REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No.10778 OF 2014
[Arising out of SLP (Civil) No. 16539 of 2010]

M/S MSP INFRASTRUCTURE LTD. .. APPELLANT(S)

VERSUS

M.P. ROAD DEVL. CORP. LTD. .. RESPONDENT(S)

JUDGMENT

S. A. BOBDE, J.

Leave granted.

2. The question that has arisen in this appeal is : whether a party to an arbitration proceeding may be permitted to raise objections under Section 34 of the Arbitration and Conciliation

Act, 1996 (for short “the Arbitration Act, 1996”), with regard to the jurisdiction of the Arbitral Tribunal (for short “the Tribunal”) after the stage of submission of the written statement.

3. M/s M.S.P. Infrastructure (Appellant) and the M.P. Road Development Corporation (Respondent) entered into a contract on 04-04-2002 for the development and upgradation of the *Raisen-Rahatgarh* road (a stretch of about 100 Kms.) in the State of Madhya Pradesh.

4. Upon a dispute arising between the parties in respect of the work carried out by the Appellant, the Respondent Corporation terminated the said contract and encashed the bank-guarantee. Thereafter, the Appellant filed a Civil-Suit being C.S. No. 63 of 2003 before the Calcutta High Court challenging the termination of the Agreement as well as the encashment.

5. The Calcutta High Court disposed of the suit on 22-05-2003 by recording “Terms of Settlement” between the parties, whereby it was decreed that the dispute would be

referred to arbitration in terms of the contract dated 04-04-2002 within a period of 30 days, under the provisions of the Arbitration Act, 1996.

6. The Tribunal made an award on 27-11-2006. By the said award, the Tribunal partly allowed the claims of the Appellant and accordingly awarded a sum of approximately Rs. 6.90 crores as well as the release of Fixed Deposit Receipts which had been deposited as security with the Respondent.

7. Aggrieved by the award dated 27-11-2006, the Respondent filed a petition on 09-01-2007 for setting aside the award under Section 34 of the Arbitration Act, 1996. The Respondent assailed the award as being in contravention of clause (b) of sub-section (2) of Section 34 of the Arbitration Act, 1996.

8. Subsequently, on 28-02-2009 the Respondent moved an application to amend the original petition under Section 34 to add additional grounds of objection. The Additional District & Sessions Judge, Bhopal (Madhya

Pradesh) vide order dated 26-08-2009 rejected the said amendment application. The learned Additional District & Sessions Judge observed that it was absolutely unjust and unfair to file such objections after two years of the filing of the petition under Section 34 of the Arbitration Act, 1996. Aggrieved, the Respondent preferred a Petition under Article 227 before the High Court of Madhya Pradesh at Jabalpur. The Madhya Pradesh High Court without going into the tenability of the amendment application at the stage at which it was moved, i.e., beyond the time permitted by Section 16 of the Arbitration Act, 1996, simply allowed the amendment by observing that they are not deciding the merits of the case and that they were simply considering the amendment application.

9. On 18-02-2010, the High Court allowed the Respondent's petition and set aside the order of the District Court, thus allowing the amendment application.

10. Aggrieved by the allowing of the amendment application, the Appellant has moved this Court. We must at

once notice that the main challenge to the order allowing the amendment is that it allows the Respondent to raise an objection to jurisdiction contrary to Section 16 of the Arbitration Act, 1996, which provides that an objection to jurisdiction shall not be raised later than the submission of the statement of defence. The grounds allowed to be raised by the order allowing the amendment application are as follows:

> *"I-A That the Indian Council of Arbitration, New Delhi had no jurisdiction to appoint any Arbitral Tribunal of private persons to entertain and decide the dispute between the parties as it related to a works contract between a contractor and a/Govt. Undertaking.*
>
> *I-B That the dispute being a dispute between a contractor and a Govt. Undertaking arising out of a works contract of more than Rs.50,000/- the Arbitration Tribunal Constituted by the State Govt. of M.P. had the exclusive jurisdiction to decide the said dispute on being submitted to it under sub section 1 of, Section 7 of the M.P. Madhyastham Adhikaran Adhiniyam, 1983 and none else. As*

such, the impugned award passed by the Arbitral Tribunal constituted-by the Indian Council of Arbitration, New Delhi having no jurisdiction to entertain and/or decide the dispute, the impugned award is a total nullity and non-est in the eye of law."

11. According to the Appellant, the Tribunal under the Arbitration Act, 1996 was fully empowered to enter into and decide the dispute submitted to it, since the dispute was referred in pursuance of an arbitration clause contained in the Concession Agreement, which reads as follows:

"39.1 Any dispute, which is not resolved amicably as provided in Clause 39.1 and 39.2 shall be finally decided by reference to arbitration by a Board of Arbitrators appointed as per the provision of the Arbitration and Conciliation Act, 1996 and any subsequent amendment thereto. Such Arbitration shall be held in accordance with the Rules of Arbitration of the Indian Council of Arbitration and shall be subject to the provisions of the Arbitration and Conciliation Act, 1996 and as amended from time to time thereafter."

12. The Appellant further contends that the aforesaid clause covers any dispute which is not resolved amicably and is intended to cover the present dispute which arises under the contract formed and concluded by the agreement which contains this very arbitration clause. The Appellant further contends that this agreement was entered into by the parties in the year 2002, being fully aware of the existence of the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 (for short "the M.P. Act of 1983"). Not only this, the parties reiterated this agreement before the Calcutta High Court when they specifically agreed vide Clause 'C' of the consent terms that if the Appointing Authority fails to appoint and constitute the Tribunal in terms of the Concession Agreement dated 04-04-2002 within a period of 30 days, the parties shall be at liberty to apply to the Madhya Pradesh High Court for appointment and constitution of the Tribunal under the provisions of the Arbitration Act, 1996. Thus, on two occasions, the parties asserted and consented that the dispute between them

would be resolved by Arbitration under the provisions of the Arbitration Act, 1996. Therefore, according to the Appellant, there is no merit whatsoever in the ground introduced by the amendment application. Even otherwise, the Appellant contended that the provisions of the Arbitration Act, 1996, being a Parliamentary Statute would have precedence over the M.P. Act of 1983, which is a State Act on the same subject. Above all, it was contended that the introduction of the ground that the Tribunal did not have jurisdiction is grossly belated and impermissible in view of Section 16(2) of the Arbitration Act, 1996.

13. It is clear from the circumstances, that in the event it is found that the newly added ground could not have been raised at this stage, i.e. the stage at which it was allowed to be raised, it is not necessary to go into the wider question as to which Act will prevail, the Central Act or the State Act. Thus, the only question that falls for consideration at this stage is whether, having regard to Section 16 of the Arbitration Act, 1996, the Respondent was entitled to

introduce the ground that the Arbitration Tribunal constituted under the M.P. Act of 1983 would take precedence over the Tribunal constituted under the Arbitration Act, 1996, that too by way of an amendment to the petition under Section 34.

14. Section 16(2) of the Arbitration Act, 1996 reads as follows:

> *"Section 16(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator."*

On a plain reading, this provision mandates that a plea that the Tribunal does not have jurisdiction shall not be raised later than the submission of the statement of defence. There is no doubt about either the meaning of the words used in the Section nor the intention. Simply put, there is a prohibition on the party from raising a plea that the Tribunal

does not have jurisdiction after the party has submitted its statement of defence. The intention is very clear. So is the mischief that it seeks to prevent. This provision disables a party from petitioning an Tribunal to challenge its jurisdiction belatedly, having submitted to the jurisdiction of the Tribunal, filed the statement of defence, led evidence, made arguments and ultimately challenged the award under Section 34 of the Arbitration Act, 1996. This is exactly what has been done by the Respondent Corporation. They did not raise the question of jurisdiction at any stage. They did not raise it in their statement of defence; they did not raise it at any time before the Tribunal; they suffered the award; they preferred a petition under Section 34 and after two years raised the question of jurisdiction of the Tribunal. In our view, the mandate of Section 34 clearly prohibits such a cause. A party is bound, by virtue of sub-section (2) of Section 16, to raise any objection it may have to the jurisdiction of the Tribunal before or at the time of submission of its statement of defence, and at any time

thereafter it is expressly prohibited. Suddenly, it cannot raise the question after it has submitted to the jurisdiction of the Tribunal and invited an unfavourable award. It would be quite undesirable to allow arbitrations to proceed in the same manner as civil suits with all the well-known drawbacks of delay and endless objections even after the passing of a decree.

15. Shri Divan, the learned senior counsel for the Respondent vehemently submitted that a party is entitled under the law to raise an objection at any stage as to the absence of jurisdiction of the Court which decided the matter, since the order of such a Court is a nullity. It is not necessary to refer to the long line of cases in this regard since, that is the law. But, it must be remembered that this position of law has been well settled in relation to civil disputes in Courts and not in relation to arbitrations under the Arbitration Act, 1996. Parliament has the undoubted power to enact a special rule of law to deal with arbitrations and in fact, has done so. Parliament, in its wisdom, must be

deemed to have had knowledge of the entire existing law on the subject and if it chose to enact a provision contrary to the general law on the subject, its wisdom cannot be doubted. In the circumstances, we reject the submission on behalf of the Respondent.

16. It was next contended on behalf of the Respondent by Shri Divan, that Section 16 undoubtedly empowers the Tribunal to rule on its own jurisdiction and any objections to it must be raised not later than the submission of the statement of defence. However, according to the learned senior counsel, objections to the jurisdiction of a Tribunal may be of several kinds as is well-known, and Section 16 does not cover them all. It was further contended that where the objection was of such a nature that it would go to the competence of the Arbitral Tribunal to deal with the subject matter of arbitration itself and the consequence would be the nullity of the award, such objection may be raised even at the hearing of the petition under Section 34 of the Act. In support, the learned senior counsel relied on

clause (b) of sub-section (2) of Section 34 which reads as follows:-

> "***34(2)*** *An arbitral award may be set aside by the Court only if –*
>
> *(a) .....*
>
> *(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.*

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 the case of ***Booz Allen and Hamilton Inc. Vs. SBI Home Finance Limited and Ors.***[1] 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."*

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1 (2011) 5 SCC 532

The scheme of the Act is thus clear. All 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 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 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.

18. We have thus no hesitation in coming to the conclusion that the amendment application raised a ground which was contrary to law and ought not to have been allowed by the High Court. We accordingly set aside the judgment and order of the High Court. There shall be no order as to costs.

.....J.
[J. CHELAMESWAR]

.....J.
[S.A. BOBDE]

New Delhi,
December 5th, 2014