VERDICTUM.IN

Neutral Citation No. - 2025:AHC:20224

Reserved On:21.01.2025
Delivered On:13.02.2025

Court No. - 2

Case :- MATTERS UNDER ARTICLE 227 No. - 14074 of 2024

Petitioner :- U.P. Jal Nigam (Urban) And Another
Respondent :- Spml Infra Ltd.
Counsel for Petitioner :- Vimlesh Kumar Rai

HON'BLE PIYUSH AGRAWAL,J.

1. Heard Shri Vimlesh Kumar Rai, learned counsel for the petitioners and Shri Ujjawal Satsangi, learned counsel for the respondent.

2. The instant petition has been filed against the impugned order dated 21.09.2024 passed by the Commercial Court, Jhansi in Arbitration Execution Case No. 04/2024.

3. Learned counsel for the petitioner submits that the respondent was awarded a contract, which could not be completed within the stipulated period as provided in the agreement/mutual consent. As such, a dispute arose between the parties and the matter was referred to the Arbitrator. He further submits that on 03.03.2010, an award was passed against the petitioners awarding Rs. 92,04,289/- with 8% interest. Against the aforesaid award dated 03.03.2010, the petitioners filed an application under section 34 of the Arbitration & Conciliation Act, 1996, which was rejected vide order dated 03.02.2021 by the Commercial Court, Jhansi on the ground that the court has no jurisdiction to interfere with the award. He further submits that against the award dated 03.03.2010 and order dated 03.02.2021, the petitioners preferred First Appeal From Order (D) No. 283/2021 before this Court, which is still pending. He further submits that in the meantime, the name of the respondent – Company was changed as SPML Infra Limited'. He

VERDICTUM.IN

further submits that in the meantime, Execution Case No. 289/2022 was filed by the respondent – decree holder before the Commercial Court, Jhansi under section 36 of the Act, which was dismissed vide order dated 02.01.2023. He further submits that after more than 9 months, an application was filed by the respondent on 19.10.2023 before the Commercial Court, Jhansi fo recalling the order dated 02.01.2023, which was dismissed vide order dated 16.03.2024.

4. He further submits that thereafter, second execution case under section 36 of the Arbitration & Conciliation Act was filed by the respondent, being Arbitration Execution Case No. 04/2024, before the Commercial Court, Jhansi, in which the petitioners filed preliminary objection stating that the execution case was time-barred, but by the impugned order dated 21.09.2024, the preliminary objection filed by the petitioners has been rejected.

5. Learned counsel for the petitioners further submits that the second execution case is not maintainable as the same is barred by time. He further submits that the award was passed on 03.03.2010; whereas, the execution case was filed on 17.05.2024 after a lapse of more than 12 years, which is not permissible under the Act and thus, the same is liable to be set aside, but the court below, without considering the same in a proper prospect, has passed the impugned order.

6. Per contra, learned counsel for the respondent supports the impugned order and submits that the application was filed within time as prescribed under the Act. In support of his submission, he has placed reliance on the judgement of the Apex Court in ***Board of Control for Cricket in India Vs. Kochi Cricket Private Limited & Others*** [(2018) 6 SCC 287] and contends that the present petition is liable to be dismissed as the second execution case is within limitation.

VERDICTUM.IN

7. After hearing learned counsel for the parties, the Court has perused the records.

8. With regard to the applicability of section 36 of the Act after amendment, the Apex Court in ***Board of Control for Cricket in India*** (supra) has held as under:-

> *"38. That the expression "the arbitral proceedings" refers to proceedings before an arbitral tribunal is clear from the heading of Chapter V of the 1996 Act, which reads as follows:*
>
> *"Conduct of Arbitral Proceedings"*
>
> *The entire chapter consists of Sections 18 to 27 dealing with the conduct of arbitral proceedings before an arbitral tribunal. What is also important to notice is that these proceedings alone are referred to, the expression "to" as contrasted with the expression "in relation to" making this clear. Also, the reference to Section 21 of the 1996 Act, which appears in Chapter V, and which speaks of the arbitral proceedings commencing on the date on which a request for a dispute to be referred to arbitration is received by the respondent, would also make it clear that it is these proceedings, and no others, that form the subject matter of the first part of Section 26. Also, since the conduct of arbitral proceedings is largely procedural in nature, parties may "otherwise agree" and apply the Amendment Act to arbitral proceedings that have commenced before the Amendment Act came into force. In stark contrast to the first part of Section 26 is the second part, where the Amendment Act is made applicable "in relation to" arbitral proceedings which commenced on or after the date of commencement of the Amendment Act. What is conspicuous by its absence in the second part is any reference to Section 21 of the 1996 Act. Whereas the first part refers only to arbitral proceedings before an arbitral tribunal, the second part refers to Court proceedings "in relation to" arbitral proceedings, and it is the commencement of these Court proceedings that is referred to in the second part of Section 26, as the words "in relation to the arbitral proceedings" in the second part are not controlled by the application of Section 21 of the 1996 Act.*
>
> *39. Section 26, therefore, bifurcates proceedings, as has been stated above, with a great degree of clarity, into two sets of proceedings – arbitral proceedings themselves, and Court proceedings in relation thereto. The reason why the first part of Section 26 is couched in negative form is only to*

VERDICTUM.IN

state that the Amendment Act will apply even to arbitral proceedings commenced before the amendment if parties otherwise agree. If the first part of Section 26 were couched in positive language (like the second part), it would have been necessary to add a proviso stating that the Amendment Act would apply even to arbitral proceedings commenced before the amendment if the parties agree. In either case, the intention of the legislature remains the same, the negative form conveying exactly what could have been stated positively, with the necessary proviso. Obviously, "arbitral proceedings" having been subsumed in the first part cannot re-appear in the second part, and the expression "in relation to arbitral proceedings" would, therefore, apply only to Court proceedings which relate to the arbitral proceedings. The scheme ofSection 26 is thus clear: that the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the principal Act, on or after the Amendment Act, and to Court proceedings which have commenced on or after the Amendment Act came into force.

63. The matter can also be looked at from a slightly different angle. Section 36, prior to the Amendment Act, is only a clog on the right of the decree holder, who cannot execute the award in his favour, unless the conditions of this section are met. This does not mean that there is a corresponding right in the judgment debtor to stay the execution of such an award. Learned counsel on behalf of the Appellants have, however, argued that a substantive change has been made in the award, which became an executable decree only after the Section 34 proceedings were over, but which is now made executable as if it was a decree with immediate effect, and that this change would, therefore, take away a vested right or accrued privilege in favour of the Respondents. It has been argued, relying upon a number of judgments, that since Section 36 is a part of the enforcement process of awards, there is a vested right or at least a privilege accrued in favour of the Appellants in the unamended 1996 Act applying insofar as arbitral proceedings and court proceedings in relation thereto have commenced, prior to the commencement of the Amendment Act. The very judgment strongly relied upon by senior counsel for the appellants, namely Garikapati Veeraya (supra), itself states in proposition (v) at page 515, that the vested right of appeal can be taken away only by a subsequent enactment, if it so provides specifically or by necessary intendment and not otherwise. We have already held that Section 26 does specifically provide that the court proceedings in relation to arbitral proceedings, being independent from arbitral proceedings, would not be viewed as a continuation of

VERDICTUM.IN

arbitral proceedings, but would be viewed separately. This being the case, it is unnecessary to refer to judgments such asUnion of India v. A.L. Rallia Ram, (1964) 3 SCR 164 and NBCC Ltd. v. J.G. Engineering (P) Ltd., (2010) 2 SCC 385, which state that a Section 34 proceeding is a supervisory and not an appellate proceeding. Snehadeep Structures (P) Ltd. v. Maharashtra Small-Scale Industries Development Corpn. Ltd., (2010) 3 SCC 34 at 47-49, which was cited for the purpose of stating that a Section 34 proceeding could be regard as an "appeal" within the meaning of Section 7 of the Interest on Delayed Payments To Small Scale and Ancillary Industrial Undertakings Act, 1993, is obviously distinguishable on the ground that it pertains to the said expression appearing in a beneficial enactment, whose object would be defeated if the word "appeal" did not include a Section 34 application. This is made clear by the aforesaid judgment itself as follows:

> *"36. On a perusal of the plethora of decisions aforementioned, we are of the view that "appeal" is a term that carries a wide range of connotations with it and that appellate jurisdiction can be exercised in a variety of forms. It is not necessary that the exercise of appellate jurisdiction will always involve re- agitation of entire matrix of facts and law. We have already seen in Abhayankar [(1969) 2 SCC 74] that even an order passed by virtue of limited power of revision under Section 115 of the Code is treated as an exercise of appellate jurisdiction, though under that provision, the Court cannot go into the questions of facts. Given the weight of authorities in favour of giving such a wide meaning to the term "appeal", we are constrained to disagree with the contention of the learned counsel for the respondent Corporation that appeal shall mean only a challenge to a decree or order where the entire matrix of law and fact can be re-agitated with respect to the impugned order/decree. There is no quarrel that Section 34 envisages only limited grounds of challenge to an award; however, we see no reason why that alone should take out an application under Section 34 outside the ambit of an appeal especially when even a power of revision is treated as an exercise of appellate jurisdiction by this Court and the Privy Council.*
>
> **********
>
> *40. It may be noted that Section 6(1) empowers the buyer to obtain the due payment by way of any proceedings. Thus the proceedings that the buyer can resort to, no doubt, includes arbitration as well. It is pertinent to note that as opposed to Section 6(2), Section 6(1) does not*

VERDICTUM.IN

> *state that in case the parties choose to resort to arbitration, the proceedings in pursuance thereof will be governed by the Arbitration Act. Hence, the right context in which the meaning of the term "appeal" should be interpreted is the Interest Act itself. The meaning of this term under the Arbitration Act or the Code of Civil Procedure would have been relevant if the Interest Act had made a reference to them. For this very reason, we also do not find it relevant that theArbitration Act deals with applications and appeals in two different chapters. We are concerned with the meaning of the term "appeal" in the Interest Act, and not in the Arbitration Act."*
>
> *67. In 2004, this Court's Judgment in National Aluminium Company (supra) had recommended that Section 36 be substituted, as it defeats the very objective of the alternative dispute resolution system, and that the Section should be amended at the earliest to bring about the required change in law. It would be clear that looking at the practical aspect and the nature of rights presently involved, and the sheer unfairness of the unamended provision, which granted an automatic stay to execution of an award before the enforcement process of Section 34 was over (and which stay could last for a number of years) without having to look at the facts of each case, it is clear that Section 36 as amended should apply to Section 34 applications filed before the commencement of the Amendment Act also for the aforesaid reasons."*

9. In view of the aforesaid facts & circumstances of the case, as also the law laid down by the Apex Court in ***Board of Control for Cricket in India*** (supra), no interference is called for in the impugned order.

10. The petition fails and is, accordingly, dismissed.

Order Date :**-13/02/2025**
Amit Mishra

Digitally signed by :-
AMIT KUMAR MISHRA
High Court of Judicature at Allahabad