

Court No. - 37

Case :- APPEAL UNDER SECTION 37 OF ARBITRATION AND CONCILIATION ACT 1996 No. - 901 of 2023

Appellant :- National Highway Authority Of India

Respondent :- Parimal Bajpai And 3 Others

Counsel for Appellant :- Aloke Kumar

Counsel for Respondent :- Suresh Chandra Verma, Saumitra Dwivedi, Shashank Shekhar Mishra

Hon'ble Ajay Bhanot, J.

The competent authority under Section 3-G of the National Highway Authority of India Act, 1988 determined the compensation amount liable to be paid to the claimants by award dated 27.08.2020. The Arbitral Tribunal was constituted under Section 3-G(5) of the National Highway Authority of India Act, 1988. The appellant before this Court as well as the respondent-claimant preferred objections against the said award before the Arbitrator. The Arbitral Tribunal while drawing its award neglected to consider the objections raised by the appellant and made the final determination solely on the footing of the objections tendered by the respondents-claimants.

Thus, aggrieved, the appellants took out proceedings under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') before the learned District Judge which came to be registered as Arbitration Case No. 17 of 2022

(National Highway Authority of India vs. Parimal Bajpai and Others).

In the aforesaid proceedings, the case of the appellants before the Court below was that the challenge to the compensation determined by the competent authority was specifically made by the NHAI before the Arbitrator. The Arbitrator failed to make any finding on the objections raised by the appellants/ petitioners and the arbitral award dated 27.08.2020 was passed while the said application remained pending in Case No. C202103000000613.

A ground in regard to the aforesaid illegality which vitiates the arbitral award was taken in the proceedings under Section 34 of the Act registered as Arbitration Case No. 17 of 2022 (National Highway Authority of India vs. Parimal Bajpai and Others) before the learned court below. The relevant pleadings are extracted hereunder:

"It is pertinent to mention that NHAI had challenged the award dated 27.08.2020 in C202103000000613 before Ld. Arbitrator wherein respondent is also a party, however, Ld. Arbitrator wherein respondent is also a party, however, Ld. Arbitrator has not decided the aforesaid case and same is still pending."

The learned court below did not advert to the said grounds and no finding in this regard was made in the impugned order dated 27.08.2020 rendered by the court below while deciding the said Arbitration

Case No. 17 of 2022 (National Highway Authority of India vs. Parimal Bajpai and Others). These are the undisputed facts of the case.

Shri Alope Kumar, learned counsel for the appellants submits that the failure of the court below to decide the said categorical objections taken in the proceedings under Section 34 of the Act perpetuates the error of the arbitral tribunal. And as a consequence thereof, an award which is contrary to the fundamental policy of Indian law and also in conflict to the basic notions of morality and justice is sought to be executed against the appellants.

Per contra, Shri Shashank Shekhar Mishra, learned counsel assisted by Shri Devesh Kumar Verma, learned counsel on behalf of the respondents contends that the prerequisites for exercise of powers under Section 34 of the Act are not satisfied in as much as no request under Section 34(4) of the Arbitration and Conciliation Act, 1996 was made before the court below to adjourn the proceedings to give the Arbitral Tribunal an opportunity to resume the arbitral proceedings and cure the errors.

Heard learned counsels for the parties. At the outset, it would be apposite to reproduce Section 34 of the Act, interpretation of which will govern the fate of the controversy.

"Section 34. Application for setting aside arbitral award. --

(1). Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2). An arbitral award may be set aside by the Court only if--

(a) the party making the application ¹[establishes on the basis of the record of the arbitral tribunal that]--

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that--

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation. —Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(3). An application for setting aside may not be made after three

months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal: Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4). On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

Section 34(4) of the Arbitration and Conciliation Act, 1996 contemplates a second opportunity to the arbitral tribunal to revive arbitration proceedings to cure the defects in the award.

The prerequisites of exercise of powers under Section 34(4) of the Act are two fold. Firstly, the learned court in proceedings under Section 34 of the Act has come to a conclusion that it is appropriate to give the arbitral tribunal an opportunity to resume arbitral proceedings or to take such other action as in the opinion of the arbitrator will eliminate the grounds for setting aside the arbitral award. This precondition requires the court to apply its mind to the grounds taken by the parties in their application for setting aside an arbitral award and also to examine the other material evidences in the record.

The second condition precedent for exercise of powers under Section 34(4) of the Act is that the party should make a request for giving the arbitral tribunal such an opportunity. The legislative intent of Section 34(4) of the Act can be determined from the words used in the provision. The legislature has not used legalese or formal legal terms, but the provision is in a less formal cast. The phrase "so requested by a party" stands in contradistinction to "a formal prayer made by the party" or "a specific relief sought by the party". The request by a party as contemplated in Section 34(4) of the Act can be gleaned out from the grounds in the application under Section 34 of the Act. The pleadings as regards the deficiencies in the award have been explicitly made in the application under Section 34 of the Arbitration Act. In these circumstances, it is safe for the court below to accept the same as a request by the party contemplated under Section 34(4) of the Act.

In the facts of this case, there is no difficulty in concluding that the said prerequisite for exercise of powers under 34(4) of the Act was duly satisfied as the appellants have taken specific grounds as regards the errors in the arbitral award.

The court below neglected to make any finding in

regard to the objections to the arbitral award, while passing the impugned order. The impugned order is vitiated by non application of mind.

In these facts, the prerequisites for exercising powers under Section 34 of the Act are fully satisfied. Learned court below misdirected itself in fact and law by declining to give the arbitral tribunal an opportunity to resume the arbitral proceedings and cure the aforesaid defects.

The question now arises as to whether the matter should be remitted to the court below for resuming proceedings under Section 34 of the Act or to the arbitral tribunal for resuming arbitral proceedings.

In light of the provisions of Section 34 of Arbitration and Conciliation Act, 1996 and the appellate powers of this Court, interest of justice which are consistent with the provisions of law will be served by remitting the matter to the Arbitral Tribunal. The narrative will be fortified by authorities in point. The Supreme Court in **National Highways Authority of India Vs. P. Nagaraju and Ors.** reported at **2022 SCC OnLine SC 864** while examining the course of action before the appellate court while dealing with the infirmities in an arbitral award has held:

"That being the fact situation and also the position of law being clear that it would not be open for the court in the proceedings

under Section 34 or in the appeal under Section 37 to modify the award, the appropriate course to be adopted in such event is to set aside the award and remit the matter to the learned Arbitrator in terms of Section 34(4) to keep in view these aspects of the matter and even if the notification dated 28.03.2016 relied upon is justified since we have indicated that the same could be relied upon, the further aspects with regard to the appropriate market value fixed under the said notification for the lands which is the subject matter of the acquisition or comparable lands is to be made based on appropriate evidence available before it and on assigning reasons for the conclusion to be reached by the learned Arbitrator. In that regard, all contentions of the parties are left open to be put forth before the learned Arbitrator."

The impugned order dated 21.08.2023 passed by learned Additional District Judge, Kanpur Nagar in Arbitration Case No. 17 of 2022 (National Highway Authority of India vs. Parimal Bajpai and Others) is liable to be set aside and is set aside.

The matter is remitted to the Arbitrator to resume proceedings in Case No. C202103000000613 and to determine the objections raised by the appellant on merits. The proceeding shall be completed within a period of two months. The Arbitrator shall decide the objections made by the appellants against the award by the competent authority in accordance with law and after giving an opportunity of hearing to both the parties.

The appeal is accordingly allowed.

Order Date :- 17.11.2023

Vandit