IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

Present :-
THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA.

A.P. 625 of 2019
and
A.P. 627 of 2019
Lindsay International Private Limited
Vs
IFGL Refractories Limited

For the Petitioner	:	Mr. Sakya Sen, Sr. Adv. Mr. Sukrit Mukherjee, Adv. Mr. Shaunak Mitra, Adv. Mr. S.R. Kakrania, Adv. Mr. Tanuj Kakrania, Adv. Mr. Karanjeet Sharma, Adv.
For the Respondent	:	Mr. Anindya Kr. Mitra, Sr. Adv. Mr. Soumabho Ghose, Adv. Mr. Arunabha Deb, Adv. Mr. Ayush Jain, Adv. Ms. Arti Bhattacharya, Adv.
Last Heard on	:	14.06.2022.
Delivered on	:	08.07.2022.

Moushumi Bhattacharya, J.

1. The petitioner, Lindsay International, seeks setting aside of an order dated 24th August, 2019 by which the petitioner's applications under section 16 of The Arbitration and Conciliation Act, 1996, were dismissed. Lindsay names the order

as an 'Award'/'Interim Award' and has hence filed the present applications under section 34 of the Act for setting it aside.

2. Section 16 empowers the arbitral tribunal to rule on its own jurisdiction including on an objection with regard to the existence or validity of the arbitration agreement.

3. The respondent IFGL Refractories takes a preliminary point of maintainability that the impugned order is not an award and is hence not amenable to the recourse provided under section 34 of the 1996 Act.

4. The first question which is required to be decided is whether the impugned order dated 24th August, 2019 - described as a "Partial Award" - qualifies as an award falling within the parameters of the Act. The petitioner claims the impugned order to be an interim arbitral award within the meaning of section 31(6) of the Act. The respondent contends otherwise; namely that the impugned decision is not an interim award and hence the present application under section 34 of the Act, for setting aside the impugned decision, is not maintainable.

The question of Maintainability

5. According to Mr. Sakya Sen, learned counsel appearing for the petitioner Lindsay, it is the pith and substance of the award rather than the nomenclature which determines the nature and character of the award. Counsel relies on several decisions to submit that any order passed by an arbitral tribunal in an application under section 16 would qualify as an award if it decides on the merits of the dispute. Counsel submits that the learned Arbitrator, while considering the

scope of existence of the arbitration agreement between the parties made a categorical finding that there has been no novation of the earlier contract between the parties by virtue of the subsequent Memorandum of Understanding (MOU). It is submitted that by reason of such finding, the Counter-Claim of the petitioner would become infructuous since the stand of the petitioner before the Arbitrator was that the arbitration agreement between the parties was novated by the subsequent MOU.

6. Mr. Anindya Mitra, learned senior counsel appearing for the respondent IFGL, opposes the relief prayed for by Lindsay and submits that to be categorised as an award, the decision has to determine a claim which has been referred to in the arbitration on merits. According to counsel, the impugned order was passed by the Arbitrator under section 16 of the Act and only decides the jurisdictional issue of whether the Arbitrator can entertain any claim referred for adjudication on the merits of the claim. Counsel submits that IFGL did not make any claim on the alleged novation/supersession of the agreement by the subsequent MOU.

The controversy – as made out by the petitioner Lindsay

7. Lindsay's case is that the Arbitrator could not have decided on the novation/supersession issue since this amounted to a decision on the merits of the case. In referring to merits, Lindsay urges that in rejecting the argument of the arbitration agreement being superseded by the MOU, the Arbitrator has given a finding on one of the primary disputes between the parties. To put it simply, Lindsay's case is that the arbitration agreement was novated while IFGL contends that the arbitration agreement remained intact; IFGL referred the dispute to

arbitration on the strength of the arbitration agreement. The other contention of Lindsay is that in rejecting the contention of novation, the Arbitrator prejudged the issue nos. 5 & 6 framed in the arbitration proceedings. Issue nos. 5 & 6 dealt with whether the termination of the MOU by the claimant IFGL was justified and whether the respondent Lindsay committed any breach of the MOU.

8. Is Lindsay correct in saying this?

The answer of the Court is as follows:

i) Issue Nos. 5 & 6 were framed by the Arbitrator on 21st December, 2019, that is after the impugned decision dated 24th August, 2019. Hence, the contention that in coming to the impugned finding that the MOU did not supersede the arbitration agreement, the Arbitrator decided on two of the issues framed, is without basis. It may also be presumed that since the impugned decision preceded framing of the issues, the petitioner Lindsay was fully aware of the impugned order at the time when it agreed to framing of issue nos. 5 & 6.

ii) The application of Lindsay was made under section 16 of the Act questioning the jurisdiction of the Arbitral Tribunal and was not an application inviting the Arbitrator to make an interim award under section 31(6) of the Act. Lindsay invited the Arbitrator to decide on the novation aspect in the section 16 application. This would be clear from paragraph 20 of the application where it has been averred that the MOU superseded the 12 purchase orders and that the MOU did not contain an arbitration clause.

iii) Hence, the issue of the arbitration agreement being novated by the subsequent MOU was raised by Lindsay as a jurisdictional issue to be decided in the section 16 application. It can therefore be concluded that the Arbitrator was called upon to decide on the novation aspect as a question of jurisdiction and not as an issue on the merits of the dispute.

iv) The contention of Lindsay that the Arbitrator breached the divide between the jurisdiction issue simpliciter and a fundamental aspect of the dispute would be belied from a careful reading of the controversial part of the impugned decision, an extract of which is given below.

> "*Let me now consider the other part of the submission of Mr. Bhattacharyya that even if there was an arbitration agreement between the parties, such agreement stood novated and/or superseded by the subsequent MOU executed by the parties.*" [Mr. Bhattacharyya represented Lindsay]

The Arbitrator then proceeds to deal with the aspect of novation and section 62 of The Indian Contract Act, 1872 and comes to the following finding:

> *"..... considering both the contract and MOU, there is hardly any scope to hold that the MOU has extinguished the previous contract."*
>
> and
>
> *"As such it cannot be held that the earlier contract stood extinguished by subsequent MOU."*

9. The above extract further makes it clear that it was only on Lindsay's persuasion that the Arbitrator entered into the controversy and decided the point of novation. Notwithstanding the argument made on behalf of the parties before this court, it would be evident that the question whether the arbitration agreement was novated by the subsequent MOU would in any event be a crucial -

and unavoidable - factor for deciding the jurisdiction of the Arbitrator to continue with the arbitral proceedings. If for instance, the Arbitrator had accepted the fact of novation, the arbitration agreement would have ceased to exist and the substratum of the arbitration proceedings would have been obliterated. Thus, in any view of the matter, it cannot be held that the Arbitrator transgressed into the arena of the dispute between the parties. It may also be noted that the objection taken of the Arbitrator deciding the claim on merits does not form part of the pleadings before this Court.

Whether the order under challenge is a Partial Award

10. The expression "Partial Award" does not find place in the 1996 Act. Section 2(1)(c) defines "arbitral award" to include an interim award. Section 31(6) empowers the arbitral tribunal to make an interim arbitral award at any time during the arbitral proceedings on any matter with respect to which a final arbitral award may be made. Read together, an interim award is a sub-set of the super-set arbitral award and one which is given in aid of the final arbitral award. In other words, the interim award must snugly fit into and within the contours of the final award and form a part thereof. This also means that an interim award must be an adjudication in respect of the dispute which the parties to the arbitration have brought before the tribunal in the form of a statement of claim and defence/counter-claim (refer section 23). Although the nomenclature of the impugned decision is a "Partial Award", the said expression may be interchanged with an interim award as defined under the Act for present application.

11. The question is whether the impugned decision satisfies the trappings of an interim arbitral award under section 2(1)(c) and 31(6) of the Act.

The impugned decision reads as follows.

> *"PARTIAL AWARD DISPOSING OF PRELIMINARY OBJECTION RAISED BY THE RESPONDENT AS TO COMPETENCE OF THE TRIBUNAL TO ARBITRATE IN THIS REFERENCE DUE TO LACK OF ITS JURISDICTION,...."*

12. It is hence clear that the impugned decision was rendered on an application by Lindsay on a preliminary objection on the competence of the tribunal to rule on its jurisdiction; in essence an application under section 16 of the Act. Section 16 empowers an arbitral tribunal to decide on an objection taken by a party to resist the arbitration as to the existence or validity of the arbitration agreement. Section 16(5) mandates the arbitral tribunal to decide on the issue of jurisdiction or whether it is exceeding the scope of its authority before the tribunal continues with the arbitral proceedings. It also provides that the arbitral tribunal can continue with the arbitral proceedings and make an arbitral award if it rejects the objection to jurisdiction or to the existence or validity of the arbitration agreement. It is therefore clear that an order passed under section 16(5) is an order on jurisdiction simpliciter, that is, whether the Arbitrator can entertain any claim referred to him for adjudicating on the merits of the claim. In essence, an order under section 16(5) must precede an order on the merits of a claim.

13. The application of Lindsay has to be contextually seen to understand whether the impugned order reflects the limited scope of a decision under section 16(5). The application of Lindsay was made on 30th April, 2019 under section 16

with the object of challenging the jurisdiction of the Tribunal in adjudicating the dispute between the parties. The prayers in the application repeat the object, namely, that the arbitral tribunal does not have jurisdiction to entertain any alleged dispute arising out of the purchase orders and accordingly to rule that the tribunal does not have jurisdiction to entertain the dispute (prayer (b)).

The impugned decision rejected Lindsay's application by holding that

> "*the tribunal does not find any merit in the respondent's said application under section 16 of the Arbitration and Conciliation Act, 1996 and as such the same is rejected*".

The impugned decision does not state, in any part thereof, that it has considered or adjudicated on the merits of the dispute contained in the pleadings before the Tribunal as on that date, namely the Statement of Claim of IFGL. It is relevant to state that the Statement of Claim was the only pleading before the Tribunal on 24th August, 2019 since Lindsay had not filed any statement of defence till then.

14. Further, the Statement of Claim filed by IFGL was essentially 2-fold; (a) payment received by Lindsay from Arcelor Mittal as price of goods and (b) default award for the amount of Sales Tax payable/paid by IFGL to the Sales Tax Authority. Thus, to be a decision on merits, namely an interim award, the impugned decision must have considered and adjudicated on either of the claims in the Statement of Claim of IFGL.

15. Significantly, none of the claims of IFGL deals with the issue of novation or supersession of the arbitration agreement. It is but natural that IFGL, the claimant before the arbitral tribunal, would not urge such an issue for

consideration since it was relying on the arbitration clause in the agreement executed between the parties. The case of novation could only have been that of Lindsay who was resisting the arbitration and called upon the Arbitrator to decide on its jurisdiction to enter into the reference. In any event, the decision could only have been confined to the Statement of Claim filed by IFGL since Lindsay's Counter-Claim was not before the Arbitrator at the relevant point of time.

Conclusion

16. An interim award, by definition, is a stopover en-route to the destination to final adjudication of the dispute. An interim award is a part-pronouncement on the merits of the dispute as urged by and considered by the arbitral tribunal. The parties are hence already on the road to the final award and well past the rough (and tumble of the) terrain of the jurisdictional toll-gates. Being firmly ensconced within the outer periphery of the final award (as 2(1)(c) suggests), an interim award is a decision on the merits of the dispute and not a decision on the jurisdiction of the tribunal. The interim award must take within its fold the claim and the counter-claim or set-off of the claimant and the respondent respectively and contain a decision on the same.

17. As a further pointer to the legislative intent of fortifying the jurisdiction-merit divide between a section 16 and a section 31/31(6), the avenues of challenge provided under the Act are also distinct. While a refusal to exercise jurisdiction is an appealable order under section 37, an award/interim award has

to climb two levels through the section 34 step before it can be challenged under section 37.

18. Therefore, the impugned decision rejecting the petitioner's application under section 16 is an order on jurisdiction bereft of the depth and detail of a part-adjudication on the merits of the claim. The alleged breach of the wall separating the jurisdiction and the merits is not a transgression into a prohibited arena, it is purely a decision on a question posed by the objector itself (Lindsay) – that the arbitration agreement ceased to exist after the MOU was executed by the parties.

The case law on the jurisdictional aspect

19. The *kompetenz* principle or the issue of jurisdiction ingrained in section 16 essentially refers to the triumvirate of a) whether the arbitration clause exists; b) whether the Arbitral Tribunal is properly constituted; and c) whether the arbitration is in accordance with the arbitration agreement: ref. *IFFCO vs Bhadra Products; (2018) 2 SCC 534*. What this means is that the Arbitral Tribunal can also rule that no arbitration agreement exists or the arbitration agreement is not valid or even that the arbitration agreement does not confer jurisdiction on the Tribunal to adjudicate upon the particular claim by a party before it. An issue of jurisdiction must inevitably relate to the authority of the Arbitrator to hear and decide a case and include objections to the competence of the Arbitrator to hear the dispute. Objections such as absence of consent or a dispute falling outside the scope of the arbitration agreement would also form part of the jurisdictional issues.

20. The factors which would contribute to the trappings of an interim award, as defined under sections 2(1)(c) and 31(6) of the 1996 Act, would acquire a measure of clarity from the decisions shown to the Court. In *Harinarayan G. Bajaj vs. Sharedeal Financial Consultants Pvt. Ltd.; AIR 2003 Bom 296*, a Single Bench of the Bombay High Court held that issues pertaining to jurisdiction will be the subject matter of an order under section 16 of the Act. A Single Bench of the Delhi High Court also came to the same conclusion in *Union of India vs. East Coast Boat Builders & Engineers Ltd.; (1998) 2 Arb LR 702*, namely, that an order on the point of jurisdiction of the arbitral tribunal would not be an interim award. In *Nirma Ltd. vs. Lurgi Energie Und Entsorgung GMBH, Germany; AIR 2003 Guj 145*, a Division Bench of the Gujarat High Court held that a decision on the jurisdictional aspect was an "order" and not an "award".

21. In *M.S. Commercial vs. Calicut Engineering Works Ltd.; (2004) 10 SCC 656*, the Supreme Court opined that once the Arbitrator had taken a decision that there was an arbitration agreement, the Arbitrator was bound to continue with the arbitration proceedings and make an arbitral award under section 16(5) of the Act. A similar question was considered by this Court in A.P. 33 of 2021 between the same parties in an application for setting aside of a decision dated 15th October, 2020, claimed to be an interim award by the applicant Lindsay (refer *Lindsay International Private Limited vs. IFGL Refractories Limited; 2021 SCC OnLine Cal 1979*). The question before the Court was whether the order refusing introduction of a new claim by way of amendment to the counter-statement was an interim award. The Court rejected the contentions of the

applicant and found that the impugned order was not an interim award as defined under the relevant provisions of the Act.

22. The decisions cited on behalf of the petitioner proceed on the basis that the arbitrability of a claim or counter-claim cannot be decided in a section 16 application. In *National Thermal Power Corpn. Ltd. vs. Siemens Atkeingesellschaft; (2007) 4 SCC 451,* the arbitral tribunal of the International Chambers of Commerce made a partial award deciding on the merits of the counter-claim of NTPC on the ground that those claims had been settled by the parties in a meeting. The NTPC preferred an appeal from the partial award under section 37 of the Act. The Supreme Court held that the appeal was not maintainable since the arbitral tribunal had made an award. In *Indian Farmers Fertilizer Cooperative Limited vs. Bhadra Products; (2018) 2 SCC 534*, the arbitral tribunal decided whether the claims made in the arbitration were barred by limitation. In *Bharat Sanchar Nigam Limited vs. Nortel Networks India Private Limited; (2021) 5 SCC 738*, the Supreme Court reiterated that issues with respect to existence and validity of the arbitration agreement are recorded as jurisdictional issues. Hence, a matter in issue in the arbitration was decided by the order under challenge. Since it has already been held that the Arbitrator in the present case did not decide on any claim made by IFGL, these decisions do not assist the petitioner Lindsay.

<u>The question of Estoppel, Approbation and Reprobation</u>

23. The impugned decision makes it clear that the Arbitrator was persuaded by the petitioner to decide the jurisdictional issue first as a preliminary issue before

entering into the merits of the reference. The preliminary issue was whether the arbitration agreement stood novated by the subsequent MOU. On the other hand, the argument of the petitioner before this Court is that the Arbitrator should not have decided the issue of novation. Hence, the stand taken by the petitioner before the Arbitrator is contrary to the stand taken by it before this Court. Having invited the Arbitrator to decide the question of novation as a preliminary issue, the petitioner cannot now take a position which is inconsistent with what it had urged before the Arbitral Tribunal.

24. In *Mumbai International Airport Private Limited vs. Golden Chariot Airport; (2010) 10 SCC 422* the Supreme Court explained the common law doctrine prohibiting approbation and reprobation as a facet of the law of estoppel and linked the same to the doctrine of election as discussed in *Scarf v. Jardine; (1881-85) All ER Rep 651(HL)* among other cases. A similar deprecatory note was sounded by a 3-Judge Bench of the Supreme Court in *Suzuki Parasrampuria Suitings Private Limited vs. Official Liquidator of Mahendra Petrochemicals Limited; (2018)10 SCC 707* where it was held that a litigant can take different stands at different times but cannot take contradictory stands in the same case. Although both the decisions were given in the facts particular to those cases, the principle posited is that a litigant cannot shift its stand for taking advantage of court processes at different stages of the same proceeding.

25. By reason of the above discussion, this Court is of the considered view that the impugned decision dated 24th August, 2019 does not qualify to be nor does it have the trappings of an interim award under section 2(1)(c) or section 31(6) of the 1996 Act. Hence, the impugned order cannot be challenged under section 34

of the Act. Since the issue of maintainability of the present application has been decided against the petitioner, the question of the said decision being set aside under section 34 of the Act does not arise.

26. AP 625 of 2019 and AP 627 of 2019 are accordingly dismissed without any order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be supplied to the respective parties upon fulfillment of requisite formalities.

(**Moushumi Bhattacharya, J**)