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WITNESS

Volume 10 Issue 10 | May 2019

₹65 US \$6 UK £4

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Jayant Saran
Partner, Deloitte



Rahul Vallicha
Manager, Deloitte



Sachin Yadav
Director, Deloitte

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Managing Partner,
Dhir & Dhir Associates

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Associate, AZB & Partners

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Sr. Associate,
Singh & Singh

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Varsha Banerjee
Partner, Dhir & Dhir Associates
Sharmistha Ghosh
Associate, Dhir & Dhir Associates

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When can Courts Interfere with The Arbitral Award Under Section 34?

Exceptional Circumstances when The Conscience of The Court is shocked by Infraction of Fundamental Notions of Justice

“A unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party”

Justice R.F. Nariman

Maneesha Dhir

Hon'ble Supreme Court has recently in *SSangyong Engineering & Construction Co. Ltd. Vs. National Highways Authority of India* ('NHAI') in Civil Appeal No. 4779 of 2019 (2019 SCC OnLine 677) the question before the Hon'ble Supreme Court was whether the amendments made in Section 34, are applicable to applications filed under Section 34 to set aside the arbitral tribunal after 23.1.2015. The Hon'ble Supreme Court has held that in context of Section 34 petitions challenging the award passed by the Arbitral tribunal amendment made via the Arbitration and Conciliation (Amendment) Act, 2015 ('Amendment Act') shall apply prospectively i.e., to only such petitions that are filed after 23.10.2015 irrespective of the fact whether the arbitral proceedings were pending before the arbitral tribunal or not.

Hon'ble Supreme Court has further held that ordinarily the court should not interfere with the arbitral award passed by

the arbitral tribunal only on the basis of some irregularity but the court can only in exceptional cases interfere with the arbitral award only when the “conscience of the court is shocked by infraction of fundamental notions of principles of justice”. The Hon'ble Supreme Court in the present matter, invoking its power under Article 142 of the Constitution of India, as an exception to the general rule that courts should not interfere with the arbitral award, set aside the Judgment of the Single bench of the Hon'ble High Court of Delhi as well as the Judgment of the Division Bench of the Hon'ble High Court of Delhi and the majority award of the Arbitral Award and upheld the minority award of the arbitral tribunal along with interest.

ISSUE AND FACTS

The issue before the Hon'ble Supreme Court emerged from a tender for construction of a four-lane bypass on National Highway ('Project'). The bid of SSangyong Engineering & Construction Co. Ltd. ('Ssangyong' / 'Appellant') was accepted vide its letter of acceptance dated 30.12.2005 for a total contract value of Rs.

219,01,16,805/- (Rupees Two Hundred Nineteen Crore One Lakh Sixteen Thousand Eight Hundred and Five Only). As per the contract, price adjustment of four key components was agreed to be calculated as per formula given in sub-clause 70.3 of the contract. NHAI was making payments to Ssangyong using formula under sub-clause 70.3 under the old series (1993-94) and the new series (2004-05) as per the bills raised by Ssangyong and almost all of the payments were made by NHAI from entering into the contract till February 2013.

Thereafter, NHAI issued a policy circular ('Circular') dated 15.02.2013 which devised a new formula by applying “linking factor” for determining the prices of the key components required in building the project. However, the particular circular expressly stated that:

“Thus, payment on account of price adjustment may be made by adopting the above process subject to the condition that the contractors furnish undertaking/ affidavit that this price adjustment is

acceptable to them and they will not make any claim, whatsoever, on this account in future after this payment”

FINDINGS OF ARBITRAL TRIBUNAL AND HON'BLE HIGH COURTS

Ssangyong aggrieved by the said circular filed a Writ Petition before the High Court of Madhya Pradesh challenging the validity of the circular. The Hon'ble High Court vide order dated 03.04.2013 disposed off the Writ Petition concluding that there is a dispute resolution mechanism available with the Appellant through the Dispute Adjudication Board, after that there is also a speedy and efficacious remedy available by way of Arbitration in the contract. The Appellant thereafter, without prejudice, submitted a conditional undertaking dated 17.05.2013 stating that:

“The above undertaking is without prejudice to the Contractor’s right to challenge the said Circular dated 15.02.2013 as per provisions of contract and other legal remedies available to the Contractor before the appropriate forum.”

The Appellant thereafter filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 (‘The Act’) before the Hon'ble High Court of Delhi praying for interim protection qua the implementation of the Circular and the Hon'ble High Court of Delhi vide order dated 31.05.2013 was pleased to grant the same thereby, restraining NHAI from applying the Circular retrospectively.

In the interim, the dispute between the parties was referred to the Dispute Adjudicating Board (‘DAB’). By majority, the DAB vide its recommendation dated 31.10.2013, recommended some certain linking factor in consonance with the circular dated 15.02.2103 but one of the members of the DAB gave a dissenting note to the Appellant.

The Appellant aggrieved by the majority recommendation of the DAB issued a notice of dissatisfaction dated 19.11.2013 and referred the dispute to the arbitral tribunal consisting of three members for the unpaid

The Hon'ble Supreme Court finally in its conclusion set aside the Majority award passed by the Arbitral Tribunal along with the Judgment of the Single Bench as well as the Division Bench of the Hon'ble High Court of Delhi. Interestingly, the Hon'ble Supreme Court rather than referring the matter afresh to the Arbitral tribunal it invoked its power under Article 142 of the Constitution and upheld the Minority award passed by the Arbitral Tribunal.

price adjustment for the period from September 2010 till May 2014 plus interest. The issue before the Arbitral Tribunal was a very narrow one, ‘Whether price adjustment would continue under the terms of the contract, or whether the Circular dated 15.02.2013, applying the linking factor, would have to be applied’. The Arbitral Tribunal by a majority of 2:1 answered the issue in favour of NHAI by their award dated 02.05.2016 and held that the Circular could be applied as the same is within contractual stipulations and rejected the

claim of the Appellant based upon the guidelines that were available on some website especially referring to Paragraph 13 of the guidelines a linking formula was prescribed. However, the minority dissenting award held that neither the circular nor the guidelines could be made applicable to the contract as they were dehors the contract between the parties.

Aggrieved by the Arbitral Award dated 02.05.2016, the Appellant approached the Hon'ble High Court of Delhi which via order dated 09.09.2016 held that the possible view taken by the majority arbitrators cannot be interfered with as the same is a plausible outcome and the Hon'ble Court cannot interfere with the arbitral award, given the limited grounds of challenge under section 34 of the Act and dismissed the petition of the Appellant. The Appellant thereafter, filed an appeal to the Division Bench of the Hon'ble High Court of Delhi but the same was also dismissed via Judgment dated 03.04.2017 on similar wordings to that of the Single Bench.

Now the Appellant approached the Hon'ble Supreme Court of India aggrieved against the Judgment dated 03.04.2017 of the Division Bench of the Hon'ble High Court of Delhi praying for some relief as the Arbitral Tribunal had relied upon the government guidelines that were never brought on record by either of the parties and which ultimately resulted in rewriting the terms of the contract and a new contract was foisted on the appellant unilaterally and the same is liable to be set aside as the same ought to shock the conscience of the Court.

FINDINGS OF THE HON'BLE SUPREME COURT

The Hon'ble Supreme Court of India relying upon the Judgment in *Renusagar Power Co. Ltd. v General Electric Co* (1994 Supp (1) SCC 644) which held that the Court should not generally interfere with the arbitral award but in some circumstances it may set aside the arbitral award if the same is contrary to the Fundamental policy of Indian Law, The interest of India or Justice or morality.



Following the Judgment in *Renusagar* (supra) the Hon'ble Supreme Court in *ONGC Ltd. Vs. Saw Pipes Ltd.* {(2003) 5 SCC 705} added one more ground of "patent illegality" in addition to the three grounds set out in *Renusagar* (supra) and held that illegality must go to the root of the matter and also held that award could also be set aside if it is so unfair that it shocks the conscience of the Court.

Similar Judgments have been subsequently passed by the Hon'ble Supreme Court in *DDA vs R.S. Sharma and Co* {(2008) 12 SCC 80} and *Associate Builders vs. Delhi Development Authority* (2015) 3 SCC 49. The Hon'ble Supreme Court in *Associate Builders* case (supra) has once again clarified that an award could be set aside under the ground of justice when the "award" would be such that it would shock the conscience of the Court. Further, an award against morality was considered to be something that was against the mores of the day that would shock the conscience of the Court.

Relying upon the above Judgments and the Amendment Act, the Hon'ble Supreme Court held that:

"48.... A Circular, unilaterally issued by one party, cannot possibly bind the other party to the agreement without that other party's consent..... This being the case, it is clear that the majority award has created a new contract for the parties by applying the said unilateral Circular and by substituting a workable formula under the agreement by another formula de hors the agreement. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court. However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any Court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary

to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment."

The Hon'ble Supreme Court of India has once again clarified that in ordinary circumstances the courts should not interfere with the Arbitral award passed by the Tribunal, even if there is some possibility that a divergent view might be possible but that would entail going into the merits of the award but the same is not permissible under Section 34 of the Act as it prescribes only limited grounds of challenging the Arbitral Award. But the courts should not refrain from using their powers when it concurs the finding that such a travesty has taken place which is contrary to the fundamental principles of justice and shocks the conscience of any court. The Hon'ble Supreme Court has followed the objective of enactment of the Act i.e., speedy disposal of disputes instead of sending the dispute back to the arbitral tribunal to invoke its power under Article 142 of the Constitution of India to uphold the minority award passed by the tribunal and restarting the arbitration proceedings afresh, thereby leading to consumption of more time.

Now it will be interesting to see whether in future cases the Court when setting aside the arbitral award refers the dispute back to Arbitral tribunal or invoke its power under Article 142 of the Constitution of India to uphold the minority award. Further, it would be rather interesting to see in cases where there is no minority award in favour of either of the parties, what would the Hon'ble Supreme Court do? Whether it will refer the matter back to the arbitral tribunal which would again take considerable time or whether it would deliberate the dispute itself and pass the arbitral award? [W](#)

ABOUT AUTHOR



Maneesha Dhir is Managing Partner of *Dhir & Dhir Associates*, a full service law firm. Her core area of practice include *Telecom, Dispute Resolution & Arbitrations, Insolvency Laws, Corporate & Financial Restructuring and Merger & Acquisitions.*