

DISPUTE RESOLUTION AND ARBITRATION

MONTHLY UPDATE



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STATE OF GUJARAT THROUGH CHIEF SECRETARY AND ANOTHER V. AMBER BUILDERS

2020 SCC ONLINE SC 13

Background facts

- This matter pertains to a dispute between State of Gujarat (**State**) and Amber Builders (**Contractor**) arising out of a works contract (**Agreement**). On November 11, 2014 the State issued a letter to the contractor demanding an amount of INR 1,09,00,092 on the ground that there were certain deficiencies in the work that was carried out by the contractor. The state further threatened to withhold the payments from security deposits and bills of other pending works.
- The contractor challenged the same in the Gujarat High Court (**High Court**) by way of writ petition on the ground that State was not competent to withhold the amount payable under other contracts or recover the amount from payments made under other contracts until the liability of the contractor was determined and quantified by a Court or forum of competent jurisdiction. The State, however, alleged that since the work of the contractor had deficiencies, the State had got the work done from another person at the risk of the contractor and the contractor can approach the Court in case he had any dispute under Clause 43 A of the agreement.
- The High Court relied on judgement in *State of Karnataka v. Shree Rameshwara Rice Mills, Thirthahalli*¹ and set aside the communication dated November 11, 2014 on the ground that the employer or the principal cannot unilaterally recover the said amounts from the ongoing contract work of a contractor in connection with another contract without quantification or crystallization of the amount sought to be recovered in an independent contract between the two.
- The State appealed this order in the Hon'ble Supreme Court and contended that the High Court had no jurisdiction to pass the impugned order and the remedy, if any, to the contractor was to approach State Tribunal as constituted under the State Act.
- The respondent relied on an order of the State Tribunal dated November 24, 2005 wherein it was held that the tribunal can only exercise jurisdiction, powers and authority conferred on it under the State Act and defended the writ jurisdiction of the High Court. The Tribunal

¹ (1987) 2 SCC 160

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had held that State Act does not empower Tribunal to grant injunction and it cannot take recourse to the Code of Civil Procedure, 1908 to grant interim relief and also that an order of interim injunction, as sought does not fall within the ambit of 'interim award'.

Issue at hand

- The sole issue for consideration before the Supreme Court was whether Gujarat Public Works Contract Disputes Arbitration Tribunal had jurisdiction to make interim orders in terms of Section 17 of the Arbitration and Conciliation Act, 1996 (Arbitration Act) under section 3 of Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992 (State Act).

Findings of the Court

- The Court observed that Section 2(4) of the Arbitration Act makes it absolutely clear that other than Section 40(1), 41 and 43, Part I of the Arbitration Act shall apply to all arbitrations even if they are carried out under any other enactment, except insofar as the provisions of Part I are inconsistent with the other enactment or any rules made thereunder. The Apex Court held that while even statutory arbitrations under other Acts would be governed by Part I of the Arbitration Act, the only exception being any departure from Part I in the special enactment when such special enactment will prevail over the Arbitration Act.
- The Court considered various provisions of the State Act including Section 13 which specifically bars the jurisdiction of the Civil Courts, including the power to grant interim relief in terms of Section 9 of the Arbitration Act and Section 21 which categorically states that the provisions of the Arbitration Act shall, in so far as the same are inconsistent with the provisions of the State Act, shall cease to apply to any dispute arising from a works contract with all related arbitration proceedings transferred to the Tribunal.
- In deciding the issue, Supreme Court relied on its earlier decision in the matter of *Gangotri Enterprises Limited v. Union of India*². It was finally held that on a conjoint reading and a careful analysis of the Acts together, the powers vested in the Arbitral Tribunal in terms of the Section 17 of the Arbitration Act can be exercised by the Tribunal constituted under the State Act because there is no inconsistency in the Acts as far as the grant of interim relief is concerned. The power vested in the tribunal under the State Act and Section 17 of the Arbitration Act complement each other.
- The Apex Court allowed the appeal of the State of Gujarat and set aside the judgment of the High Court with liberty to the contractor to approach the State Tribunal for deciding its claims on merits.

Our view

While this judgment clarifies the applicability of Arbitration Act, it did not analyse the situation where a State Act or a Special Act is inconsistent with the provisions of the Arbitration and Conciliation Act 1996 (as Amended) with the arbitration clause/terms of contract being silent on treatment of such inconsistency with respect to primacy of the applicable law.

This is likely to create some confusion and the Hon'ble Apex Court will likely be approached to opine in judgments to follow.

CENTRAL ORGANISATION FOR RAILWAY ELECTRIFICATION V. ECI-SPIC-SMO-MCML

2019 SCC ONLINE SC 1635

Background facts

- The present appeal is in relation to dispute between Central Organization for Railway Electrification (**Appellant**) and ECI-SPIC-SMO-MCML (**Respondent**) arising out of General Conditions of Contract (**GCC**).
- On October 10, 2017 Appellant issued a 7-day notice under the GCC to the Respondent for failure to complete the work under the contract within the prescribed period, and thereafter issued a 48 hours' notice calling upon the Respondent to make good the progress of work, failing which the contract will stand terminated. The Respondent failed to make adequate progress and on November 11, 2017 the contract was terminated as per clause 62 of GCC. The security deposit and the performance guarantee submitted by the Respondent was also forfeited.
- After being directed by the Allahabad High Court to avail the alternative remedy by invoking arbitration clause, the Respondent vide its letter dated July 27, 2018 requested

² (2016) 11 SCC 720

the Appellant for appointment of an Arbitral Tribunal for resolving the disputes between the parties and settle the claims.

- The Appellant vide its letter dated September 24, 2018 sent a list of four serving Railway Electrification Officers of JA Grade to act as arbitrators. The Respondent was asked to select any two and communicate to the Appellant for formation of the arbitration tribunal panel. Vide letter dated October 25, 2018, the Respondent was sent a list of another panel comprising four retired Railway officers.
- Without issuing any response, the Respondent filed Arbitration Petition No. 151 of 2018 before High Court under Section 11(6) of the Arbitration Act seeking appointment of a sole arbitrator for resolution of differences. The High Court rejected the argument of the Appellant that the arbitrator ought to be appointed only from the panel of arbitrators in terms of GCC on the premise that the powers of the Court to appoint arbitrator are independent of the contract between the parties and no fetters could be attached to the powers of the court.
- Aggrieved by this order, the Appellant approach the Hon'ble Supreme Court for relief.

Issues at hand

- The Supreme Court was faced with following issues:
 - Whether appointment of an independent arbitrator without reference to the Clauses of the GCC is correct?
 - Whether Retired Railway Officers are not eligible to be appointed as arbitrators under Section 12(5) read with Schedule VII of the Act and were statutorily made ineligible to be appointed as an arbitrator?
 - Whether failure to act in terms of the Contract in not responding within thirty days from the date of the request is tenable?
 - Whether the General Manager of Railways himself becoming ineligible by operation of law to be appointed as arbitrator, is not eligible to nominate the arbitrator?

Findings of the Court

- Appellant while relying on *Union of India v. Parmar Construction Company*³ and *Union of India v. Pradeep Vinod Construction Company*⁴ contended that the Arbitral Tribunal was to consist of a panel of three retired railway officers not below the rank of Senior Administrative Grade officer after compliance of the procedure as stipulated in GCC and hence the High Court erred in appointing the sole arbitrator outside the panel of arbitrators.
- Respondent on other hand, relying on *Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Limited*⁵ and *TRF Limited v. Energo Engineering Projects Limited*⁶ argued that by virtue of the provisions of Section 12(5) read with Schedule VII of the Arbitration Act, the panel of arbitrators proposed by the Appellant were statutorily made ineligible to be appointed as arbitrators since they were either serving or retired employees of the appellant. Further, the General Manager of the Appellant himself was ineligible to nominate any of the persons to be arbitrator.
- With respect to first issue, the Supreme Court reiterated its decision in *Parmar Construction Company* and *Pradeep Vinod Construction Company*, and held that the appointment of arbitrator should be in terms of the agreement and the High Court has erred in appointing an independent arbitrator ignoring clause 64 of the GCC.
- With respect to second issue, placing reliance on *Voestalpine* and *Government of Haryana PWD Haryana (B and R) Branch v. G.F. Toll Road Private Limited*⁷, the Apex Court held that merely because the panel of the arbitrators are the retired employees who have worked

Our view

In our opinion, the Supreme Court has not specifically addressed the basic principle of ineligibility of an arbitrator in its present judgment by assuming a party's right to nominate an arbitrator from a pool of named arbitrators by an ineligible authority being sufficient safeguard to the issues of impropriety as addressed in its judgment in the matter of TRF Limited.

The liberty to select an arbitrator from a pool of arbitrators (retired employees of the proposing organization) proposed by an otherwise ineligible authority shall not, in fact, effect the principle of fair and equal treatment in selection of an arbitrator and keeping the process of arbitration impartial. This is an aspect that must be re-considered and opined by the Hon'ble Apex Court in judgments to follow.

³ 2019 SCC Online SC 442

⁴ 2019 SCC Online SC 1467

⁵ (2017) 4 SCC 665

⁶ (2017) 8 SCC 377

⁷ (2019) 3 SCC 505

in the Railways, it does not make them ineligible to act as the arbitrators but ensure that the technical aspects of the dispute are suitably resolved.

- With respect to the next issue, relying on its judgment in the matter of *Punj Lloyd Limited. v. Petronet MHB Limited*⁸, it was decided that the Respondent was not justified in contending the appointment of Arbitral Tribunal has not been made before filing of application under Section 11 of the Arbitration Act and that the Right of the Appellant to constitute an Arbitral Tribunal is extinguished on filing of application under Section 11(6) of the Arbitration Act, especially when the Respondent's failed to respond and select its arbitrators from the panel of suggested four arbitrators by the Appellant.
- With respect to the last issue, reliance was placed on *TRF Limited v. Energo Engineering Projects Limited*⁹ and *Perkins Eastman Architects DPC v. HSCC (India) Limited*¹⁰, the Supreme Court considered a situation where both the parties have nominated an arbitrator of their choice, the advantage of one party in appointing an arbitrator of their choosing would get counter-balanced by equal power with the other party. The Apex Court, therefore, finally concluded that the power of the General Manager to nominate the arbitrator is counter-balanced by the power of the respondent to select any of the two nominees from out of the four names suggested from the panel of the retired officers and therefore it cannot be said that the General Manager has become ineligible to act as arbitrator.
- It was further held that when the agreement specifically provides for appointment of Arbitral Tribunal consisting of three arbitrators from out of the panel serving or retired Railway Officers, the appointment of the arbitrators should be in terms of the agreement as agreed by the parties. That being the condition in the agreement between the parties, the High Court was not justified in appointing an independent sole arbitrator ignoring the GCC and the impugned orders cannot be sustained.

DYNA TECHNOLOGIES PVT. LTD. V. CROMPTON GREAVES LTD.

2019 SCC ONLINE SC 1656

Background facts

- The case emanates out of Crompton Greaves (**Respondent**) work order dated November 15, 1994 issued to Dyna Technologies Pvt Ltd (**Appellant**) setting out the terms and conditions of the work. After commencement of the work, the respondent instructed the employees of the Appellant to stop the work. The Appellant claimed compensation for such premature termination and ultimately the dispute was referred to Arbitral Tribunal consisting of three Arbitrators with the Appellant inter alia claiming losses due to unproductive use of machineries, which was accepted by the Arbitral Tribunal for a sum of INR 27,78,125 with interest @ 18% p.a. vide its award dated April 30, 1998 and Correction to award dated May 5, 1998.
- Upholding the challenge to the award by the Respondent, the Single Judge of the Madras High Court, while relying on the *Sundarsan Trading Company v. Government of Kerala*¹¹ and *Tamil Nadu Civil Supplies Corporation Limited v. Albert and Company*¹², held that the Court cannot interfere with an arbitral award simply because another view is possible on the available materials. The arbitrator is a Judge of choice of parties and the Court cannot set aside an arbitral award unless it suffers from error apparent on the face of the record. It cannot be set aside even if the Court can come to different conclusion on the same facts.
- On appeal, the Division Bench vide its impugned order partly allowed the appeal and set aside the award of the Tribunal relating to claim no. 2. The High Court was of the opinion that "*the award does not contain sufficient reasons and the statements contained in paragraph 3.1(a) to 3.1(g) of the award do not provide any reasons, discussions or conclusion.*" The Bench further observed that the option of Section 34(4) of the Arbitration Act was not necessary as the compensation could not have been claimed considering the

⁸ (2006) 2 SCC 638

⁹ (2017) 8 SCC 377

¹⁰ 2019 SCC OnLine SC 1517

¹¹ (1989) 2 SCC 38

¹² (2000 (III) CTC 83)

fact that the work order has provision barring claim no. 2 and the arbitral proceeding was beyond the competence of the Tribunal by considering the conditions under the work order.

- Aggrieved by this decision of the High Court, the Appellant approached the Supreme Court in the present appeal.

Issue at hand

- Considering the above facts, the SC was called upon to clarify the requirement of 'reasoned award'.

Findings of the Court

- It was contended by the Appellant that in reference to claim no. 2 Arbitral Tribunal had appreciated the evidence, considered various clauses of the contract and has given cogent reasons for holding that the actual losses were incurred by the Appellant. Hence, in the given circumstances, the decision of High Court to reappraise and substitute its own view is in contravention of agreement and also beyond scope of Section 37 of the Arbitration Act. The Appellant further contended that there was no challenge to the evidence relied upon by the Arbitral Tribunal and only liability was questioned – Respondent's argument being that there was no provision under the contract for granting compensation for loss incurred due to unproductive use of machinery and that the Tribunal had exceeded its jurisdiction. Relying on *K.N. Sathyapalan (Dead) by Lrs. v. State of Kerala*¹³, the Appellant argued that a contractual provision which is in contravention of a specific statutory provision, if allowed to be implemented, will result in frustration of a right conferred by law.
- The Respondent, on the other hand, inter alia, contended that neither the Arbitral Tribunal nor the learned Single Judge of the High Court examined the terms of the contract in appreciating the right of the Claimant to claim compensation of damages and the corresponding liability of the respondent to settle the claim. It was further contended that the Arbitral Tribunal exceeded its jurisdiction and committed manifest error in awarding claim no.2 despite contractual provision prohibiting the same.
- Perusing its decision in *Som Datt Builders Ltd. v. State of Kerala*¹⁴, the Apex Court held that the mandate under Section 31(3) of the Arbitration Act is to have reasoning, which is intelligible and adequate, which in appropriate cases can be even implied by the Courts. The aforesaid provision does not require an elaborate judgment to be passed by the arbitrators having regard to the speedy resolution of dispute.
- The Apex Court then laid down three characteristics of a reasoned order, namely proper, intelligible and adequate; and held that:
 - If challenge to an award is based on impropriety or perversity in the reasoning, then it can be challenged strictly on the grounds provided under Section 34 of the Arbitration Act.
 - If the challenge to an award is based on the ground that the same is unintelligible, the same would be equivalent of providing no reasons at all, which makes the Courts *functus officio* under Section 34 of the Arbitration Act to hear challenge to the award and warrants remanding the matter to the Tribunal in the usual course.
 - On the issue of adequacy of reasoning, the Court has to adjudicate the validity of such an award based on the degree of particularity of reasoning required, having regard to the nature of issues for consideration, the documents submitted by the parties and the contentions raised before the Tribunal so that awards with inadequate reasons are not set aside in casual and cavalier manner.
- While emphasizing on distinguishing between inadequacy of reasons in an award and unintelligible awards, the Apex Court observed that the present award is confusing and has jumbled the contentions, facts and reasoning, without appropriate distinction and without legal reasoning, thereby rendering the award as unintelligible and liable to be set aside.

Our view

In our opinion, the Supreme Court has made a remarkable effort in distinguishing the basis of challenge to an arbitral award by laying down the foundation of preliminary evaluation of an award in its form and content on the basis of being proper, intelligible and adequate, which parameters are often confused or sometimes not considered in the ordinary course resulting in unwarranted form of judicial intervention by the courts resulting in varying consequences.

This Order is essentially a cautionary tale for the parties and arbitrators to have a clear award, instead to have an award which is obfuscated in structure and implied in its content.

¹³ (2007) 13 SCC 43

¹⁴ (2009) 4 ARB LR 13

CLOUDWALKER STREAMING TECHNOLOGIES PVT. LTD. V. FLIPKART INDIA PVT. LTD. (PENDING BEFORE THE NATIONAL COMPANY LAW TRIBUNAL AT BANGALORE)

CP(IB) No.260/BB/2019

Background facts

- Cloudwalker Streaming Technologies Private Limited (**Cloudwalker**) had approached Flipkart India Private Limited (**Flipkart**) expressing its desire to establish a business relation with Flipkart for the sale of Cloudwalker's Products (i.e. LED television units) through the resellers of Flipkart and had entered into a supply agreement dated December 29, 2016. In the course of business transaction, Cloudwalker has alleged that there was a certain quantity of LED TV's which were not accepted by Flipkart, due to which they have incurred a loss to a tune of INR 26.95 Lakh.
- In view of the above, Cloudwalker has alleged that Flipkart is liable to pay it a sum of INR 26.95 Lakh and filed the Application before the NCLT, Bangalore for initiation of Corporate Insolvency Resolution Process (CIRP). The NCLT passed an order dated October 24, 2019 admitting the application initiating CIRP.
- Flipkart filed a Writ Petition before the Hon'ble High Court of Karnataka to stay and quash the abovementioned order passed by NCLT, Bangalore.

Issues at hand

- Whether there is an 'operational debt' as defined under the Insolvency and Bankruptcy Act, 2016, or is the claim made by Cloudwalker a mere claim for damages.
- Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid?

Findings of the Court

- The High Court has passed an order staying the operation of the impugned order passed by NCLT, based on the following aspects:
 - The NCLT does not have jurisdiction to entertain the petition with respect to claim of damages. The NCLT committed a jurisdictional error in proceeding to pass an order of admission after holding that the claim was for damages.
 - It has categorically affirmed that a claim for damages does not fall under the purview of an operational debt under Section 9 of the Insolvency and Bankruptcy Code, 2016.
 - The NCLT has ignored the fact that there is no documentary evidence filed along with the petition to show the liability. The requirement of the law is that there must be invoices filed, which was not done.
 - The order is draconian in that a completely solvent company whose annual business exceeds INR 30,000 Crore has been ordered to go through CIRP.
- The High Court concluded that Cloudwalker's case is only a claim for damages and the company has not been able to establish or substantiate the existence of any debt.

Our view

This Order addresses the issue of jurisdictional overreach by NCLT and will be helpful in demarcating the scope of NCLT's authority when dealing with similar matters which require a distinction to be drawn between instances of debt and a claim for damages arising under a contractual relationship between parties.

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