Anbay Legal Monthly Newsletter

Arbitration Update

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M/S TANTIA CONSTRUCTIONS LIMITED v. UNION OF INDIA

PETITION FOR SPECIAL LEAVE TO APPEAL (C) NO. 10722/2022

FACTS:

- There was a disagreement over price escalation while the project was being completed, and the applicant asked the High Court to appoint an arbitrator. The arbitration petition was dismissed on September 16, 2016, and the appointing authority was instructed to ensure the formation of the Arbitral Tribunal.
- The contract was signed on March 22, 2016, the final bill was generated and presented on December 16, 2016, and a new request for the appointment of an arbitrator was submitted by the applicant on August 21, 2017, the Tribunal took this claim into consideration.
- Since the case's merits cannot be discussed at this time and all other objections are open to the arbitrator, the Court's only job at this point is to determine if an arbitration clause exists in the contract.

PLAINTIFF'S CONTENTION

- The Court's only duty at this point is to determine if an arbitration clause exists in the contract; the merits of the case cannot be discussed, and all other objections are open to the arbitrator's consideration.

RESPONDENT'S CONTENTION

- The claim for which the applicant is now asking the Arbitral Tribunal to be appointed was a part of the claim petition he filed and has already been decided upon by the Arbitral Tribunal.
- By filing a subsequent demand notice on August 21, 2017, the applicant actually wishes to raise the same issues that he had raised in the earlier arbitration proceedings and have already been dealt with and partly rejected
- Once the claims made by the applicant have been resolved, the Arbitral Tribunal will no longer be needed to hear their case.

ISSUE AT HAND

- Could petitioner's application under Section 11 of the 1996 Act for appointment of an arbitrator for resolution of dispute between the parties be dismissed when the subject matter of the said proceeding has already been decided?

DECISION OF THE COURT

- The same contract or transaction cannot be the subject of two separate arbitration proceedings.

- It is undeniable that the arbitrator in the current case rendered a decision on the claims made after the issue was originally brought to arbitration. After then, it was requested to start a new arbitration process in order to address certain additional claims, possibly after the final payment was paid.
- In accordance with Section 11(6) of the Arbitration and Conciliation Act, 1996, the High Court correctly declined to refer the matter to arbitration. As a result, the Supreme Court rejected the appeal on this basis.

NATIONAL HIGHWAY AUTHORITY OF INIDA V. TRANSSTROY (INDIA) LIMITED

CIVIL APPEAL NO. 6732 OF 2021

FACTS:

- The parties entered into an engineering Procurement and Construction Agreement on 13/11/2014, in respect of which, the Respondent had agreed to carry out improvement/augmentation of a National Highway in the State of Tamil Nadu.
- According to the NHAI (Appellant), the respondent/contractor was in continuous breach of specific obligations under the Contract for which a cure period notice was issued by the NHAI calling upon the contractor to cure the defects within 60 days, which the contractor failed. Thus, a notice of intention to terminate the agreement was issued under Clause 23.1.2 of the agreement.
- The respondent sent its reply to this NHAI's notice, which the appellants found unsatisfactory and issued another termination notice under Clause 23.1.2 of the contract, specifically stating that this is without prejudice to its right to claim damages in case of Contractor's failure to comply with the obligations casted upon him under the Contract.
- On receipt of termination notice, the respondent invoked clause 26.2 of the Contract to refer certain disputes for amicable settlement. Thereafter, the respondent invoked the arbitration clause under Clause 26 of the Contract. The presiding arbitrator was appointed and Arbitral Tribunal was constituted. Thereafter, SoC was filed by the Respondent/Contractor on 15/05/2017 and NHAI filed SoD on 11/07/2017, where the NHAI reserved its right to claim damages and stated that it would file its counter claim separately and did seek extension of time for filing the counter claim, which was rejected by the Arbitral Tribunal.
- Thereafter, the NHAI moved an application u/s 23(2A) of the Arbitration and Conciliation Act, 1996 (hereinafter, "the A&C Act") to place its counter claim on record, which was rejected by the Tribunal on the ground that procedure under Clauses 26.1 and 26.2 was not followed, according to which, the claims were to be notified and an attempt at amicable settlement was to be made before invocation of arbitration and the appellant did not specify its claims at that stage. Thus,

holding the counter claim beyond the scope of arbitration agreement and adjudication of the said dispute beyond the jurisdiction of the Arbitral Tribunal.

- Aggrieved by this order, NHAI preferred an appeal u/S 34 of the A&C Act before the High Court of Delhi. The Court dismissed the appeal on the same grounds. Therefore, the applicant preferred an SLP against the impugned order.

APPELLANT'S CONTENTION:

- The claim and the counter claim are both, based on the same cause of action vis-à-vis termination of the agreement, therefore, there is no need to hair split the dispute between the parties as it would lead to multiplicity of cases.
- The term "dispute" as used in Clause 26 and referred in Clause 26.1 was interpreted as being two-sided. The Contractor himself referred the termination notice as a unilateral decision from which a "dispute" had arisen. Therefore, it would be travesty of process to interpret "Dispute" as allowing only the claim of the Respondent. It was further submitted that the Arbitral Tribunal and the High Court have failed to appreciate the difference between the expressions 'claim' which may be made by one side and 'dispute' which has two sides.
- Any of the parties could invoke Clause 26, therefore, after the respondent has invoked it, there was no reason for the appellant to re-invoke it as it would be duplication of the same process for which arbitration is pending.
- The contention on behalf of the Contractor that the counter claim was by way of counterblast be rejected as the NHAI specifically reserved its right in the termination notice and SoD to claim damages.
- The procedural provisions cannot be interpreted in a hyper-technical manner contrary to the letter and spirit of Arbitration Act.
- The decision of the Tribunal and the High Court are against the mandate of Section 23(2A) of the A&C Act as it explicitly recognizes the right of the appellant to file counter claim.

RESPONDENT'S CONTENTION:

- It was mandatory to attempt to amicably settle the dispute as a pre-condition to the invocation of arbitration under Clause 26 of the Contract which has not been done by the appellant.
- The term "Disputes" defined and set out in Clause 26.1.1 has to be strictly construed to mean those disputes which were identified by any party and referred for conciliation under Clause 26.1.1 read with Clause 26.2. No such identification had been done by the appellant for its counter claim, so they cannot be raised.
- Only reserving the rights would not allow the parties to bypass the mechanism laid down in the contract under Clause 26.

- Section 23(2A) of the Act does not permit a counter claim to be raised in a manner which is inconsistent with the agreement of the parties.

ISSUE AT HAND:

- Whether the Arbitral Tribunal and the High Court have erred in not permitting the NHAI to take on record the counter claim?

DECISION OF THE COURT:

- The main dispute between the parties which is required to be resolved through conciliation is regarding termination of contract, and not regarding claims and/or counter-claims.
- Referring to various communications and notice invoking arbitration issued by the respondent, it is observed that the respondent had recognised and referred to the termination of the agreement as the main dispute between the parties. Thus, the respondent cannot object to the counter-claim of the appellant which arose out of the same termination of the agreement.
- A true and fair interpretation of Clause 26 of the Contract stipulates that every claim that arose out of the termination of the agreement could be referred to arbitration and not just the claims of the respondent could be entertained as once any dispute is notified under Clause 26.1, the entire subject matter including counter claim/set off would form subject matter of arbitration according to the phrase in Clause 26.3, "any dispute which is not resolved in Clauses 26.1 and 26.2".
- The Arbitral Tribunal and the High Court of Delhi have made an error in differentiating between the expressions "claim" which may be made on one side and "dispute" which by its definition has two sides.
- The Arbitral Tribunal while rejecting the Appellant's application seeking to place its counter claim on record by observing that in the said application, the NHAI has not stated anything about having made an effort for an amicable settlement as laid down in the procedure under Clause 26.1 and 26.2. However, it shall be noted that the NHAI reserved its right to claim the damages in the notice for termination and in the Statement of Defense and specifically stated therein that the NHAI reserved its right to file the counter claim.
- Therefore, the grounds for rejecting this application by the Arbitral Tribunal is contrary to main intent of the parties of resolving the dispute through conciliation first.
- The High Court while passing the impugned judgment and order has not appreciated the aspect that when there is a provision for filing the counter claim/set off, which is expressly inserted in Section 23 of the A&C Act, there is no reason for curtailing the right of the appellant for making the counter claim or set off as such curtailment would defeat the object of Section 23(2A) and may give rise to parallel proceedings before various fora.

- Thus, the impugned judgment and order passed by the High Court are quashed and set aside and the application submitted by NHAI to file counter claim is allowed. The present appeal is accordingly allowed.

FOOD CORPORATION OF INDIA V. M/S ADANI AGRI LOGISTICS LTD.

O.M.P. (COMM) 82/2022 AND IA NOS. 1929/2022, 1931/2022

FACTS:

- The parties entered into an agreement on 18/07/2005 where the respondent company (*hereinafter, "Adani"*) was selected as the Developer-Cum-Operator of food grains handling, storage and transportation facilities as specified in the Agreements.
- The facilities for two circuits were to be completed within thirty-six months from the date of execution of the respective Agreements and the agreements were for a term of twenty years from the Operations Date, which was agreed to be the date on which the facilities were commissioned and the Respondent commenced providing the services on a commercial basis.
- The petitioner (*hereinafter, "FCI"*) agreed to pay storage-cum-handling charges (*hereinafter, "SCH charges"*) on a monthly basis in terms of the agreement and these charges were subject to variation in proportion to the Wholesale Price Index (WPI). The Charges were to be increased every year based upon 70% of the inflation rate determined on the basis of WPI recommended by the Government of India by taking previous year's WPI Index as the base.
- The complete facilities were not commissioned within the prescribed period; thus, an arrangement was made where Adani developed certain storage depots and the parties agreed to use on payment of certain usage charges. FCI confirmed by a letter dated 09/05/2007 that the twenty-year guarantee period had begun in 2007 after the operationalisation of the depots. Further, the charges for the year 2007 were agreed to be paid on actual utilization basis and the commitment for payment for full capacity would commence on commissioning of the complete facilities.
- A Supplementary Agreement to the Agreements was executed between the parties and some changes in SCH Charges were made which were later restored to the original agreed value by FCI with effect from 28/09/2013. Thereafter, Adani stated that it would be willing to accept 28/09/2013 as the date of operation if the twenty-year service period also commences from the said date, to which, FCI did not agree and reiterated that twenty-year period commenced on 11/05/2007 when the interim arrangement was made.
- Pursuant to this dispute, amicable settlement could not be reached between the parties, thus, by a letter dated 24/03/2017, Adani invoked the arbitration agreement and the Arbitral Tribunal was constituted.

- The arbitral tribunal partly allowed the claims of the respondent, it held that the twenty-year service period would commence from 28.09.2013 and the WPI for financial year 2013-14 would be considered as the base price for determining the SCH.
- Aggrieved by the impugned award, FCI filed the present petition.

PETITIONER'S CONTENTIONS:

- The finding of the Arbitral Tribunal that the Service Period of twenty years would commence from 28/09/2013 and the said date would be treated as the Operations Date is erroneous on two grounds. First, that the parties had expressly agreed that period of twenty years would be computed from May, 2007; and second, that the Arbitral Tribunal's conclusion is based on an erroneous assumption that by virtue of Section 28(3) of the A&C Act, it was not bound by the express agreement between the parties.
- The arbitrator also erred in applying the Penta Test as propounded by the Supreme Court in ***Nabha Power Ltd. v. Punjab State Power Corporation Ltd.***[1] as one of the tests was that the interpretation should not contradict the express terms of the contract and the Arbitral Tribunal has disregarded the same.

RESPONDENT'S CONTENTIONS:

- It is open for the Arbitral Tribunal to read the agreement between the parties to make business sense and it had done so.
- The question of interpretation of a contract fell within the jurisdiction of the Arbitral Tribunal and therefore, it is not open for this court to interfere with the Arbitral Tribunal's decision in this regard. The challenge laid by FCI is beyond the scope of Section 34 of the A&C Act.
- If the arbitral award is set aside, it should be set aside in its entirety and the question of whether respondent is entitled to escalation based on WPI as on May, 2007 ought to be left open.

DECISION OF THE COURT:

- Referring to various letters exchanged between the parties in 2007 for communication regarding the base depots, the Supplementary Agreement and in the recorded minutes of the meeting held on 04/12/2012 in which both the parties expressly agreed that the Service Period of twenty years would commence from May, 2007. Thus, there being no ambiguity in relation to the terms of the contract and understanding between the parties, it was not open for the Arbitral Tribunal to render the award contrary to the same with unnecessary application of the business efficacy test.
- The tribunal erred in applying the Penta Test as propounded by the Supreme Court in ***Nabha Power Ltd v. Punjab State Power Corp. Ltd.*** as it is only for the purpose of determining the intention of the parties, and would have no application when there is no ambiguity as to the contract between the parties.

[1] (2018) 11 SCC 508

- The Arbitral Tribunal also based its reasoning in holding that the period of twenty years will commence from 28/09/2013 by stating that two different dates were not possible. This rationale is unacceptable as the parties are at liberty to choose different dates for different purposes. The fact that the escalation has to be calculated from the base date, that is 28.09.2013, would not necessarily lead to the conclusion that the Service Period must commence from the same date.
- Notwithstanding that the Arbitral Tribunal finds the agreement entered into between the parties as inequitable, it is not open for the Arbitral Tribunal to re-write the same.
- Section 28(3) of the A&C Act as amended cannot be read to mean that an Arbitral Tribunal can render an award contrary to the contract between the parties and an arbitral award that is contrary to the material terms of the contract between the parties would undeniably vitiate the award on the ground of patent illegality if the same goes to the root of the dispute as also affirmed in the case of ***PSA SICAL Terminals Pvt. Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin***[2]***.***
- Therefore, the impugned award is contrary to the terms of the contract and is liable to be set aside to that extent and the guarantee period would commence from May, 2007.

NATIONAL HIGHWAYS AUTHORITY OF INDIA v P. NAGARAJU @ CHELUVAIAH

C.A. NO. 4671/2022 @ SLP (C)NO.19775/2021) WITH C.A. NO.4676/2022 @ SLP(C) NO. 19811/2021

FACTS:

- The brief facts of this case include that the notifications were issued under the National Highways Act 1956 for land acquisition pursuant to which a Special Land Acquisition Officer was appointed to determine the compensation for land acquired.
- Simultaneously the disputes arose between the Respondents and the Appellant in relation to quantum of the compensation payable.
- Under Section 3G (7) of the NH Act, an arbitrator was appointed to determine compensation. The arbitrator increased the amount of compensation to be paid to the Appellant.
- In appeal, the District and Sessions Court as well as the Karnataka High Court upheld the award. The Appellant then approached the Supreme Court.

PETITIONER CONTENTIONS:

[2] (2021) SCC OnLine SC 508

- The argument in this appeal was that the arbitrator's decision was ex-facie incoherent and clearly out of the purview of law.
- In recalculating the compensation, the arbitrator took into account the guideline value specified in the notification dated 28.03.2016 released by the Department of Stamps and Registration, that is noticeably the market value fixed on a date after the 01.02.2016 acquisition notification.

ISSUES AT HAND:

- Whether the market value specified in the notification dated 28.03.2016 used as a guideline value was appropriately taken into consideration by the arbitrator
- whether the methods used denied the NHAI of a chance and led to breach of the principles of natural justice in violation of Section 28.
- If the guideline value established in relation to "City Greens" and "Zunadu" was legitimate and if the learned Arbitrator has suggested legitimate grounds to place such reliance, as failure to provide an explanation or participate in the discussion will also amount to patent illegality and be in violation of Section 31(3) of the Act, 1996.

DECISION OF THE COURT:

- The Supreme Court allowed the appeal. The Supreme Court held that since the scope of interference by a court is limited, it would not be open to the court to modify an award and alter the compensation payable.

- The appropriate course to be adopted in such event is to set aside the award and remit the matter back to the Tribunal in terms of §34(4) of the Act.

INDIAN OIL CORPORATION LIMITED v NCC LIMITED

2022 (SC) 616

FACTS:

- Pursuant to a tender floated by the appellant, Indian Oil Corporation Limited ("IOCL"), the respondent, NCC Limited ("NCCL"), was appointed as the contractor to complete certain civil, structural, and associated UG Piping works for Paradip Refinery ("Contract"). IOCL and NCCL executed 4 (four) other similarly worded contracts. The Contract permitted NCCL to notify in writing its claims for additional costs to the engineer-in-charge and site engineer ("Notified Claims").

- It is highlighted that there is delay in completion of works beyond the scheduled completion date which led NCCL to seek extension of time. NCCL also submitted its final bill to the engineer-in-charge while making specific reference to its Notified Claims. Subsequently, NCCL offered to withdraw its Notified Claims for additional payments if its twin conditional requests for extension of time and price adjustment were favourably accepted by IOCL.

- Accordingly, IOCL treated NCCL's Notified Claims as withdrawn and released certain payments. However, IOCL's action was questioned by NCCL on the grounds that IOCL had made only partial payments by not considering the entire period of extension and the same was not in line with NCCL's conditional requests. To this, IOCL informed NCCL that none of the claims mentioned by NCCL in the final bill were Notified Claims.

- In this backdrop, NCCL invoked the arbitration clause under the Contract pursuant to which IOCL referred NCCL's disputes regarding arbitrability of its Notified Claims to the General Manager. In respect of NCCL's claims arising out of one of the contracts, the general manager held that NCCL's claims could not be referred to arbitration and that the arbitration agreement itself did not survive on account of NCCL withdrawing its Notified Claims. Therefore, the general manager held that no disputes existed to be referred to arbitration.

- With respect to the other 4 (four) contracts having the same arbitration clause, the general manager held that none of NCCL's claims were Notified Claims. In view of the above, NCCL filed applications under Section 11(6) of the Act before the Delhi High Court seeking appointment of a sole arbitrator, which were allowed. Later. being aggrieved, IOCL preferred five civil appeals challenging the judgments and orders of the Delhi High Court before the Supreme Court.

PLAINTIFF'S CONTENTION:

- The plaintiff in the current case has argued that the conditions of the GCC, the contract the parties entered into, control both parties in the current case. The process to be followed in the event of a dispute between the parties, namely as stated in the GCC and the arbitration clause, actually governs both parties.
- The foundation of arbitration is party autonomy, and the contents of the agreement must be construed in the way that the parties intended.

RESPONDENT'S CONTENTION:

- In accordance with the agreement made between the parties, the General Manager is not allowed to determine whether a claim is barred because there has been agreement and satisfaction or if it is an excepted claim.
- In accordance with Section 11(6A) of the Arbitration Act, the courts' scope of involvement at the time of an arbitrator's appointment is limited to determining whether an arbitration agreement exists.
- At the stage of appointment of the arbitrator, the Court cannot look into whether there has been accord and satisfaction between the parties (4) At the stage of appointment of arbitrator, the Court cannot look into whether a claim is an excepted claim.

ISSUES:

- Whether at the stage of deciding section 11 application, the Court could *prima facie* consider the aspect regarding 'accord and satisfaction' of the claims?
- Whether the dispute is non-arbitrable or falls within the excepted clause if the facts were "very clear and glaring" and the clauses in the agreement were specific?

DECISION OF THE COURT:

- It is settled that the jurisdiction of a court under Section 11 of the Act is primarily to find out whether there exists a written agreement between the parties for arbitration and whether the aggrieved party has made a prima facie arguable case.
- The limited jurisdiction under Section 11 of the Act does not denude the court of its judicial function to conduct a 'prima facie review' to look beyond the bare existence of the arbitration clause.
- Although an arbitral tribunal may have jurisdiction and authority to decide the disputes including questions on jurisdiction and arbitrability, the same can also be considered by a court under Section 11 of the Act if certain matters are excluded from the arbitration clause.
- The issue with regard to 'accord and satisfaction' of claims can be considered by a court at the stage of deciding an application under Section 11 (6) of the Act.

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