KINNARI MULLICK AND ANOTHER

v.

GHANSHYAM DAS DAMANI

(Civil Appeal No. 5172 of 2017)

APRIL 20, 2017

[DIPAK MISRA, A. M. KHANWILKAR, MOHAN M. SHANTANAGOUDAR, JJ.]

Arbitration and Conciliation Act, 1996 – s.34(4) – Appellants entered into an agreement with respondent – Disputes arose between the parties – Respondent invoked arbitration proceedings – Arbitrator passed award allowing the claim of respondent – Appellants filed application u/s.34 for setting aside the award – Single Judge of High Court set aside the impugned award with the finding that it did not disclose any reason in support thereof – Division Bench affirmed the finding and conclusion recorded by Single Judge however, suo motu *relegated the parties before the Arbitral Tribunal, in absence of any application filed by the parties to the arbitration proceedings and directed the Arbitrator to assign reason to support award passed by him – Propriety of – Held: No power has been invested by the Parliament in the Court to remand the matter to the Arbitral Tribunal except to adjourn the proceedings for limited purpose mentioned u/s.34(4) – The limited discretion available to the Court under s.34(4) can be exercised only upon a written application made in that behalf by a party to the arbitration proceedings – Respondent failed to make such a request before Single Judge in the first instance and also failed to do so before Division Bench – The Court cannot exercise this limited power of deferring the proceedings before it* suo motu *– Further, the quintessence for exercising power u/s.34(4) is that the arbitral award has not been set aside – In the instant case, Division Bench affirmed the conclusions recorded by the Single Judge and dismissed the appeal preferred by the respondent, thus the award was set aside on that count – Impugned direction of High Court suffers from jurisdictional error and thus cannot be sustained.*

Allowing the appeal, the Court

HELD: 1. On a bare reading of s.34(4) of Arbitration and Conciliation Act, 1996, it is amply clear that the Court can defer

A **the hearing of the application filed under Section 34 for setting aside the award on a written request made by a party to the arbitration proceedings to facilitate the Arbitral Tribunal by resuming 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. The quintessence for exercising power under this provision is that the arbitral award has not been set aside. Further, the challenge to the said award has been set up under Section 34 about the deficiencies in the arbitral award which may be curable by allowing the Arbitral Tribunal to take such measures which can eliminate the grounds for setting aside the arbitral award. No power has been invested by the Parliament in the Court to remand the matter to the Arbitral Tribunal except to adjourn the proceedings for the limited purpose mentioned in sub-section 4 of Section 34. [Para 13] [666-B-D]**

2. In any case, the limited discretion available to the Court under Section 34(4) can be exercised only upon a written application made in that behalf by a party to the arbitration proceedings. It is crystal clear that the Court cannot exercise this limited power of deferring the proceedings before it *suo motu*. Moreover, before formally setting aside the award, if the party to the arbitration proceedings fails to request the Court to defer the proceedings pending before it, then it is not open to the party to move an application under Section 34(4) of the Act. For, consequent to disposal of the main proceedings under Section 34 of the Act by the Court, it would become *functus officio*. In other words, the limited remedy available under Section 34(4) is required to be invoked by the party to the arbitral proceedings before the award is set aside by the Court. [Para 14] [666-G-H; 667-A]

3. In the present case, the Single Judge had set aside the award. Indeed, the Respondent carried the matter in appeal before the Division Bench. Even if it is assumed that the appeal was *in continuum* of the application under Section 34 for setting aside of the award and therefore, the Division Bench could be requested by the party to the arbitral proceedings to exercise its discretion under Section 34(4) of the Act, the fact remains that no formal written application was filed by the Respondent before the Division Bench for that purpose. In other words, the Respondent

did not make such a request before the Single Judge in the first instance and also failed to do so before the Division Bench rejected the appeal of the Respondent. [Para 15] [667-B-D]

4. The power of the Court under Section 34 of the Act is not to remand the matter to the Arbitral Tribunal after setting aside the arbitral award. A *priori*, it must follow that the Division Bench committed manifest error in relegating the parties before the Arbitral Tribunal with a direction to assign reasons in support of the impugned award. Such direction could not have been issued in the fact situation of the present case. The impugned direction suffers from the vice of jurisdictional error and thus cannot be sustained. [Paras 16, 17] [668-D-E]

McDermott International Inc. v. Burn Standard Ltd. **(2006) 11 SCC 181 : [2006] 2 Suppl. SCR 409 – relied on.**

MMTC v. Vicnivass Agency **(2009) 1 MLJ 199**; *Raitani Engineering Works Pvt. Ltd. v. The Union of India and Others* **[2015 (2) GLD 615 (Gau)]**; and *Bhaskar Industrial Development Limited v. South Western Railway* **(decision of High Court of Karnataka in MFA No.103528 of 2015) – approved.**

BSNL v. Motorola India Pvt. Ltd. **(2009) 2 SCC 337 : [2008] 13 SCR 445**; *Konkan Railway Corporation Limited v. Rani Construction Private Limited* **(2002) 2 SCC 388 : [2002] 1 SCR 728**; *GAIL v. Keti Construction (I) Ltd.* **(2007) 5 SCC 38 : [2007] 6 SCR 439 – referred to.**

Case Law Reference

[2008] 13 SCR 445	**referred to**	**Para 9**
[2002] 1 SCR 728	**referred to**	**Para 9**
[2007] 6 SCR 439	**referred to**	**Para 9**
(2009) 1 MLJ 199	**approved**	**Para 9**
[2015 (2) GLD 615 (Gau)]	**approved**	**Para 9**
[2006] 2 Suppl. SCR 409	**relied on**	**Para 9**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5172 of2017.

A From the Judgment and Order dated 13.08.2014 of the High Court at Calcutta in APO No. 223 of 2014.

Rana Mukherjee, Sr. Adv., Ms. Daisy Hannah, Shekhar Kumar, Advs. for the Appellants.

B M. C. Dhingra, Ashwini Kr. Gupta, Piyush Kant Roy, Advs. for the Respondent.

The Judgment of the Court was delivered by

A. M. KHANWILKAR, J. 1. This appeal raises a short question as to whether Section 34 (4) of the Arbitration and Conciliation Act, 1996 (for short "the Act") empowers the Court to relegate the parties C before the Arbitral Tribunal after having set aside the arbitral award in question and moreso *suo moto* in absence of any application made in that behalf by the parties to the arbitration proceedings?

2. The Appellants, being joint owners of premises No.4 Wood Street, Kolkata, known as 4C, Dr. Martin Luther King Sarani, Kolkata, D entered into two development agreements with the Respondent for a construction of a multi storied building. On completion of construction of the building sometime in 2003, the Appellants entered into a further agreement with the Respondent in terms of which the Respondent, for better enjoyment of the property, distributed the owner's allocation. In E terms of the said agreement, the Respondent fully sold and transferred his share of the premises to various prospective buyers with proportionate area of the land to them as well as in common areas. According to the Appellants, the Respondent is not in possession of any portion of the suit premises. The Appellants have also executed and registered the conveyance along with the proportionate right in common areas and F land of the said premises to various transferees, save and except two flats. The said agreement contained an Arbitration clause which reads thus:

> "*21. That all disputes and/or differences between the parties herein shall be referred to arbitration in terms of the provisions* G *of the Arbitration & Conciliation Act, 1996.*"

3. The Respondent asserted that he was entitled to execution and registration of conveyance in respect of 50% built up area on the ground floor of such premises. That claim was rejected by the Appellants. The Respondent, through his advocate's letter dated 21.11.2009 addressed H to the Appellants, inter alia informed them about the appointment of one

Siddhartha Sankar Mandal, Advocate as arbitrator and further, that the said arbitrator would send intimation to the Appellants about the date, time and venue in respect of the arbitration proceedings to be held by him. The said letter, however, did not specify that Siddhartha Sankar Mandal was appointed as Sole Arbitrator nor did it call upon the Appellants to appoint their nominee arbitrator. The Appellants then received communication through Siddhartha Sankar Mandal dated 01.11.2009 stating that he has been appointed as arbitrator to arbitrate the dispute between the Appellants and the Respondent and that he would enter upon the reference on 10.11.2009. By this letter, the Appellants were called upon to remain present so as to hold a meeting as scheduled. According to the Appellants, the letter did not even provide for 30 days' time between the date of meeting and the receipt of the communication by the Appellants. Nevertheless, the arbitrator proceeded with the arbitration proceedings and held meetings. The Appellants did not file their statement of defence. Instead, they filed an application on 10.05.2010 before the arbitrator under Section 16 of the Act, inter alia challenging the composition of the Arbitral Tribunal and also raising the issue of jurisdiction to proceed with the arbitration as a Sole Arbitrator. The arbitrator, however, rejected the said application on 27.08.2010 by an interim award.

4. The Appellants then filed their counter statement in November 2010 to the statement of claim in the said arbitral proceedings without prejudice to their contention that, the Arbitral Tribunal has not been properly constituted and that the arbitrator had no jurisdiction to adjudicate the alleged dispute referred to him. The Appellants were also advised to file an application under Section 14 before the High Court, alleging bias on the part of the arbitrator and for a declaration that the arbitrator had become incompetent to perform his functions. The learned Single Judge of the High Court at Calcutta vide judgment dated 17.09.2012 disposed of the said application by reserving the right of the Appellants to raise all grounds mentioned in the application regarding the competence of the Arbitral Tribunal at the time of challenging the award under Section 34 of the Act, if such occasion arose.

5. The Appellants then received a copy of the purported award dated 18.06.2013 passed by the Arbitral Tribunal. The arbitrator allowed the claim of the Respondent and directed the Appellants to execute and register appropriate deed and/or deeds as proposed by the Respondent vide its Advocate's letter dated 29.06.2009; and further directed that

A conveyance and/or conveyances was/were to be executed and registered by the Appellants, costs and expenses thereof were to be borne by the Respondent within a period of 30 days from the date of the award irrespective of any intervening holiday and/or holidays. The said award, however, did not contain any reason for allowing the claim of the Respondent.

B

6. Being dissatisfied with the interim award dated 27.08.2010 and final award dated 18.06.2013 passed by the Arbitral Tribunal, the Appellants filed an application under Section 34 of the Act, for setting aside of the said awards. The learned Single Judge was pleased to allow the said application on the finding that the impugned award did not disclose any reason in support thereof. The impugned award was accordingly set aside and the parties were left to pursue their remedies in accordance with law. The relevant portion of the decision of the learned Single Judge reads thus:

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> *"Since the present award is completely lacking in reasons and is littered with the unacceptable expressions like "I feel that the claim is justified", "I find no basis" and the like which cannot be supplement for reasons that the statute demands, A.P. No.1074 of 2013 is allowed by setting aside the award dated June 18, 2013. The parties are left free to pursue their remedies in accordance with law."*

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E

7. Against the aforementioned decision the Respondent preferred an appeal before the Division Bench of the High Court at Calcutta. The Appellants also filed a cross objection in respect of the adverse findings recorded by the learned Single Judge against them. The cross objection bearing APO No.223 of 2014 and APOT No.318 of 2014, were heard and decided together by the Division Bench vide impugned judgment dated 13.08.2014. The Division Bench affirmed the findings and conclusion recorded by the learned Single Judge that the award did not contain any reason whatsoever and thus rejected the appeal preferred by the Respondent, in the following words:

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> *"We have considered the rival contentions. Section 31 is clear that would require the Tribunal to assign reason. The award would suffer from such lacunae. We would not be in a position to agree with Mr. Sharma when he would contend, it was reasoned, but reasons might have been insufficient.*

H

The learned Judge observed, "The award does not indicate a line or sentence of reasons and notwithstanding the petitioners herein, having pulled out of the reference and not urging their counter-statement or any defence to the claim, it was still incumbent on the arbitrator to indicate the grounds on which the respondents were entitled to succeed".

We fully endorse what his Lordship would say as quoted (supra). Hence, the appeal fails on such count."

While considering the cross objection filed by the Appellants, the Division Bench negatived the ground urged before it about the inappropriate and illegal constitution of the Arbitral Tribunal. As a result, the cross objection filed by the Appellants was also rejected. Having decided as above, the Division Bench *suo moto* decided to relegate the parties before the Arbitral Tribunal by sending the award back with a direction to assign reasons in support of its award. It will be useful to reproduce the observations of the Division Bench in this regard. The same reads thus:

"*On the cross-objection we would, however, agree with Mr. Sharma when he would draw our attention to Section 13. The learned Judge, in our view, rightly rejected the contention of the respondents. The challenge procedure as spelt out in Section 13 would refer to constitution of the Tribunal as well. Section 4 would clearly provide, if a party knowing his right does not take any step that would debar him to object at a later stage as if he shall be deemed to have waived his right to object.*

Section 34 would empower the Court to remit the award to the Arbitrator, at a stage when the award was under challenge, to eliminate the ground for setting aside of the arbitral award. Applying such provision we send the award back to the Arbitrator with a direction, he must assign reason to support his award. However, we wish to give the Arbitrator a free hand. If he feels, further hearing to be given to the parties, he may do so and upon hearing, he may publish his award in accordance with law adhering to the norms and procedures laid-down under the said Act 1996 without being influenced by the award that the learned Judge already set aside.

A *The appeal is dismissed without any order as to costs."*
(emphasis supplied)

8. Aggrieved by the highlighted operative part of the direction issued by the Division Bench to send back the award to the Arbitral Tribunal for assigning reasons in support of the award, the Appellants B have approached this Court by way of present appeal.

9. Indeed, the Appellants have also challenged the approach of the Division Bench and of the learned Single Judge in rejecting the contention of the Appellants about the jurisdiction of the Arbitral Tribunal. According to the Appellants, that objection could be raised by the C Appellants and ought to be answered in their favour, keeping in mind, the decision of this Court in ***BSNL Vs. Motorola India Pvt. Ltd.***[1]. It is contended that the Appellants could raise the plea, that the Arbitral Tribunal did not have jurisdiction. Further, the Appellants had submitted the submission of defence without prejudice and thus the participation of the Appellants in the proceedings before the Arbitral Tribunal would not D come in the way of the Appellants to raise that contention. The Appellants have also relied on the decisions of this Court in the case of ***Konkan Railway Corporation Limited Vs. Rani Construction Private Limited***[2] and ***GAIL Vs. Keti Construction (I) Ltd.***[3]. However, it may not be necessary for us to examine this argument if we were to accept the E challenge set up by the Appellants to the concluding part of the impugned judgment of the Division Bench of having relegated the parties before the Arbitral Tribunal with a direction to assign reasons in support of the impugned award. As regards this contention, the Appellants have relied on the dictum in the case of ***MMTC Vs. Vicnivass Agency***[4] of the High Court of Madras, ***Raitani Engineering Works Pvt. Ltd. Vs. The Union*** F ***of India and Others***[5] decided by the Gauhati High Court dated 28.05.2015, ***Bhaskar Industrial Development Limited Vs. South Western Railway***[6] decided by the High Court of Karnataka, Dharwad Bench and lastly in ***McDermott International Inc. Vs. Burn Standard Ltd.***[7]

G [1] (2009) 2 SCC 337
[2] (2002) 2 SCC 388
[3] (2007) 5 SCC 38
[4] (2009) 1 MLJ 199
[5] Arbitration Petition No.13 of 2015 [2015 (2) GLD 615 (Gau)]
[6] MFA No.103528 of 2015
H [7] (2006) 11 SCC 181

10. The Respondent, on the other hand, submits that ample power is bestowed upon the Court to relegate the parties to the award under challenge back to the Arbitral Tribunal to eliminate the ground for setting aside of the arbitral award, in terms of Section 34 of the Act. It is submitted that no jurisdictional error has been committed by the Division Bench in exercising that power for sending the award back to the Arbitral Tribunal with a direction to assign reasons in support of the award. It is submitted that the dismissal of the appeal preferred by the Respondent against the judgment of the learned Single Judge will not come in the way of the Respondent muchless to participate in the proceedings before the Arbitral Tribunal as has been remitted by the Division Bench for the limited purpose of assigning reasons in support of the award. It is submitted that no interference is warranted with the concluding part of the judgment of the Division Bench which intends to facilitate rectification of the deficiencies in the award already pronounced by the Arbitral Tribunal.

11. We have heard the learned counsel for the parties. At the outset, we may note that, if the plea taken by the Appellants in relation to the concluding part of the impugned judgment - of sending the award back to the Arbitral Tribunal for recording reasons - was to be accepted, we may not be required to dilate on any other argument. Inasmuch as the learned Single Judge allowed the application under Section 34 of the Act for setting aside of the award preferred by the Appellants; and the Division Bench has already affirmed the conclusion recorded by the learned Single Judge while dismissing the appeal preferred by the Respondent. Thus, the award has been set aside on that count. The Respondent has not challenged that part of the impugned judgment and has allowed it to become final.

12. In this backdrop, the question which arises is: whether the highlighted portion in the operative part of the impugned judgment of the Division Bench can be sustained in law? For that, we may advert to Section 34(4) of the Act which is the repository of power invested in the Court. The same reads thus:

"Section 34.....

(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*

A *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."*

13. On a bare reading of this provision, it is amply clear that the Court can defer the hearing of the application filed under Section 34 for B setting aside the award on a written request made by a party to the arbitration proceedings to facilitate the Arbitral Tribunal by resuming 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. The quintessence for exercising power under this provision is that the arbitral award has not been set aside. Further, the challenge to C the said award has been set up under Section 34 about the deficiencies in the arbitral award which may be curable by allowing the Arbitral Tribunal to take such measures which can eliminate the grounds for setting aside the arbitral award. No power has been invested by the Parliament in the Court to remand the matter to the Arbitral Tribunal D except to adjourn the proceedings for the limited purpose mentioned in sub-section 4 of Section 34. This legal position has been expounded in the case of ***McDermott International Inc.*** (supra). In paragraph 8 of the said decision, the Court observed thus:

E *"8.....parliament has not conferred any power of remand to the Court to remit the matter to the arbitral tribunal except to adjourn the proceedings as provided under sub-section (4) of Section 34 of the Act. The object of sub-section (4) of Section 34 of the Act is to give an opportunity to the arbitral tribunal to resume the arbitral proceedings or to enable it to take such other action which will eliminate the grounds for* F *setting aside the arbitral award."*

(emphasis supplied)

14. In any case, the limited discretion available to the Court under Section 34(4) can be exercised only upon a written application made in that behalf by a party to the arbitration proceedings. It is crystal clear G that the Court cannot exercise this limited power of deferring the proceedings before it *suo moto*. Moreover, before formally setting aside the award, if the party to the arbitration proceedings fails to request the Court to defer the proceedings pending before it, then it is not open to the party to move an application under Section 34(4) of the Act. For, H consequent to disposal of the main proceedings under Section 34 of the

Act by the Court, it would become *functus officio*. In other words, the limited remedy available under Section 34(4) is required to be invoked by the party to the arbitral proceedings before the award is set aside by the Court.

15. In the present case, the learned Single Judge had set aside the award vide judgment dated 07.03.2014. Indeed, the Respondent carried the matter in appeal before the Division Bench. Even if we were to assume for the sake of argument, without expressing any opinion either way on the correctness of this assumption, that the appeal was *in continuum* of the application under Section 34 for setting aside of the award and therefore, the Division Bench could be requested by the party to the arbitral proceedings to exercise its discretion under Section 34(4) of the Act, the fact remains that no formal written application was filed by the Respondent before the Division Bench for that purpose. In other words, the Respondent did not make such a request before the learned Single Judge in the first instance and also failed to do so before the Division Bench rejected the appeal of the Respondent.

16. In the case of **MMTC** (supra), the Madras High Court, while dealing with the purport of Section 34(4) of the Act in paragraph 22 (C) of the reported judgment, observed thus:

> *"(C).....On the other hand, Section 34(4) of the new Act, does not prescribe any condition precedent on the substance of the matter but prescribes three procedural conditions namely that there should be an application under Section 34(1) of the new Act and that a request should emanate from a party and the Court considers it appropriate to invoke the power under Section 34(4) of the new Act."*

Again, in paragraph 22 (e) (IV) of the reported judgment, it observed thus:

> *"But under the 1996 Act, the Court has only two sets of powers after the award is pronounced viz.,*
>
> *(i) to set aside the award under Section 34(2); or*
>
> *(ii) to adjourn the proceedings to enable the arbitral tribunal to resume the proceedings or take such other action as in the opinion of the tribunal will eliminate the grounds for setting aside the arbitral award."*

A In the case of **Raitani Engineering Works Pvt. Ltd.** (supra), the Gauhati High Court, placing reliance on the decision in **MMTC** (supra) in paragraph 8 of its decision, observed thus:

> *"But unfortunately in the present case, the award given by the arbitration panel on 13.07.2012 was quashed in its entirety*
> B *and the appeal under Section 34 is no more pending before the Court. Therefore, invoking the powers conferred under sub-section (4) of Section 34 of the Arbitration Act to facilitate the arbitration panel to take rectificatory steps is not an option in this matter. Moreover neither of the contesting party in this*
> C *dispute have applied for an additional award and therefore it may not be appropriate to direct the arbitration panel to re-decide on the six un-decided claims of the contractor."*

The Division Bench of the High Court of Karnataka in the case of **Bhaskar Industrial Development Limited** (Supra) has expounded that the power of the Court under Section 34 of the Act is not to remand
D the matter to the Arbitral Tribunal after setting aside the arbitral award.

17. A priori, it must follow that the Division Bench committed manifest error in issuing direction in the concluding part of the impugned judgment, as reproduced hereinbefore in paragraph No.7. Such direction could not have been issued in the fact situation of the present case. The
E impugned direction suffers from the vice of jurisdictional error and thus cannot be sustained. We have no option but to quash and set aside the same.

18. As the Respondent has not challenged the decision of the Division Bench, we are left with the situation where the award has been
F set aside, and as observed by the learned Single Judge, with liberty to the parties to pursue their remedies in accordance with law.

19. Accordingly, we allow this appeal to the extent indicated above with no order as to costs.

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Ankit Gyan Appeal allowed.