Dispute Resolution Hotline

June 01, 2017

ONCE THE AWARD IS SET ASIDE – THE DISPUTE CANNOT BE REMANDED BACK TO THE ARBITRAL TRIBUNAL - RULES SUPREME COURT

- Once a court has set aside the arbitral award, it cannot relegate the parties back to arbitral tribunal.
- The power to relegate the parties back to the arbitral tribunal cannot be exercised *suo moto* by the court - a written application in that behalf by a party – a must.

INTRODUCTION:

Recently, the Supreme Court of India **("SC")** in *Kinnari Mullick* **("Appellants")** *v. Ghanshyam Das Damani*[1] **("Respondent")** has ruled on the power of the court to relegate the parties to the arbitral tribunal, when award passed by the same arbitral tribunal has been set aside under Section 34 of the Arbitration and Conciliation Act 1996 **("Act").** The Supreme Court concluded that a court can relegate the parties to the arbitral tribunal, only if there is a specific written application from one party to this effect; and relegation has to happen before the arbitral award passed by the same arbitral tribunal is set aside by the court.

FACTS AND BACKGROUND:

The Appellants and the Respondent entered into two developmental agreements for construction of a multistoried building. Subsequently, a dispute arose with respect to the distribution of the flats and its conveyancing deeds. Thereafter, the Respondent nominated their arbitrator, but notably did not specify that the Respondent's nomination was to appoint a sole member Tribunal. Moreover, the Respondent's notice to the Appellants did not call upon them to appoint their nominee arbitrator. On the basis such nomination by the Respondent, the sole arbitrator commenced the arbitral proceedings.

The Appellants subsequently preferred an application under Section 16 of the Act and challenged the jurisdiction[2] of the sole arbitrator on 10 May 2010. The sole arbitrator rejected the application on 27 August 2010 by way of an interim award.

Aggrieved by the interim award, the Appellants approached the Single Judge of the Calcutta High Court **("Single Judge")** under Section 14 of the Act[3] alleging bias and for a declaration that the sole arbitrator had become incompetent to perform his functions. The Single Judge by judgment dated 17 September 2012 disposed of the Section 14 application by reserving the Appellants' right to challenge the award under Section 34 of the Act, if required.

The sole arbitrator issued the final award on 18 June 2013 in favour of the Respondent. Interestingly, the award was not reasoned. Aggrieved by the award, the Appellants filed a challenge petition under Section 34 of the Act for setting aside the award. Both the interim award as well as the final award formed the subject matter of the challenge under Section 34 of the Act. The Single Judge allowed the challenge petition on the premise that the award did not disclose any reason in its support. Accordingly, the award was set aside, and the parties were left to pursue their remedies in accordance with law.

Aggrieved by the finding of the Single Judge, the Respondent preferred an appeal before the Division Bench of the Calcutta High Court **("Division Bench")**. The Division Bench affirmed the findings recorded by the Single Judge. However, the Division Bench *suo moto* decided to relegate the parties back to the arbitral tribunal with a direction to the arbitral tribunal to assign reasons in support of its award.

Aggrieved by the order of the Division Bench, the Appellants filed a special leave petition before the Supreme Court of India **("Supreme Court").** The Respondent did not challenge either the settling aside of the award, or the relegation of parties back to the Tribunal.

ISSUE:

The primary issue assailed before the Supreme Court was whether a court, under Section 34(4) of the Act, is empowered to remand the parties back before the arbitral tribunal with a direction to assign reasons in support of the arbitral award, especially when the arbitral award has been set aside by the Single Judge, and the Division Bench has concurred with that finding.

DECISION OF THE SC:

The Supreme Court:

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a. examined Section 34(4)[4] of the Act and observed that the *quintessence for exercising the power under this provision is that the arbitral award has not been set aside.*

b. relied on *McDermott International Inc. v. Burn Standard Limited,*[5] and opined that the Parliament has not vested any power on courts to remand the parties to the Tribunal or defer the proceedings, except within the limited scope prescribed under Section 34(4) of the Act. The Supreme Court held that such power under Section 34(4) can be exercised only on a written application being made by a party and not *suo motu*.

c. referred to the Madras High Court judgment of *MMTC v. Vicnivass Agency*[6], and affirmed the three procedural conditions for invoking Section 34 (4) namely: (i) there should be an application under Section 34(1) of the Act; (ii) a request should emanate from a party under Section 34(4); and (iii) the court considers it appropriate to invoke the power under Section 34(4) of the Act.

In the present facts and circumstances, since no written application filed was filed by the Respondent before the Single Judge or the Division Bench under Section 34(4), and the fact that the arbitral award had been set aside by the Single Judge and the setting aside confirmed even by the Division Bench, the Supreme Court held that the decision of the Division Bench to remit the award back the sole arbitrator suffered from jurisdictional error and was unsustainable.

ANALYSIS:

The Supreme Court's ruling that courts had no power to remand the parties back to the arbitral tribunal after the arbitral award has been set aside, is praise worthy. It would inevitably protect the parties from being obliged to knock the doors of errant Arbitral Tribunals which had already failed to render an award worthy of passing the muster of Section 34 of the Act.

– Shweta Sahu, Alipak Banerjee & Moazzam Khan
You can direct your queries or comments to the authors

[1] Civil Appeal No. 5172 of 2017 arising out of SLP (Civil) No. 2370 of 2015

[2] Arbitration and Conciliation Act 1996, section 16:
"*Competence of arbitral tribunal to rule on its jurisdiction.—*
1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—
(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and (b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.
2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.
3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.
4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.
5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.
6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34."

[3] Arbitration and Conciliation Act 1996, section 14:
"*Failure or impossibility to act.—*
1) The mandate of an arbitrator shall terminate if—
(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and (b) he withdraws from his office or the parties agree to the termination of his mandate.
2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.
3) *If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.*"

[4] Arbitration and Conciliation Act 1996, section 34(4):
"*On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.*"

[5] (2006) 11 SCC 181

[6] (2009) 1 MLJ 199

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