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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 16.03.2021

+ O.M.P. (COMM) 116/2021 & I.A. No. 3848/2021 (*for stay of Arbitral Award*) I.A. No. 3849/2021(*for exemption*)

ROAD CONSTRUCTION DEPARTMENT, BIHAR Petitioner

Through: Mr. Keshav Mohan, Ms. Ritu Arora
and Mr. Rishi K. Awasthi, Advocates.

versus

BLA-S &P (JV)

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J. (Oral):

I.A. No. 3850/2021 (*for delay 65 days in filing the petition*) & I.A. No. 3851/2021 (*for delay of 166 days in re-filing the petition*)

1. By way of the afore-noted applications, the Petitioner seeks condonation of delay in filing and re-filing of the objection petition under Section 34 of the Arbitration and Conciliation Act, 1996 [*hereinafter referred to as the 'Act'*] assailing the impugned Arbitral Award dated 1st October, 2019 passed by the Arbitral Tribunal comprising of – (i) Mr. A.K. Yadav [presiding Arbitrator], (ii) Mr. R.N. Goel, and (iii) Mr. B.D. Joshi [being the other two member Arbitrators]. The Arbitral Tribunal pronounced

the majority Award [2:1] on 1st October, 2019, whereby the claims of the Respondent were allowed. One of the members to the Tribunal, Mr. B.D. Joshi, did not sign the impugned Award.

2. Mr. Keshav Mohan, learned counsel for the Petitioner states that the period of limitation under Section 34(3) of the Act would commence only when a valid Arbitral Award is made. In the instant case, the Arbitral Award dated 1st October, 2019 is not a valid or executable Award on account of being in violation of Section 31 of the Act, and therefore, notwithstanding the delay in filing the petition, the Court may entertain this petition. His contentions are summarized hereinbelow: -

2.1 *The majority Award dated 1st October, 2019 does not qualify as a valid Award in terms of Section 31 of the Act.*

Under Section 29 and 31(2) of the Act, participation and deliberation of all the members of the Arbitral Tribunal is necessary in order to pass a valid Award; in absence whereof, the award is rendered invalid. Mr. B.D. Joshi was not present during the Internal meetings/deliberations conducted for making/ publishing of the award. His consent or dissent has not been made part of the Impugned award.

2.2 *The majority award is valid only if reasons for omission were supplied.*

Under Section 31(2) of the Act, the signatures of the majority members of the Arbitral Tribunal will be considered sufficient, only if, reasons for the omission of signature of the member of the Arbitral Tribunal who refrained from signing the Arbitral

Award are supplied. The reasons stated in the impugned award for the omission are vague. The manner in which the Tribunal has functioned amounts to miscarriage of justice.

2.3 *The period of limitation under Section 34(3) of the Act has not commenced.*

It is a settled principle of law that the limitation under Section 34(3) of the Act can commence only after passing of a valid Award signed by all the members of the Arbitral Tribunal. The impugned Award has been signed and passed only by two Arbitrators namely, Mr. A.K. Yadav and Mr. R.N. Goel. Since the signed copy of a legally valid Award by all the members of the Arbitral Tribunal has not been received till date, as provided under Section 31(1) of the Act, the limitation period under Section 34(3) has not begun.

2.4 *Signing of award is mandatory under Section 31.*

That the signing of the Award is mandatory, in terms of Section 31 of the Act. The learned counsel for the Respondent [i.e. the Claimant before the Arbitral Tribunal] had sent a written communication to the presiding Arbitrator stating that it would be filing an application under Section 29A of the Act seeking extension of the mandate of the Arbitral Tribunal. Similar communication was also sent by Mr. B. D Joshi However, all such requests were ignored. The period for rendering the Award and dissenting opinion must be within the period prescribed under Section 29A of the Act. It is not merely an administrative act or a formality which can be suspended. The award cannot be

made and finalized unless all the members of the Arbitral tribunal have deliberated upon the proceedings. The dissenting opinion of one of the members of the Arbitral Tribunal had to be delivered contemporaneously on the same date when the final Award was passed. Since the Award rendered has not been signed by the third member in terms of Section 31 of the Act, therefore, the Award is not valid. Hence, the period of limitation contemplated under Section 31 of the Act will not apply. In support of his submission, he placed before this Court the judgment of the High Court of Bombay in ***Maharashtra State Electricity Distribution Company v. Deltron Electronics***,¹ [hereinafter referred to as '***M.S.E.D.C.***']; and a decision of the Supreme Court in ***Dakshin Haryana Bijli Vitran Nigam Limited v. M/s Navigant Technologies Pvt. Ltd.***² [hereinafter referred to as '***Dakshin Haryana***'].

Analysis

3. The Court has considered the submissions of Mr. Mohan. Under Section 34, the period of limitation for filing the objections to the Award of the Act commences from the date on which the party making the application has received a signed copy of the Arbitral Award in accordance with Section 31(5) of the Act. Section 34(3) reads as under: -

“(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that

¹ ***Maharashtra State Electricity Distribution Company Vs. Deltron Electronics***, (2017) 2 Mh LJ 605.

² ***Dakshin Haryana Bijli Vitran Nigam Limited Vs. M/s Navigant Technologies Pvt. Ltd.***, 2021 SCC OnLine SC 157.

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. The provision of Section 34(3) of the Act, unambiguously and unequivocally states that the application for setting aside the Award cannot be made after three months have lapsed from the date on which the party making the application has received the Award. The Court can, however, entertain a petition for setting aside the Award even after the expiry of three months, provided the party was prevented by a ‘sufficient cause’ from filing the petition within the aforesaid period. However, the Court cannot entertain a petition after thirty days have expired from the initial period of three months. On this aspect, the law is now well settled. The Apex Court, in ***Union of India Vs. Popular Construction***³ has held that Section 5 of the Limitation Act would not apply to applications made under Section 34 of the Act. Further, in ***Simplex Infrastructure Vs. Union of India***⁴, the Supreme Court has made it evident that the statutory period of limitation for filing the application for setting aside of Award is three months, extendable by thirty days if ‘sufficient cause’ is made out. However, no further extension can be granted by the Court for filing the application under Section 34 of the Act.

5. In view of the above legal position, the Court will now proceed to examine the facts as presented by the Petitioner concerning limitation. The

³ ***Union of India Vs. Popular Construction***, (2001) 8 SCC 470.

date of the receipt of the Award is 12th October, 2019. Three months' limitation period commenced on 13th October, 2019 and expired on 8th January, 2020. Further, thirty days' limitation period also expired on 7th February, 2020. The present petition was filed on 24th July, 2020. Thus, the present petition is *ex facie* beyond the extended period of 30 days prescribed under Section 34(3) of the Act.

6. Nevertheless, the Petitioner contends that the limitation period under Section 34(3), which is applicable to valid arbitral awards, will not commence in the first place, as the award is allegedly invalid due to non-fulfilment of the criteria set out in Section 31.

7. In the opinion of the Court, this contention is entirely misconceived. The plea of invalidity does not dilute the rigour of Section 34(3) of the Act. If the Award is to be declared invalid on the grounds as urged, the Court has to first entertain the objections made under Section 34 of the Act. It cannot be said that a different period of limitation would be applicable in cases wherein the Petitioner approaches the Court contending that the Award before the Court is an invalid Award.

8. In light of the above, let us now let us turn to the contention urged by the Petitioner regarding the plea of invalidity of the Award. In a nutshell, Petitioner's contention is that since the plea of invalidity of an award is premised on the ground of omission of signatures of a member of the Arbitral Tribunal, the limitation provided under Section 34(3) of the Act

⁴ *Simplex Infrastructure Vs. Union of India*, (2019) 12 SCC 455.

would not apply. Regardless of the Court's disagreement on the plea of exemption from limitation, the court finds that the contention of invalidity advanced by Mr. Mohan is plainly devoid of merits. The requirement of the form and content of the Arbitral Award, as stipulated under Section 31, is that the Arbitral Award shall be made in writing and signed by the members of the Arbitral Tribunal. However, at the same time, under Section 31(2) a situation is contemplated wherein the Arbitral Tribunal comprises of more than one member. In such proceedings, the existence of signatures of the majority members of an Arbitral Tribunal has been considered to be sufficient for making an Award valid, so long as the reasons for the omitted signature are stated. In this regard, it is seen that the concluding paragraph of the Arbitral Award notes as under: -

"This award does not incorporate the consent/dissent of one member Arbitrator Sh. B.D. Joshi, as he is reportedly indisposed and due to his different view in respect of some of the claim items, as conveyed vide his mail dated 29.09.2019 and 30.09.2019. His consent/dissent note has also not been received till 01.10.2019 as expected. The date of pronouncing award was mutually agreed by the Tribunal members as 30.09.2019, which had to be postponed to 01.10.2019 due to reason stated above. As the tenure of Arbitral Tribunal is expiring on 02.10.2019, the Tribunal is pronouncing the majority award on 1st October, 2019."

9. The aforesaid extract clearly states that the Award has not incorporated the consent/dissent of one member of the Arbitral Tribunal – Mr. B.D. Joshi, due to his indisposition and also due to his differing views in respect of the claim items, as conveyed *vide* his communication dated 29th September, 2019. Further, the Arbitral Tribunal takes note of the fact that since the consent/dissent note has not been received at the time of drafting the Award, as was expected, the Award is being pronounced as mutually agreed upon by the other members of the Arbitral Tribunal. The aforesaid

reasons, in the *prima facie* opinion of the Court, are sufficient to demonstrate compliance of Section 31(2) of the Act and the majority award so rendered is the final award.

10. Further, this Court is bound by the principles as explained by the Supreme Court in the decision in ***Dakshin Haryana*** (*supra*), wherein it was held that the signing of an award, “*is not merely a ministerial act, or an empty formality which can be dispensed with*”,⁵ and that a dissenting opinion must be given “*contemporaneously on the same date as the final award, and not on a subsequent date, as the tribunal becomes functus officio upon the passing of the final award*”.⁶ However, the Petitioner has placed reliance upon this judgement to argue that signing of the award by the dissenting Arbitrator is mandatory and will determine the beginning of the period of limitation. The Apex Court had, upon mulling over the facts of the case, held, that even though the award was pronounced on an earlier date by two members, the signed copy of the award was provided to the parties on a later date when the third arbitrator pronounced his dissenting opinion. On that date, the signed copy of the award, the dissenting opinion, alongwith original record, were handed over to the parties and the proceedings were terminated. Thus, the Court reckoned that the period of limitation will start from the date when the signed copy of the award was delivered to the parties in terms of section 31(5) of the Act. Hence, the reliance placed on the decision in ***Dakshin Haryana*** case would not advance the case of the Petitioner.

⁵ para 4 (viii) at page 15.

⁶ Para 4 (xiv) at page 18.

11. Mr. Mohan has made several averments regarding the fact that Mr. B.D. Joshi was not involved in the deliberations / internal meetings, prior to making the Award. In the opinion of the Court, these contentions cannot be examined forthwith, as the petition is clearly barred by limitation. Whether the reasons stated for omission of the signatures of Mr. B.D. Joshi are adequate and germane for fulfilment of requirement under law, or that the Arbitrator whose signatures are omitted, actually participated in the hearing/deliberations for making the Award, are questions that are required to be ventured into when the Court entertains the petition under Section 34 of the Act.

12. On this aspect, the Petitioner has placed before this Court, a decision of the High Court of Bombay in *M.S.E.D.C. (supra)*. The Petitioner proffers that in *M.S.E.D.C.*, the omission of signature by an Arbitrator without justification was found to be a sufficient cause to declare the award invalid, despite the question of limitation arising therein. However, upon a detailed examination of the judgment, it is seen that the said judgment is of no assistance to the case of the Petitioner. In *M.S.E.D.C.*, a plea was raised that the petition was barred by limitation, as calculated from the date when the signed arbitral award therein was first received. Particularly, after three months of the same, the Arbitral Tribunal decided to review the award, and a re-hearing meeting took place, wherein, upon deliberation, it was ultimately decided to withdraw the notice of rehearing. On these peculiar facts, the Court therein held that the final award was effectively communicated to the Petitioner on the date of communication of such withdrawal, and calculated

thus, the petition was well within time. The Bombay High Court, therefore, specifically went into the question of limitation, decided that the petition is maintainable, and only then proceeded to adjudicate the question of validity and declare the award invalid due to non-signing by the Arbitrator. However, in the present case as canvassed by Mr. Mohan before this Court, a plea cannot be made to ignore the delay and adjudicate upon the validity of the impugned award. Once the finding is returned that the challenge is delayed beyond remedy, the hands of the Court are tied and it cannot delve into determining the validity of the impugned award.

Conclusion

13. In view of the foregoing discussion, in the opinion of the court, the question whether the impugned Award qualifies to be a valid Award, is an aspect that can only be examined under Section 34 of the Act and there will be no separate/different period of limitation in such a case. These questions, no doubt, would go into root of the Award, however, it does not mean that notwithstanding the period of limitation prescribed, the Court can entertain a petition even if it is filed beyond the extended statutory period of thirty days prescribed under Section 34(3) of the Act, just because it is premised on the plea of non-compliance with Section 31 of the Act.

14. For these reasons, the afore-noted applications seeking condonation of delay cannot be allowed. Dismissed.

O.M.P. (COMM) 116/2021

15. In view of the above, the present petition is dismissed, being barred

by limitation and all pending applications are disposed of.

SANJEEV NARULA, J

MARCH 16, 2021

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(corrected and released on 5th April, 2021)

