SSANGYONG ENGINEERING V. NATIONAL HIGHWAYS AUTHORITY OF INDIA, 2019 SCC ONLINE SC 677

Supreme Court of India; 2-judge bench, **R. F. Nariman** and Vineet Saran JJ; decided on 08 May 2019

The law on public policy

(A) BACKGROUND

The contract was: -

(i) executed on 12.04.2006 between Korean company Ssangyong *and* National Highway Authority of India (NHAI), an authority which functions under the Ministry of Road Transport, Union of India

(ii) for construction of highways

The dispute involved calculation of the price adjustment:

(i) the price adjustment clause specified a formula for adjustment of the contract price in cases of increase or decrease in rates and price of labor, materials, fuels, and lubricants. Ssangyong was paid a price adjustment every month in terms of the agreed formula.

(ii) The formula was $V_c = 0.85 \times P_c/100 \times Ri \times (C_1 - C_0)/C_0$. The indices C_0 represented the all India average WPI for cement as on a date (that is, 29 September 2005). The indices C_1 represented WPI, which is an index of the price of a representative basket of wholesale goods. It is now published from time to time by the Ministry of Commerce and Industry ("Ministry").

(iii) The Ministry launched a new series of WPI on 14.09.2009, but the base year taken in this new series was 2004-2005. The new series (with a base year of 2004-2005) came into effect in September 2010.

(iv) Ssangyong raised several invoices based on the price adjustment clause. From December 2005 to August 2010, the old series of WPI was used for calculation. For three years during this period payments were disbursed too by NHAI. After September 2010 till February 2013, bills were raised applying the WPI of the new series.

(v) Later NHAI took the position that an anomaly had crept in due to change in the WPI Series during the tenure of the contract.

(vi) In 2013 NHAI issued a circular to provide a linking factor (expressed in a number), the purpose of which was to link the old series to the new series. Applying the linking factor, NHAI sought recovery of certain payments already made.

(vii) Ssangyong did not accept this circular and raised a dispute. It wanted to be paid based on the new series without applying the linking factor. An application for interim relief was filed under Section 9 of the ACA in May 2013 in Delhi High Court. On 31 May 2013, Justice Manmohan Singh restrained NHAI from implementing the circular retrospectively. Later, the interim relief matter was transferred to the arbitral tribunal.

(viii) Under the dispute resolution clause, the matter went to the Disputes Review Board (DRB). The majority members of the DRB recommended a certain linking factor and calculated the figures for price adjustment. One member dissented and recommended that in view of the express terms of the contract, the circular could not be applied for price adjustment. Ssangyong referred the matter to arbitration.

The arbitration was invoked on 19 November 2013 (that is before the 2015 Amendment): -

(ix) The dispute before the arbitral tribunal "was a 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 award was made by a three-member tribunal on 02 May 2016: -

(i) **The majority** held the circular could be applied as it was within contractual stipulations and rejected Ssangyong's claim. **While doing so, the majority award relied on a guideline of the Ministry of Commerce and Industry, which stated that the establishment of a linking factor to connect the old Series with the new Series is required. This guideline was not Part of the pleadings**.

(ii) The **minority third arbitrator** dissented and concluded that neither the circular nor the guidelines applied as they were *de hors* the contract.

Ssangyong's application to set aside the award under Section 34: dismissed:-

(i) application by Vibhu Bakhru J of Delhi High Court on 09 August 2016;

(ii) On reasoning that the view of the majority arbitrators was a possible view, therefore, cannot be interfered with.

Ssangyong's appeal under Section 37: dismissed by the 2-judge appellate bench: -

(i) The Appeal under Section 37 [FAO. (OS) COMM- 82/2016] filed against the order of the single-judge dated 09.08.2016 in Delhi High Court was dismissed by Indira Banerjee and Anil Kumar Chawla JJ on 03.04.2017.

(ii) The court accepted the reasoning of the single judge and said that the view taken by the majority arbitrators is plausible.

(B) THE SUPREME COURT'S DECISION

1. Applicability of 2015 Amendments Set Aside Proceedings

The court held that the amended Section 34 ACA will apply only to those applications under Section 34 which have been made to the court on or after 23 October 2015. This would be irrespective of the commencement of arbitration proceedings before 23 October 2015.

2. "Public Policy" in Section 34 and Section 48 Are Now the Same

After 2015 Amendments, "public policy of India," in both Sections 34 and 48 would mean:

(i) The "fundamental policy of Indian law," as explained in paragraphs 18-27 of *Associate Builders* v. *Delhi Development Authority* [(2015) 3 SCC 49], i.e., its meaning would be relegated to the understanding of the ratio in *Renusagar Power Co. Ltd.* v. *General Electric Co.* ("Renusagar") [1994 Supp (1) SCC 644].

(ii) Conflict with morality and justice would mean conflict with the "most basic notions of morality and justice", to be construed in line with para 36-39 of *Associate Builders*. A conflict of this kind would be one that shocks the conscience of the court and can only be invoked in exceptional circumstances.

(iii) "Interest of India" would no longer remain a ground for interference as the 2015 Amendment has deleted it.

(iv) Post-2015 amendment, the expression "public policy of India" under Sections 34 and 48 of the ACA would be as it was interpreted in *Renusagar*.

(v) Expansion of fundamental policy of Indian law in *ONGC Ltd.* v. *Western Geco International Ltd.* (2014) 9 SCC 263, has been done away with (including its interpretation in paras 28 and 29 of *Associate Builders*).

(vi) The ground of "patent illegality", as explained in *ONGC Ltd.* v. Saw *Pipes Ltd.*, is now a separate ground under Section 34.

(vii) Insofar the principles of natural justice, contained in Sections 18 and 34(2)(a)(iii), para 30 of *Associate Builders* would remain to be the law.

(viii) A mere contravention of the substantive law of India would not be considered a ground to set aside an arbitral award; therefore para 42.1 of *Associate Builders* will not obtain.

3. Patent Illegality- Interpretation

Patent illegality would mean:

(i) Illegality appearing on the face of the award and one which goes to the root of the matter but not an erroneous application of law.

(ii) When an arbitrator does not give reasons for an award and contravenes Section 31(3) of the ACA [to be construed as per para 42.2 of *Associated Builders*]

(iii) Perversity, as explained in para 31 and 32 of *Associate Builders*, including a finding based on no evidence or on documents taken behind the back of the parties or ignoring vital evidence in making an award.

(iv) Construction of the contract done by the arbitrator is not a possible view to take.

(v) Dealing with matters outside of the arbitrator's jurisdiction. [to be construed as per paras 42.3 to 45 of *Associate Builders*]

Patent illegality would not mean

(i) contravention of a statute not linked to "public policy";

(ii) Reappreciation of evidence.

Ground of patent illegality will not apply for setting aside arbitral awards in international commercial arbitrations.

4. Review on Merits

The scope of challenge under Section 34(2)(a) does not include a review of the merits of the award by the court.

5. Right to Present the Case Under Section 34(2)(A)(iii)

The court explained the interplay of Sections 18, 24(3) and 26 of the ACA to state that the ground under Section 34(2)(a)(iii) can be invoked if any of the parties have not been given an opportunity to present its case.

Under Section 18 each party is to be given full opportunity to present its case. Section 23(3) provides for communication to the other party of-

(i) necessary information and documents by one party to the tribunal, and

(ii) supply of any expert report or document on which the tribunal is relying.

Section 26 points that when an expert report is relied upon by the tribunal, the said report and all material with the expert must be first made available to any party who requests such things. Also, if requested, parties are to be given the opportunity to put questions to the expert and to present their own expert witness.

Section 34(2)(a)(iii) can be invoked where materials are taken behind the back of the parties by the arbitral tribunal without affording opportunity to comment.

6. Decision on Matters Beyond The Scope of Submission to Arbitration-Interpretation

The arbitral award deals with decision on matters beyond the scope of the submission to arbitration when an arbitral tribunal has rendered an award which decides matters:

(i) Beyond the scope of the arbitration agreement, or

(ii) Beyond the disputes referred to the arbitral tribunal.

However, an arbitral award would not be beyond the scope of the submission to arbitration if the contractual interpretation therein, including going beyond the terms of the contract, could be said to have been construed as "disputes" within the arbitration agreement.

Decision on matters outside this scope could be corrected on the ground of "patent illegality" but will not apply to international commercial arbitrations under Part II.

7. Relief

The court set aside the majority award but held that under the scheme of Section 34, the dispute would have to be referred afresh to another arbitration.

However, such reference would cause considerable delay and could go against the objectives of the ACA, i.e. speedy resolution of the disputes. Hence, the minority award was upheld.