Serial No.01
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

CRP No. 11 of 2022

Date of Decision: 09.05.2022

The Chief Engineer (PWD)
(National Highways)
Government of Meghalaya, Shillong.

Vs. M/s. BSC – C&C JV

Coram:

Hon'ble Mr. Justice H.S.Thangkhiew, Judge.

Appearance:

For the Petitioner(s) : Mr. S. Sahay, Adv.
Ms. R. Colney, GA.

For the Respondent(s) : Mr. U. Hazarika, Sr. Adv. with
Mr. L. Khyriem, Adv.
Ms. G. Mohan, Adv.

i) Whether approved for reporting in Law journals etc: Yes/No

ii) Whether approved for publication in press: Yes/No

JUDGMENT AND ORDER

1. The instant petition under Article 227 is a second round of litigation that is before this Court between the same parties, though in the present proceedings the erstwhile respondent in the earlier round (CRP No. 2 of 2022) is now the petitioner. The petitioner is aggrieved with the impugned order

dated 14.02.2022 passed by the Arbitral Tribunal constituted for adjudication of disputes in relation to Agreement dated 21.02.2011 for the 2-laning Project for Nongstoin-Shillong Section of NH-44 under the Special Accelerated Road Development Programme (SARDP-NE) of the Ministry of Road Transport and Highways.

2. The brief facts are that the Arbitral Tribunal vide an interim award dated 27.07.2021 was pleased to award an amount of Rs. 75 Crores to the respondent by partly allowing an application of the respondent under Section 31(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') which was made, seeking an interim award in respect of Claim No. 1 in the Arbitral proceedings. An application under Section 33 of the Act was then filed by the respondents before the Arbitral Tribunal seeking certain modifications in the award which however, came to be rejected by an order dated 21.12.2021. By order dated 14.02.2022 the Arbitral Tribunal then framed issues for its determination in the said Arbitration proceedings and the first issue framed was with regard to the amounts claimed by the respondents under Claim No. 1.

3. The grievance of the petitioner centres around the contention that the Arbitral Tribunal patently lacks inherent jurisdiction to reconsider Claim No. 1, inasmuch as, the same had already been considered and an award had been passed thereon, dated 27.07.2021. The Arbitral Tribunal by a subsequent

order dated 21.12.2021 passed under a Section 33 application, had also rejected prayers for modification of the award in respect of Claim No. 1 which the petitioner asserts had finally decided the Claim No. 1, but by framing issue No. 1 on Claim No.1, vide the impugned order, the Arbitral Tribunal had conferred authority on itself to award further amounts on a claim which it had already decided. The impugned order is assailed on the grounds that the same had been passed without jurisdiction, against the provisions of the Arbitration Act and in violation of the doctrine of *functus officio* and res-judicata.

4. Mr. S. Sahay, learned counsel for the petitioner submits that Claim No. 1 had been finally determined by the award dated 27.07.2021 passed by the learned Arbitral Tribunal and as per Section 35, is enforceable as a decree under the Act, and as such Claim No. 1 being decreed by the award, the Arbitral Tribunal is therefore *functus officio* in respect of Claim No. 1. Learned counsel has referred to ***IFFCO Ltd. v. Bhadra Products, (2018) 2 SCC 534 and McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181*** to emphasize the point that an interim award is not subject to a final award but is a final award on matters covered thereby, which he submits is the position in the instant case, as the award dated 27.07.2021 covers Claim No. 1 and therefore, is final as far as Claim No. 1 is concerned.

5. It is also argued that the respondent's application under Section 33 before the Arbitral Tribunal is a clear admission of the fact that Claim No. 1

has been finally decided, since an additional award as per Section 33 (4) can be sought only in respect of Claims already presented in the arbitral proceedings but omitted from the award; and the rejection of the same by order 21.12.2021, he contends, clearly reflects that no additional award or clarification as sought by the claimant, was made out. He submits that the only remedy against rejection of a Section 33 application is by preferring a Section 34 petition under the Act. The framing of the first issue by the Arbitral Tribunal as to the entitlement of the respondent over amounts claimed by it under Claim No. 1, he submits has given a new lease of life to the said claim despite the respondent failing to secure relief in the award as also by Section 33 application. The learned counsel has articulated the challenge to the impugned order in his written arguments as follows: -

(a) Arbitral Tribunal is patently lacking inherent jurisdiction over Claim No. 1 as the same already stands finally decreed by Award dated 27.07.2021.

(b) Exercise of jurisdiction over Claim No. 1 after passing the award dated 27.07.2021 is also contrary to order dated 21.12.2021 of the Arbitral Tribunal wherein it has been held that Tribunal has considered all the claims and passed its award, which calls for no correction.

(c) Arbitral Tribunal is patently lacking inherent jurisdiction over Claim No. 1 as the Arbitral Tribunal has become *functus officio* having heard and decided the Claim No. 1.

(d) Impugned order has resulted in failure of justice, inasmuch as, the respondents, are being permitted to re-litigate decided claims.

(e) Impugned order is based on a procedure unknown to law which is liable to be corrected by this Hon'ble Court.

(f) Re-hearing of the decided matter is also barred by the principle of res-judicata contained in Section 11 of the Code of Civil Procedure, 1908.

6. On the question of maintainability of this petition under Article 227, learned counsel has placed the judgment of this Court between the same parties dated 11.02.2022 (CRP No. 2 of 2022) and submits that in the earlier proceedings it was the respondent herein which had argued before this Court and placed several decisions that jurisdiction under Article 227 is not curtailed against Arbitral proceedings, but now are seeking to take a contrary stand. It is further submitted by the learned counsel that even otherwise, the orders of Arbitral Tribunal which are patently lacking in jurisdiction have been challenged before writ Courts and have been held to be maintainable. Reliance is also placed on the decision of the Delhi High Court in the case of ***Surender Kumar Singhal & Ors vs. Arun Kumar Bhalotia & Ors. (2021***

SCC Online Del. 3708) wherein he submits the entire gamut of the maintainability and scope and extent of interference has been discussed.

7. The learned counsel has also contended that alternate remedy under Section 34 of the Act is also not available to the petitioner in view of the fact that the award dated 27.07.2021 has already been put to challenge by the institution of Commercial Arbitration Case and while the matter is pending, the impugned order came to be passed which renders the remedy of Section 34 illusory and even if the petitioner was to succeed in the pending Section 34 application, by reliance on the impugned order, the respondent can obtain another award on the same claim which has been decreed and which decree is already under challenge.

8. He lastly submits that remedy under the Arbitration Act is not available in cases where there is patent lack of inherent jurisdiction and the only recourse is an application such as the present one under Article 227 of the Constitution of India.

9. Mr. U. Hazarika, learned Senior counsel assisted by Mr. L. Khyriem, learned counsel for the respondent submits that the only issue in the present proceedings is whether Issue No. 1, framed by the Arbitral Tribunal on 14.02.2022, could be framed in view of the interim award dated 27.07.2021 and whether any further adjudication in respect of the said claim would be permissible. He submits that apart from the non-maintainability of the present

petition, framing or non-framing of issues is not mandatory under the Act nor determinative of the rights of the parties and as such no cause of action has arisen to warrant the instant proceedings. It is further submitted that remedy for any grievance lies in the filing of a Section 34 petition, assuming that the petitioner is aggrieved by the final arbitral award, under Section 16(3) of the Act on the ground that the Arbitral Tribunal has exceeded the scope of its authority.

10. In support of his contention as to non-maintainability, the learned Senior counsel has placed reliance on the following judgments: -

(i) Deep Industries Limited vs. ONGC (2020) 15 SCC 706.

(ii) Tagus Engineering Pvt. Ltd. vs. Reserve Bank of India (Writ Petition No. 3957 of 2021, Bombay High Court) order dated 21.02.2022.

(iii) SBP and Co. vs Patel Engineering Ltd., (2005) 8 SCC 618.

11. On the necessity or requirement of framing issues the learned Senior counsel has cited the following judgments: -

(i) Prabhakar Nirman vs. TCIL Limited 2019 SCC Online Del 9559 (Para 52(i).

(ii) Patel Engineering Co. Ltd. vs. B.T.Patil & Sons Belgaum (Construction) Pvt. Ltd. *(Arbitration Petition No. 891 of 2010, decided on 04.04.2013).*

12. It is contended by the learned Senior counsel that the entire petition is based on a complete misreading of the award, as though the respondent under Section 31(6) had sought an amount of Rs. 117,97,18,006/- under Claim No. 1, the Arbitral Tribunal had proceeded on the principle of Order XII Rule 6 CPC by giving a judgment upon admission and awarded a sum of Rs. 75 Crores with the balance due to be paid after detailed calculations. It is submitted that nowhere does the interim award say that Claim No. 1 has been adjudicated in its totality, or that quantification of the balance amount has been decided. With regard to the rejection of the Section 33 application learned Senior counsel asserts that as the adjudication was final only as far as Rs. 75 Crores being part of Claim No. 1, the Arbitral Tribunal had reiterated the findings of the award and had further observed that the figure that had been arrived at of Rs. 75 Crores need not be confused with the other claims.

13. The learned Senior counsel while refuting the contention of the petitioner that the Arbitral Tribunal had become *functus officio* as far as Claim No. 1 is concerned, submits that the Arbitral Tribunal had kept the balance of Claim No. 1 for determination subject to certified calculations and this is apparent from the award dated 27.07.2021 itself. He therefore submits that the petition being non-maintainable and which does not disclose any cause of action, is based on a palpably erroneous reading of the interim award being an alleged final adjudication of Claim No. 1, is one in a long series of

applications and petitions filed by the petitioner to scuttle/delay the arbitral proceedings and does not deserve any consideration from this Court.

14. Having heard the submissions of the learned counsels and after a careful perusal of the materials on record, it is noted that the only issue that is to be decided apart from the question of maintainability, is whether the Arbitral Tribunal lacked inherent jurisdiction in framing the issue on Claim No. 1 which the petitioner asserts is a closed and decided issue as far as the proceedings before the Arbitral Tribunal was concerned. The issue on Claim No. 1 as framed by the Tribunal for the sake of convenience is quoted hereinbelow:

> ***"i) Whether the Claimant is entitled to claim Rs. 117,97,18,006/- being the amount of Claim No. 1? OPC***
>
> ***(Objected to by Ld. Counsel for the Respondent)."***

In the context of Claim No.1, the same was subjected to earlier proceedings which was initiated by an application under Section 31(6) wherein the respondent/claimant had called upon the Arbitral Tribunal to pass an interim award of Rs. 117,97,18,006/- on the ground that the said amount required no finding of fact. This was partly allowed and the Arbitral Tribunal awarded the respondent/claimant Rs. 75 Crore by the award dated 27.07.2021. This award was subjected to Section 33 proceedings whereby the

respondent/claimant sought an additional award which however was rejected by the Tribunal by order dated 21.12.2021.

15. The Arbitral Tribunal after the culmination of the earlier proceedings as it proceeded to frame issues for trial and evidence had then framed the above noted issue which encompassed the entire Claim No.1 of the respondent/claimant which indisputably had already been partly allowed by way of the interim award dated 27.07.2021. In this backdrop, it would therefore be necessary to examine the operative portions of the award dated 27.07.2021 and the order dated 21.12.2021 rejecting the Section 33 application, to ascertain as to whether the Arbitral Tribunal was correct in framing the issue of Claim No.1 as has been done in the impugned order. Paragraph Nos. 101, 102 and 103 of the award dated 27.07.2021, which are relevant are quoted hereinbelow:

> ***"101. Accordingly, we partly allow the present application under section 31(6) of the Act filed by the claimant. However before passing order on the amount, it is noted that DRB 1 decided that the amounts be paid on calculation of interest on the basis of 12% per annum. Various calculations made by the claimant are mainly on simple interest basis (as reflected in its submissions before DRB 1), though at some places interest on interest is also calculated. It is strange to note that during pleadings, Ld. Counsel for the Claimant tried to justify the monthly compounding. It is not certified by the claimant that calculations have been made on the basis of simple interest and at no point there is interest on interest. It has been observed that the calculations are not exactly the way, these should have been done. For example, while calculating simple***

interest from a date xyz to the present, in calculations another date stu has been taken. Interest has been calculated from xyz to stu and then this amount has been added to the principal which cannot be done in doing calculations for simple interest.

102. Further it is noticed that in every case the delay has been taken from the date of submission of bill, while the initial date shall be one when the claimant has submitted all the papers and the bill is accepted for payment. It also needs to be mentioned that the claimant got some initial amount as advance and therefore effect of clause 51.3 of the conditions of contract may also be kept in view.

103. In the circumstances mentioned above, the Tribunal decides to award a sum of Rs. 75 Crore to the claimant pending the detailed certified calculations. This amount is the one which is mentioned before the DRB 1 and also gets mentioned in the correspondence exchanged between the claimant, respondent and the MoRTH. The Tribunal, however, is not accepting the calculations as such and wants to give a chance to the Respondent to come with its own figures if they have any. For the present, the Tribunal is deciding an amount less than the amount which is expected to come out of calculations. The Respondent is directed to make payment of the aforesaid interim award within 3 months from today to the claimant. The interest of 12% per annum will continue to accrue."

Subsequently, while dismissing the Section 33 application vide order dated 21.12.2021 the Arbitral Tribunal had held at paras 15 to 21 as follows:

"15. The Arbitral Tribunal observes that section 33(1)(a) of the Act empowers the Tribunal "to correct in the award any errors of computation, any clerical or typographical errors or any errors of similar nature"

16. The Arbitral Tribunal also observes that the Claimant is not talking of any computational, clerical or typographical error in its application dated 16.08.2021.

17. Thus, the entire case of the Claimant is based on the stand that the clarifications sought and additional award requested lies within the four walls of the words "any errors of similar nature".

18. The Arbitral Tribunal observes that any additional award can only be made under Section 33(4) of the Act and there is no application under this Act. Further it is erroneous for the Claimant to infer that the Interim Award is relating to one issue. The Tribunal observes that this is erroneous reading of the Interim Award. The plain reading of the Interim Award makes it clear that the Tribunal has considered all the claims and has reached a figure which need not be confused with any other figure. Thus, the Arbitral Tribunal is of the clear finding that no additional award or clarification as sought by the Claimant is made out.

19. As regards clarification/modification of paras 101, 103 and 104, the Tribunal is of the considered view that the reliefs sought cannot be treated as "errors of similar nature". Any relief granted here will go into the realm of substantive review. The Arbitral Tribunal observes that there is no mistake or error and therefore, no correction is needed.

20. Further, the Arbitral Tribunal takes note of the recent decision of the Supreme Court announced on 22.11.2021 in the case Gyan Prakash Arya vs. Titan Industries, 2021 SCC Online SC 1100. The relevant para is reproduced as follows:

> ***"The original award was passed considering the claim made by the claimant as per its original claim and as per the statement of the claim made and therefore subsequently allowing the application under Section 33 of the 1996 Act to modify the original award in exercise of powers under Section 33 of the 1996 Act is not sustainable. Only in a case of arithmetical and/or clerical error, the award can be modified and such errors only can be corrected. In the present case, it cannot be said that there was any arithmetical and/or clerical error in the original award passed by the learned arbitrator. What was claimed by the***

> ***original claimant in the statement of claim was awarded. Therefore, the order passed by the learned arbitrator on an application filed under Section 33 of the 1996 Act and thereafter modifying the original award cannot be sustained. The order passed by the learned arbitrator in the application under Section 33 of the 1996 Act is beyond the scope and ambit of Section 33 of the 1996 Act."***
>
> ***21. In view of the above decision of the Hon'ble Supreme Court, the Arbitral Tribunal is of the considered view that the claimant has completely failed to make out any case for giving clarifications/modifications/additional award under Section 33(1)(a) of the Act and the application filed by them is dismissed."***

16. A perusal of the award dated 27.07.2021 (relevant portion quoted above), no doubt alludes to the fact that Claim No. 1 cannot be said to have been finally and conclusively adjudicated, inasmuch as, the component regarding the calculation of interest was not accepted and the sum of Rs. 75 Crore was awarded pending other detailed certified calculations. However, the order dated 21.12.2021 on the Section 33 application, the paragraphs quoted above indicate otherwise especially para 18. It is also to be noted that the order dated 27.07.2021 at para 1(a) notes the fact that an interim award was prayed for payment of Rs. 117,97,18,006/- which is the entire amount of Claim No.1 in the application under Section 31(6). A perusal of the respondent/claimant's application which was made under Section 33 also reinforces this position since the respondent/claimant at paras 3.1.3, 3.3.5 and 3.3.7 of the said application has firstly acknowledged that the award since it

had been passed under Section 31(6) had become final on a specific issue adjudicated therein and further was seeking an additional award relating to the balance of the claims.

17. Taking into account these circumstances and the other attendant facts, it is clearly apparent that the proceedings before the Arbitral Tribunal have become locked in a procedural wrangle between the parties. This observation is made in view of the following facts. *Firstly*, an award interim or otherwise, as per Section 35 and 36 of the Act is final and binding and enforceable as a decree. *Secondly*, the said award dated 27.07.2021 has already been put to challenge by Section 34 proceedings before the Commercial Court by the petitioner and the same is pending adjudication. A second award on the same claim on subsequent adjudication would therefore in the event the Section 34 application is allowed, create a situation wherein the respondent/claimant would be in possession of another decree in its favour on the same claim. *Thirdly*, the only remedy against the rejection of the application under Section 33 would necessarily be by preferring a petition under Section 34(3). *Fourthly*, if a part of the claim had been admitted, request to make an additional arbitral award on such claims have to be proceeded with under Section 33(4) of the Act.

18. The Arbitral Tribunal by framing the issue on Claim No.1, which included the entire claim of the respondent/claimant after the rejection of the

Section 33 application has certainly given rise to disputed questions. This is also evidenced by the fact that the respondent/claimant themselves noticing this patent defect even after the instant civil revision application had been filed before this Court, on 08.04.2022 by way of an application, had prayed for re-casting and re-drafting of the issue No.1 before the Arbitral Tribunal with the following prayer:

> ***"In the premises as aforesaid, it is prayed that the Arbitral Tribunal may be pleased to:***
>
> ***a. Re-cast issue no. (i) in terms of para 103 of the Interim Award dated 27.07.2021;***
> ***b. Issue an order of clarification with respect to Issue no.(i) as it was framed vide order dated 14.02.2022; and***
> ***c. Pass any order as it may deem fit.***
>
> ***It is prayed accordingly."***

19. Though as contended by the respondents that the framing of issues is not mandatory, once an Arbitral Tribunal has resorted to the same, it is expected that the issues framed should be clear and concise as to the claims, to allow the parties to tender evidence and make submissions on the said issues which will be of useful assistance in the conduct of the proceedings. It is not a question of rights or a cause of action being vested on any party, but can simply be seen as an aid to speedy and efficient arbitral proceedings. What has been occasioned in the present case it appears is that, the Arbitral Tribunal seems to have disregarded the earlier proceedings that is the passing of the interim award dated 27.07.2021 and the rejection of the Section 33

application dated 21.12.2021, and by framing the issue No.1 on the entire Claim No.1, has effectively rewound the matter back to the respondent/claimant's original claim of Rs.117,97,18,006/- which in the view of this Court is impermissible, as the Arbitral Tribunal has become *functus officio* as far as in respect of the issues adjudicated upon in the award dated 27.07.2021.

20. The issue that therefore has to be determined is whether the Arbitral Tribunal patently lacked inherent jurisdiction in framing issue No.1 on Claim No. 1. It is an admitted position that on Claim No.1, Rs.75 Crores had been awarded to the respondent/claimant which is final on the specific matters adjudicated upon. Though it has been argued by the respondent/claimant that the remaining portion of the Claim No.1 is still up for further adjudication, and conversely by the petitioner that the award covers the entire claim, the framing of the issue as it stands leaves little room for doubt that the Arbitral Tribunal in framing the said issue, lacked inherent jurisdiction in law and fact, since as noted in the preceding paragraph, the issue covers the entire claim of Rs.117,97,18,006/-. As mentioned earlier, the respondent on seeing this irregularity, had also sought recasting of Issue No. 1 by a petition dated 08.04.2022, in spite of the fact that the matter was already before this Court, which only reinforces the stand taken by the petitioners as to the illegality committed by the Arbitral Tribunal.

21. The policy of minimum judicial intervention as provided under Section 5 of the Act is always uppermost in the minds of the Courts while exercising powers under Article 226 and 227 in matters concerning arbitration proceedings. However, situations and circumstances that have arisen in the instant matter where recourse to Section 37 of the Act is unavailable, or for that matter Section 16(5) also would not yield any remedy to correct the proceedings, as a decision rejecting a plea under Section 16(5) can only be challenged with the final award, the petitioner cannot be faulted for seeking remedy under Article 227 of the Constitution of India.

22. It is noted that the piecemeal adjudication that has been resorted to has resulted in the arbitration proceedings being delayed which does not augur well in such proceedings where time is the essence. The Hon'ble Supreme Court in the case of ***IFFCO vs. Bhadra Products (2018) 2 SCC 534*** with regard to interim awards and piecemeal adjudication had observed in paragraphs 7 and 8 as follows:

> ***"7. As can be seen from Section 2(c) and Section 31(6), except for stating that an arbitral award includes an interim award, the Act is silent and does not define what an interim award is. We are, therefore, left with Section 31(6) which delineates the scope of interim arbitral awards and states that the Arbitral Tribunal may make an interim arbitral award on any matter with respect to which it may make a final arbitral award.***
>
> ***8. The language of Section 31(6) is advisedly wide in nature. A reading of the said sub-section makes it clear that the jurisdiction to make an interim arbitral award is left to the good sense of the Arbitral Tribunal,***

and that it extends to "any matter" with respect to which it may make a final arbitral award. The expression "matter" is wide in nature, and subsumes issues at which the parties are in dispute. It is clear, therefore, that any point of dispute between the parties which has to be answered by the Arbitral Tribunal can be the subject-matter of an interim arbitral award. However, it is important to add a note of caution. In an appropriate case, the issue of more than one award may be necessitated on the facts of that case. <u>However, by dealing with the matter in a piecemeal fashion, what must be borne in mind is that the resolution of the dispute as a whole will be delayed and parties will be put to additional expense. The Arbitral Tribunal should, therefore, consider whether there is any real advantage in delivering interim awards or in proceeding with the matter as a whole and delivering one final award, bearing in mind the avoidance of delay and additional expense. Ultimately, a fair means for resolution of all disputes should be uppermost in the mind of the Arbitral Tribunal."</u>

(Emphasis supplied)

23. Considering the sequence of events, that is the award dated 27.07.2021, the Section 33 rejection order dated 21.12.2021 and lastly the impugned order dated 14.02.2022, though intervention of Courts in arbitration proceedings by invocation of Article 227 is to be limited to exceptional circumstances, the instant case at hand in the considered view of this Court has given rise to such circumstances. This Court in the earlier round of litigation ***[CRP. No. 2 of 2022 M/s. BSC-C AND CJV vs. The Chief Engineer (PWD)]*** by order dated 11.02.2022, had dwelt at length on the scope of exercise of powers under Article 227 while granting relief to the Respondent herein. However, it is constrained to hold that the same considerations of exceptional circumstances

still hold good in the adjudication of the instant matter, which also will warrant interference in exercise of powers under Article 227 of the Constitution.

24. Accordingly, after careful consideration of the entire facts and circumstances of the case, it is hereby held that the Arbitral Tribunal patently lacked inherent jurisdiction, in framing issue No.1 on the entire Claim No.1 on which an interim award had already been pronounced on 27.07.2021. As such, issue No.1 as appearing in the impugned order dated 14.02.2022 is set aside and quashed. The Arbitral Tribunal is to proceed on the other issues and claims as indicated in the order dated 14.02.2022.

25. This petition is accordingly allowed and disposed of.

26. No order as to costs.

JUDGE

Meghalaya
09.05.2022
"Samantha-PS"