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PRELIMINARY ISSUES NOT AMENABLE TO THE JURISDICTION OF A COURT UNDER SECTION 11 OF THE ARBITRATION AND CONCILIATION ACT

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Introduction

The High Court of Delhi, in its judgment, *Parsvnath Developers Limited & Anr. v Rail Land Development Authority*, dated 19 May 2020, has reiterated the powers of a Court under Section 11 of the Arbitration and Conciliation Act, 1996 (Act). Consequently, it has been held that preliminary issues fall within the domain of the arbitral tribunal and are not to be delved into by a court under Section 11 of the Act.

Brief Facts

Tenders were invited by the Respondent for the development of 15.27 hectares of land owned by the Indian Railways situated at Sarai Rohilla, Kishan Ganj, New Delhi through IL&FS, on 18 January 2010. The project, which was to be executed through a special purpose vehicle (SPV), included the (i) re-development of the existing railway colony of 4.37 hectares; and (ii) development of the remaining area of 10.9 hectares.

Petitioner No. 1 was declared successful with its bid of INR 1651.51 Crores on 12 November 2010. The Respondent thereafter issued a letter of acceptance dated 26 November 2010 awarding the work contract to Petitioner No. 1. Subsequently, the Respondent by letter dated 7 February 2011, approved the work to be executed by the SPV. Petitioner No. 1 was then required to deposit a Performance Bank Guarantee (PBG) with the Respondent for the execution of the Development Agreement (DA).

The Government informed the Railway Board that a policy was underway with respect to alienation of land, held by the Government, and a specific approval of the Union Cabinet was required in case of a long-term lease or sale. Consequently, the Respondent was incapable of entering into the DA with Petitioner No. 1. Despite this, the Respondent insisted on submission of the PBG, and did not intimate Petitioner No. 1 of its inability to execute the DA. The Respondent withdrew the consent accorded to the SPV for the project on 13 July 2011. The approval was, thereafter, again granted to the SPV on 2 August 2012, the PBG was executed on 30 May 2013 and the DA was executed on 31 May 2013.

On account of disputes having arisen between the parties, an arbitral tribunal was constituted to resolve the same.

First Round of Arbitration: Petitioner No. 1 initiated arbitration against the Respondent claiming, *inter alia*, it be held that various delays in the execution of the project were solely attributable to the Respondent. Further, payments received by the Respondent along with interest thereon were in excess of the Respondent's entitlement to such

payment as well as interest. A majority award, dated 1 June 2018, rejecting the claims of Petitioner No. 1 was passed. Pursuant to such award, certain amounts, being cumulative payments and damages, were granted to the Respondent. Owing to expiration of the lease on 15 June 2015, certain amounts were directed to be refunded to Petitioner No. 1. However, the Respondent terminated the DA on 6 August 2015 with retrospective effect from 23 February 2015, to retain the amount to be refunded to Petitioner No. 1.

Second Round of Arbitration: Petitioner No. 1 sought to recover the amounts due to it and reserved its right to claim the balance amount as damages. The question involved in this arbitration was whether the termination was deemed or was on account of the alleged breach by Petitioner No. 1. In the award, the arbitral tribunal allowed the claim of the Petitioner and held that the action of the Respondent to insist on forfeiture of the entire amount was unsubstantiated and impermissible. The award declared the PBG to be *non-est* and directed payment to the Petitioners with interest. The award was challenged by the Respondent in the High Court as well as the Supreme Court. However, the objections of the Respondent were dismissed and the award was upheld. The Execution Petition filed by the Petitioner was disposed of on 17 July 2019 recording the stand of the Respondent that it had made payment of INR 1199.39 crores to the Petitioner. However, the PBG was returned by the Respondent only on 16 August 2019.

Third Round of Arbitration: At the stage of dismissal of appeal under Section 37 of the Act filed by the Respondent pursuant to the second round of arbitration, the Petitioner called upon the Respondent to invoke the arbitration. As per the Petitioner's notice invoking arbitration, dated 30 May 2018, such arbitration was in respect of claims pertaining to the retention of INR 132.12 crores by the Respondent. The Respondent refuted the claim of the Petitioners on the ground that (i) the Petitioners had admitted in the second arbitration that the Respondent was entitled to the said amount; and (ii) the claim was barred by limitation and under Order II Rule 2 Code of Civil Procedure, 1908 (CPC). Owing to a refusal by the Respondent to appoint its nominee arbitrator, the arbitral tribunal was appointed pursuant to a petition filed by the Petitioner. The claims in these arbitration proceedings were in respect of retention money and losses due to the misrepresentation by the Respondent. The proceedings are underway and at the stage of evidence.

The Petitioners invoked arbitration, for the fourth time, *vide* a notice dated 17 September 2019 demanding the amounts along with losses, incurred between 2 November 2015 to 20 August 2019, due to non-availability of immovable assets on which a charge was created for the PBG. Due to the Respondent's refusal to nominate its arbitrator, the Petitioner filed a petition under Section 11 of the Act (Petition).

Issues

The issues in the Petition were:

- Whether the disputes/claims sought to be referred to arbitration in the Petition were overlapping and were the subject matter of the second and third rounds of arbitration?

- Whether in a petition under Section 11 of the Act, the court can even delve into the said controversy?

Arguments on behalf of the Petitioners

On behalf of the Petitioners, it was argued that in the second arbitration, the arbitral tribunal declared the PBG *non-est*. Thus, illegal withholding of the PBG by the Respondent was affirmed. Respondent was liable for damages on account of delay in returning the PBG. Further, the Respondent was required to compensate the Petitioners

for costs, expenses and damages incurred by the Petitioners due to illegal retention of amounts by the Respondent.

There was no overlap between the reliefs proposed to be sought through the fourth arbitration and the claims in the earlier arbitrations. In the second arbitration, the claim was limited to restraint on encashment of the PBG, as the Respondent had retained amounts in excess of its entitlement.

A plea of overlap is essentially a plea concerning jurisdiction of the court which cannot be adjudicated by the court under Section 11 of the Act, after the insertion of sub-section 6A to Section 11 as the same has limited the scope of enquiry. It was further contended that issues such as estoppel, waiver, *res judicata* and a bar under Order II Rule 2 CPC, could not be raised by the Respondent. Such issues were impermissible in proceedings initiated under Section 11 of the Act as these issues were determinable by the arbitral tribunal.

The claims sought to be referred by the Petitioners were costs, expenses and damages incurred by the Petitioner due to (i) illegal retention of the PBG, post 2 November 2015; and (ii) inability to have the charge of the bank released against immovable assets of the Petitioner.

Arguments on behalf of the Respondent

On behalf of the Respondent, it was argued that the claims now sought to be referred were directly overlapping with the claims raised in the earlier arbitrations.

The claim relating to expenses for maintaining the PBG, was specifically raised in third arbitration in which the Petitioners had sought refund of the PBG amount along with interest at the rate of 18% per annum with effect from 15 June 2015. Therefore, all charges allegedly incurred on maintenance of the PBG were included in the claim before the third arbitral tribunal.

The Respondent further contended that Section 7 of the Act did not permit the Petitioner to raise a dispute again in the Petition as no arbitration agreement exists for adjudication of the disputes sought to be raised. The claims raised do not fall within the definition of "dispute" in the DA. Further, the claims pertained to periods after the termination of the DA and cannot be referred to arbitration. The conduct of the Petitioners was also brought to light and it was argued that the same merits dismissal of the Petition. It was highlighted that three references to arbitration out of the DA had already been made by the Petitioner.

Judgement

The Court held that a reading of Section 11(6A) of the Act, the 246th Law Commission Report and the judgments of *Duro Felguera, S.A. v Gangavaram Port Ltd.*, (2017) 9 SCC 729; *M/s Mayavati Trading Pvt. Ltd. v Pradyuat Deb Burman*, (2019) 8 SCC 714 and *Uttarakhand Purv Sainik Kalyan Nigam Limited v Northern Coal Field Limited,* (2019) SCC OnLine SC 1518 among others, leaves no doubt that the law on the scope of examination by the court in a petition under Section 11 is no longer *res integra*. At this stage, the scope and power are restricted only and only to examining the existence of an arbitration clause and do not even extend to its validity. Therefore, the objections raised by the Respondent requiring the court to examine whether the claims in the Petition were (i) overlapping with those in the earlier arbitrations; and/or (ii) barred by principles of Order II Rule 2 CPC, cannot be sustained in law. These issues were clearly within the domain of the arbitral tribunal and would be decided if and when raised by the Respondent before the arbitral tribunal.

The court also held that an arbitration agreement can be invoked any number of times, as held by the Supreme Court in *Dolphin Drilling Ltd. v Oil and Natural Gas Corporation Ltd.*, (2010) 3 SCC 267.

The Court on being satisfied that there exists an arbitration agreement between the parties and the disputes raised by the Petitioners deserve to be referred to arbitration, appointed an arbitrator on behalf of the Respondent for constitution of the arbitral tribunal.

Comments

The High Court has reiterated the established principles of law as were brought in by the Arbitration and Conciliation Amendment Act, 2015 through the insertion of sub-section 6A to Section 11. The High Court held that the scope and power of a court under Section 11 of the Act was not *res integra* any longer. It clarified that all preliminary issues, beyond the examination of the existence of an arbitration agreement, are to be dealt with by an arbitral tribunal and not by a court exercising power under Section 11 of the Act. It is trite law that a claim of limitation is a preliminary issue that cannot be raised before a court under Section 11 of the Act and is required to be raised before the arbitral tribunal. The High Court has reiterated this principle and brought clarity to the other issues that fall within the purview of preliminary issues and as such are to be raised before an arbitral tribunal and not a court under Section 11 of the Act. These preliminary issues, which touch upon the merits of the claim, as expounded by the High Court include waiver, estoppel, *res judicata*, overlapping claims, a bar under Order II Rule 2 CPC, arbitrability or the existence of a dispute between the parties.

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