M/s. Lion Engineering Consultants Vs. State of Madhya Pradesh & Ors.

[Civil Appeal Nos. 8984-8985 of 2017]

O R D E R

1. We have heard learned counsel for the parties.

2. The matter arising out of a dispute in execution of a works contract was referred to the Arbitrator by the High Court on 4.09.2008. The Arbitrator made his Award dated 10.07.2010 in favour of the appellant. It was challenged under Section 34 of the Arbitration and Conciliation Act, 1996 ("the Act") before the Seventh Additional District Judge, Bhopal by the respondent-State of M.P. The respondent sought to amend its objections after three years which was rejected by the trial Court. On a petition under Article 227 of the Constitution of India, the High Court has allowed the said amendment.

3. Learned counsel for the appellant submitted that the amendment could not be allowed beyond the period of limitation which affected the vested rights of a party. It 2 was also submitted that the objection having not been raised under Section 16(2) of the Act before the Arbitrator, could not be raised under Section 34 of the Act. In support of this submission reliance has been placed on MSP Infrastructure Ltd. vs. Madhya Pradesh Road Development Corporation Ltd. reported in (2015) 13 SCC 713.

4. Learned Advocate General for the State of M.P. submitted that the amendment sought is formal. Legal plea arising on undisputed facts is not precluded by Section 34(2)(b) of the Act. Even if an objection to jurisdiction is not raised under Section 16 of the Act, the same can be raised under Section 34 of the Act. It is not even necessary to consider the application for amendment as it is a legal plea, on admitted facts, which can be raised in any case. He thus submits the amendment being unnecessary is not pressed. Learned Advocate General also submitted that observations in M/s MSP Infrastructure Ltd. (supra), particularly in Paragraphs 16 and 17 do not laid down correct law.

5. We find merit in the contentions raised on behalf of the State. We proceed on the footing that the amendment being beyond limitation is not to be allowed as the amendment is not pressed.

6. We do not see any bar to plea of jurisdiction being raised by way of an objection under Section 34 of the Act even if no such objection was raised under Section 16.

7. We may quote the observations from M/s MSP Infrastructure (supra):

"16. It is not possible to accept this submission. In the first place, there is nothing to warrant the inference that all objections to the jurisdiction of the Tribunal cannot be raised under Section 16 and that the Tribunal does not have power to rule on its own jurisdiction.

Secondly, Parliament has employed a different phraseology in Clause (b) of Section 34. That phraseology is "the subject matter of the dispute is not capable of settlement by arbitration." This phrase does not necessarily refer to an objection to 'jurisdiction' as the term is well known. In fact, it refers to a situation where the dispute referred for arbitration, by reason of its subject matter is not capable of settlement by arbitration at all. Examples of such cases have been referred to by the Supreme Court in Booz Allen and Hamilton Inc. V/s. SBI Home Finance Limited (2011) 5 SCC 532. This Court observed as follows:-

"36. The well-recognised examples of non-arbitrable disputes are:

(i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences;

(ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters;

(iv) insolvency and winding-up matters;

(v) testamentary matters (grants of probate, letters of administration and succession certificate); and

(vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes."

The scheme of the Act is thus clear. All 4 objections to jurisdiction of whatever nature must be taken at the stage of the submission of the statement of defence, and must be dealt with under Section

16 of the Arbitration Act, 1996. However, if one of the parties seeks to contend that the subject matter of the dispute is such as cannot be dealt with by arbitration, it may be dealt under Section 34 by the Court.

17. It was also contended by Shri Divan, that the newly added ground that the Tribunal under the Arbitration Act, 1996 had no jurisdiction to decide the dispute in question because the jurisdiction lay with the Tribunal under the M.P. Act of 1983, was a question which can be agitated under sub-clause (ii) of clause (b) of sub-section (2) of Section 34 of the Arbitration Act, 1996. This provision enables the court to set- aside an award which is in conflict with the public policy of India. Therefore, it is contended that the amendment had been rightly allowed and it cannot be said that what was raised was only a question which pertained to jurisdiction and ought to have been raised exclusively under Section 16 of the Arbitration Act, 1996, but in fact was a question which could also have been raised under Section 34 before the Court, as has been done by the Respondent.

This submission must be rejected. The contention that an award is in conflict with the public policy of India cannot be equated with the contention that Tribunal under the Central Act does not have jurisdiction and the Tribunal under the State Act, has jurisdiction to decide upon the dispute. Furthermore, it was stated that this contention might have been raised under the head that the Arbitral Award is in conflict with the public policy of India. In other words, it was submitted that it is the public policy of India that arbitrations should be held under the appropriate law.

It was contended that unless the arbitration was held under the State Law i.e. the M.P. Act that it would be a violation of the public policy of India. This contention is misconceived since the intention of providing that the award should not be in conflict with the public policy of India is referable to the public policy of India as a whole i.e. the policy of the Union of India and not merely the policy 5 of an individual state. Though, it cannot be said that the upholding of a state law would not be part of the public policy of India, much depends on the context. Where the question arises out of a conflict between an action under a State Law and an action under a Central Law, the term public policy of India must necessarily be understood as being referable to the policy of the Union. It is well known, vide Article 1 of the Constitution, the name 'India' is the name of the Union of States and its territories include those of the States."

8. Both stages are independent. Observations in Paragraphs 16 and 17 in MSP Infrastructure (supra) do not, in our view, lay down correct law. We also do not agree with the observation that the Public policy of India does not refer to a State law and refers only to an All India law.

9. In our considered view, the public policy of India refers to law in force in India whether State law or Central law. Accordingly, we overrule the observations to the contrary in Paragraphs 16 and 17 of the judgment in MSP Infrastructures Ltd. (supra).

10. Since amendment application is not pressed, the appeal is rendered infructuous. The impugned order is set aside.

11. The matter may now be taken up by the trial court for consideration of objections under Section 34 of the Central Act. It will be open for the respondents to argue that its objection that the Act stands excluded by the M.P. Madhyastham Adhikaran Adhiniyam, 1983 could be raised even without a formal pleading, being purely a legal plea. It will also be open to the appellant to argue to the contrary. We leave the question to be gone into by the concerned court.

The appeals are disposed of accordingly.

.....J. (ADARSH KUMAR GOEL)

.....J. (ROHINTON FALI NARIMAN)

.....J. (UDAY UMESH LALIT)

NEW DELHI,

MARCH 22, 2018

M/S MMC Projects India Pvt. Ltd. Vs. Gujarat State Electricity Corporation Ltd. & ANR.

[Special Leave Petition (C) No. 15059 of 2011]

O R D E R

It is not disputed that for purposes of decision of the question arising in the present case the provisions of Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992 are in pari materia to the provisions of M.P. Madhyastham Adhikaran Adhiniyam, 1983 which have been considered by this Court vide Order dated 8.03.2018 in Civil Appeal No. 974/2012 titled as "Madhya Pradesh Rural Road Development Authority & Anr. vs. M/s L.G. Chaudhary Engineers and Contractors."

In view of above, this petition is dismissed.

.....J. (ADARSH KUMAR GOEL)

.....J. (ROHINTON FALI NARIMAN)

.....J. (UDAY UMESH LALIT)

NEW DELHI,

MARCH 22, 2018

The State of Bihar & Ors. Versus M/S. Brahmaputra Infrastructure Limited

[Civil Appeal No.3344 of 2018 arising out of SLP (C) No(S). 18212 of 2017]

The State of Bihar & Ors. Vs. M/S. Supreme Brahmaputra (JV)

[Civil Appeal No.3345 of 2018 arising out of SLP (C) No(S). 21434 of 2017]

O R D E R

(1) Leave granted. We have heard learned counsel for the parties.

(2) The State is aggrieved by the appointment of arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 (the Central Act) on the ground that the said Act is excluded by the Bihar Public Works Contracts Arbitration Tribunal Act, 2008 (Bihar Act 21 of 2008) (the State Act).

(3) To appreciate the plea raised, it is necessary to refer to the scheme of the State Act as reflected in some of the key provisions. Sections 8, 9 and 22 of the State Act are as follows:

"8. Act to be in addition to Arbitration & Conciliation Act, 1996. - Notwithstanding anything contained in this Act, and of the provisions shall be in addition to and supplemental to Arbitration & Conciliation Act, 1996 and in case any of the provision contained herein is construed to be in conflict with Arbitration Act, then the latter Act shall prevail to the extent of conflict.

9. Reference to Tribunal and making of award.-

(1) Where any dispute arises between the parties to the contract, either party shall, irrespective of whether such contract contains an arbitration clause or not refer, within one year from the date on which the dispute has arisen, such dispute in writing to the Tribunal for arbitration in such form and accompanied by such documents or other evidence and by such fees, as may be prescribed.

(2) On receipt of a reference under subsection (10, the Tribunal may, if satisfied after such inquiry as it may deem fit to make, that the requirements under this Act in relation to the reference are complied with, admit such reference and where the Tribunal is not so satisfied, it may reject the reference summarily.

(3) Where the Tribunal admits the reference under sub-section (2), it shall, after recording evidence if necessary, and after perusal of the material on record and on affording and opportunity to the parties to submit their argument, make an award or an interim award, giving its reasons therefor.

(4) The Tribunal shall use all reasonable dispatch in entering on and proceeding with the reference admitted by it and making the award, and an endeavour shall be made to make an award within four months from the date on which the Tribunal had admitted the reference.

(5) The award including the interim award made by the Tribunal shall, subject to an order, if any made under Section - 12 or 13, be final and binding on the parties to the dispute.

(6) An award including an interim award as confirmed or varied by an order, if any, made under Section- 12 or 13 shall be deemed to be a decree within the meaning of section-2 of the 10 Code of Civil Procedure, 1908 of the principal Court of original jurisdiction within the local limits whereof the award or the interim award has been made and shall be executed accordingly.

22. Overriding effect of this Act.- Notwithstanding any thing contained in any other Law, Rule, Order, Scheme, or Contract Agreement entered into before or after commencement of this Act, any dispute as defined in Section 2(e) of this Act shall be regulated under the provisions of this Act, Rules and Regulations framed thereunder, and absence of arbitration clause in any contract agreement shall not have effect excluding any dispute from the purview of this Act."

(4) It is not in dispute that the parties have executed agreement dated 22nd June, 2012, providing for appointment of an arbitrator as per provisions of the Central Act. Relevant portion of Clause 25 of the said Agreement is as follows: "The arbitration shall be conducted in accordance with provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modification or re-enactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceeding under the clause."

(5) The scheme of Sections 8, 9 and 22 of the State Act shows that in the absence of an agreement stipulating the applicability of the Central Act, the State Act applies to works contracts. Since in the present cases, an arbitration agreement exists and stipulates applicability of the Central Act, the State Act will not apply. We, thus, do not find any ground to interfere with the impugned order.

(6) The appeals are dismissed. It will, however, be open to the appellant-State to move the High Court for change of Arbitrator, if a case to this effect is made out on an objection of neutrality, as submitted by learned counsel for the State.

(7) Before parting with this order, we consider it appropriate to deal with the submission raised by learned counsel for the respondent(s) that Section 4(3)(b) of the State Act is patently unconstitutional. The said section is as follows:

"Section 4. Terms and conditions of service of the Chairman and other members of Tribunal.-

(3) (b) The Chairman and any other member shall hold the office at the pleasure of the Government, provided that; in case of premature termination; they shall be entitled to three months pay & allowances in lieu of compensation."

(8) We are of the view that a provision that the tenure of the Chairman and other members of the Arbitration Tribunal at the pleasure of the Government is inconsistent with the constitutional scheme, particularly Article 14 of the

Constitution of India. Section 4(1) of the State Act provides for a three year tenure or till the age of 70 years whichever is earlier. Termination of the said tenure cannot be at pleasure within the term stipulated as the arbitration tribunal has quasi judicial functions to perform. Any termination of the service of such member by a party to the dispute would interfere directly with the impartiality and independence expected from such member. The said provision is, thus, manifestly arbitrary and contrary to the Rule of Law. Accordingly, we declare the said provision to be unconstitutional.

.....J. (ADARSH KUMAR GOEL)

.....J. (ROHINTON FALI NARIMAN)

.....J. (UDAY UMESH LALIT)

New Delhi,

March 22, 2018.