the future course of action where parties consent to a particular way forward. The basic premise is that the parties who have come to the Court cannot be without a remedy when they have agreed that the matter should go before a different Arbitrator. The 1996 Act does not curtail the power of a Court to mould the relief in fit cases provided the relief is not repugnant to the law as existing on that date.

This Court is hence of the view that the Award dated 5th October, 2020 should be set aside for the reasons as stated above. Second, a different and independent Arbitrator should be appointed to decide the claim of the award-holder afresh. The parties shall be at liberty to urge all points before the Arbitrator which have been taken in this application.

Justice Sahidullah Munshi, retired Judge of this Court, is accordingly appointed as Arbitrator to decide the claim of the respondent No.1 afresh taking all points into consideration. The records of the arbitration proceeding which have been transmitted to this Court should be kept with the concerned Department for a week from date. The parties can thereafter have the papers sent to the learned Arbitrator appointed by this order within a period of a week thereafter.

The Arbitrator will be at liberty to fix his remuneration and shall also be entitled to secretarial and other assistance which shall be borne equally by the parties.

AP No.103 of 2021 is disposed of in terms of the above.

(MOUSHUMI BHATTACHARYA, J.)

TO/D.Ghosh/spal/S.De