SUPREME COURT OF INDIA

National Thermal Power Corporation Ltd.

Vs.

Siemens Atkeingesellschaft

(P.K.Balasubramanyan J.)

28.02.2007

JUDGMENT

P.K.Balasubramanyan, J.,

1. I respectfully agree with the reasoning and conclusion of my learned brother. I am inclined to add a few words in view of the significance of the question and the frequency with which it may arise.

2. Before the Arbitral Tribunal, Seimens, the contractor, made a claim for compensation for the delay on the part of the N.T.P.C. for whom a works contract was executed by Seimens. N.T.P.C. not only resisted the claim but also made a counter claim. The counter claim was sought to be resisted by Seimens by contending that all outstanding claims between the parties other than the one it had put forward in the claim before the Arbitral Tribunal had been settled between the parties as evidenced by a Memorandum of Understanding arrived at between them described in the proceedings as Minutes of the Meeting (M.O.M.). Seimens, therefore, contended that the claims made by N.T.P.C. before the Arbitral Tribunal by way of counter claim was not maintainable or did not survive the M.O.M. They had also raised a contention that N.T.P.C. not having acted in terms of the arbitration clause by first raising the claim before the Engineer, it could not straightaway raise the claim before the Arbitral Tribunal. That part of the objection was given up at the stage of arguments. Therefore, what survived for decision before the Arbitral Tribunal was the effect of the M.O.M. on the claims of N.T.P.C. in the counter claim filed by it. The Arbitral Tribunal thought it appropriate to dispose of certain preliminary questions including the question whether N.T.P.C. could pursue its counter claim in the light of the M.O.M. The Tribunal held that other than claims 1 and 7 in the counter- claim, the other claims had already been settled as evidenced by the M.O.M. and the said claims did not survive for adjudication by the Arbitral Tribunal. It held that claim No. 7 was not really a claim since what N.T.P.C. had done was to reserve its right to make a claim on that score. As regards claim No. 1, the Tribunal held that it was barred by limitation. Thus, in what was called a partial award, the claim of Seimens was found to be in time and the counter claim made by N.T.P.C. was found to be unsustainable.

3. N.T.P.C. sought to file an appeal against the partial award of the Arbitral Tribunal by resort to Section 37(2)(a) of the Arbitration and Conciliation Act, 1996 (for short, 'the Act').

It was the contention of N.T.P.C. that when the arbitrators refused to go into the merits of its counter claim, they were really declining jurisdiction in terms of sub-section (2) of Section 16 of the Act and in such a situation, an appeal was clearly maintainable under Section 37(2)(a) of the Act. This was sought to be met by Seimens by pointing out that it was not a case of declining of jurisdiction by the Arbitral Tribunal to entertain the counter claim made by N.T.P.C., but it was really a case of the counter claim being found unsustainable for the reasons stated in the award. The partial award thus made by the Arbitral Tribunal was an award on the counter claim of N.T.P.C. and it was not a case which fell within either sub-section (2) or sub-section (3) of Section 16 of the Act attracting Section 37(2)(a) of the Act.

4. What is sought to be argued on behalf of N.T.P.C., the appellant, is that the Arbitral Tribunal had intended to deal with the question of jurisdiction and limitation in the first instance and it was during the course of deciding those questions that the counter claim had been rejected and this amounted to a declining of jurisdiction by the Arbitral Tribunal in dealing with the counter claim of N.T.P.C. The partial award was therefore a decision on a plea under Section 16(2) of the Act and consequently appealable under Section 37(2)(a) of the Act.

5. In the larger sense, any refusal to go into the merits of a claim may be in the realm of jurisdiction. Even the dismissal of the claim as barred by limitation may in a sense touch on the jurisdiction of the court or Tribunal. When a claim is dismissed on the ground of it being barred by limitation, it will be, in a sense, a case of the court or Tribunal refusing to exercise jurisdiction to go into the merits of the Jadhav[1] this Court observed that:

> "It is well-settled that a plea of limitation or a plea of res judicata is a plea of law which concerns the jurisdiction of the court which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the court, and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of S. 115 of the Code."

In a particular sense, therefore, any declining to go into the merits of a claim could be said to be a case of refusal to exercise jurisdiction.

6. The expression 'jurisdiction' is a word of many hues. Its colour is to be discerned from the setting in which it is used. When we look at Section 16 of the Act, we find that the said provision is one, which deals with the competence of the Arbitral Tribunal to rule on its own jurisdiction. SBP & Co. sense confined the operation of Section 16 to cases where the Arbitral Tribunal was constituted at the instance of the parties to the contract, without reference to the Chief Justice under Section 11(6) of the Act. In a case where the parties had thus constituted the Arbitral Tribunal without recourse to Section 11(6) of the Act, they still have the right to question the jurisdiction of the Arbitral Tribunal including the right to invite a ruling on any objection with respect to the existence or validity of the arbitration agreement. It could therefore rule that there existed no arbitration agreement, that the arbitration agreement was not valid, or that the arbitration agreement did not confer jurisdiction on the Tribunal to adjudicate upon the particular claim that is put forward before

it. Under sub-section (5), it has the obligation to decide the plea and where it rejects the plea, it could continue with the arbitral proceedings and make the award. Under sub- section(6), a party aggrieved by such an arbitral award may make an application for setting aside such arbitral award in accordance with Section 34. In other words, in the challenge to the award, the party aggrieved could raise the contention that the Tribunal had no jurisdiction to pass it or that it had exceeded its authority, in passing it. This happens when the Tribunal proceeds to pass an award. It is in the context of the various sub-sections of Section 16 that one has to understand the content of the expression 'jurisdiction' and the scope of the appeal provision. In a case where the Arbitral Tribunal proceeds to pass an award after overruling the objection relating to jurisdiction, it is clear from sub-section (6) of Section 16 that the parties have to resort to Section 34 of the Act to get rid of that award, if possible. But, if the Tribunal declines jurisdiction or declines to pass an award and dismisses the arbitral proceedings, the party aggrieved is not without a remedy. Section 37 (2) deals with such a situation. Where the plea of absence of jurisdiction or a claim being in excess of jurisdiction is accepted by the Arbitral Tribunal and it refuses to go into the merits of the claim by declining jurisdiction, a direct appeal is provided. In the context of Section 16 and the specific wording of Section 37(2)(a) of the Act, it would be appropriate to hold that what is made directly appealable by Section 37(2)(a) of the Act is only an acceptance of a plea of absence of jurisdiction, or of excessive exercise of jurisdiction and the refusal to proceed further either wholly or partly.

7. In a case where a counter claim is referred to and dealt with and a plea that the counter claim does not survive in view of the settlement of disputes between the parties earlier arrived at is accepted, it could not be held to be a case of refusal to exercise jurisdiction by the Arbitral Tribunal. Same is the position when an Arbitral Tribunal finds that a claim was dead and was not available to be made at the relevant time or that the claim was not maintainable for other valid reasons or that the claim was barred by limitation. They are all adjudications by the Tribunal on the merits of the claim and in such a case the aggrieved party can have recourse only to Section 34 of the Act and will have to succeed on establishing any of the grounds available under that provision. It would not be open to that party to take up the position that by refusing to go into the merits of his claim, the Arbitral Tribunal had upheld a plea that it does not have jurisdiction to entertain the claim and hence the award or order made by it, comes within the purview of Section 16(2) of the Act and consequently is appealable under Section 37(2)(a) of the Act.

8. In the case on hand, what the Tribunal has found is that in view of the M.O.M. wherein the various claims of either party were thrashed out and settled, N.T.P.C. could not pursue most of the claims set out in the counter claim. This is a finding on the merits of the claim of N.T.P.C. It is not a decision by the Arbitral Tribunal either under Section 16(2) or Section 16(3) of the Act. Consequently, the High Court was right in holding that the appeal filed by N.T.P.C. under Section 37(2)(a) was not maintainable.