IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

Present:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

G.A. 394 of 2020

With

A.P. 684 of 2017

Prakash Industries Limited.

Vs.

Bengal Energy Limited. & Anr.

For the Petitioner	:	Mr. Abhrajit Mitra, Sr. Adv. Ms. Paushali Banerjee, Adv. Mr. Aritra Basu, Adv.
For the Respondent	:	Mr. S.N. Mookherjee, Adv. Ms. Lopita Banerji, Adv. Ms. Urmila Chakraborty Mr. Aasish Chowdhury Ms. Aindrila Basu
Last Heard on	:	11.03.2020.

This matter was kept on 18.03.2020. Physical hearing of court matters was suspended from 23.03.2020.

Delivered on : 11.06.2020.

Moushumi Bhattacharya, J.

1. This application has been filed by the petitioner for amendment of the grounds contained in an application under Section 34 of the Arbitration and Conciliation Act, 1996 (the Act). The arbitration petition is for setting aside of an Arbitral Award dated 31st March, 2017 passed by a Tribunal consisting of three Arbitrators and was filed within the statutory period prescribed under Section 34(3) of the Act. The petitioner seeks to amend certain grounds contained in the arbitration petition by way of what the petitioner claims to be "amplification" of the grounds already existing in the arbitration petition.

2. Mr. Abhrajit Mitra, learned Senior Counsel appearing for the petitioner, seeks to explain the reason for filing the application. Counsel submits that the petitioner engaged the present set of lawyers a month after filing of the arbitration petition and it is only upon receiving the arbitration petition as filed, that it was discovered that the grounds in support of the arbitration petition have not been amplified. Counsel submits that the grounds, which are sought to be brought in by way of the present amendment, have been taken by way of abundant caution and would not change the nature and character of the present petition. Counsel relies on *Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited* reported in *(2009) 17 SCC 796, Venture Global Engineering Vs. Satyam Computer Services Ltd.* reported in *(2010) 8 SCC 660, Emkay Global Financial Services Limited Vs. Girdhar Sondhi* reported in *(2018) 9 SCC 49 and State of Maharashtra Vs. Hindustan Construction Company Limited*

reported in *(2010) 4 SCC 518,* as instances where the court in Section 34 applications, allowed the grounds to be amended after taking into account all relevant considerations.

3. Mr. S.N. Mookherjee, learned Senior Counsel appearing for the respondent/award holder opposes the application on the legislative intent behind prescribing specific timelines under Section 34(3) of the Act. Counsel submits that if a petitioner in a Section 34 application is permitted to amend the grounds contained in the said petition, there would be no end to litigation and the object behind prescribing a cut-off period for filing under Section 34 sub-section(3) would be defeated. Counsel opposes the grounds, now sought to be brought in by the petitioner, as being completely new, which would change the very nature of the arbitration petition and are by no means amplification of the existing grounds as has been contended on behalf of the petitioner. It is submitted that amendments may be allowed only to a limited extent where the arbitration petition already contains the basic grounds of challenge which are sought to be elaborated or amplified and that the present application is not such a case. Counsel relies on *Bijendra Nath Srivastava (Dead) Vs. Mayank Srivastava* reported in *(1994) 6 SCC 117* and *Vastu Invest & Holdings Pvt. Ltd, Mumbai Vs. Gujarat Lease Financing Ltd., Mumbai* reported in *(2001) 2 Mah LJ 565/ (2001) 2 Arb LR 315* to show that amendments for introducing new grounds will not be permitted in a section 34 application.

4. The issue in controversy is required to be examined at two levels. The first relates to the permissible range of an amendment. The second is

whether the amendment can be comfortably fitted into the schematic arrangement of the tiers of challenge under section 34 of the 1996 Act.

5. First, whether the proposed amendments can pass muster under the relevant provisions of the CPC. The undisputed legal position is that an amendment which changes the nature and character of the original pleading cannot be permitted. Order VI Rule 17 of The Code of Civil Procedure, 1908 (the CPC) prescribes when and till what time amendments can be allowed and provides for;

> *"**Order VI Rule 17. Amendment of pleadings.**- The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.*
>
> *Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."*

6. On a comparison between the existing grounds in the arbitration petition and those that are part of the application for amendment, it is found that there are 30 grounds in the existing arbitration petition which are concerned with the Award being opposed to public policy, bias, unequal treatment of the parties, unfairness of procedure, disregard of the provisions of the 1996 Act, breach of the principles of natural justice and material illegality. The petitioner now seeks to bring in an additional 26 grounds in support of the contention that the Arbitral Tribunal has not taken various provisions of the Sale of Goods Act, 1930, into account and certain related

propositions which are based on decisions of the Supreme Court. The petitioner also seeks to challenge the Award as being contrary to binding judicial precedents and the public policy of India as well as the fundamental policy of Indian law. The new grounds assail the Award as being perverse for not taking into consideration the material on record. The grounds of "perversity" and "shocking the conscience of the court" have been rolled into one while the Award being contrary to the public policy of India, fundamental policy of Indian law and against binding precedence are urged in individual grounds. Ground Nos. IA to IR (18 grounds) deal with the Sale of Goods Act and decisions of the Supreme Court on awarding of damages.

7. On the issue whether the new grounds would change the nature and character of the existing arbitration petition, it appears that none of the grounds pertaining to the Sale of Goods Act or the quantum of damages had been taken earlier. Of the existing grounds, a predominant emphasis has been given on the bias of the Arbitral Tribunal manifested in vitiating the procedure and not treating the parties on an equal footing. The petitioner has however covered the ground of the Award being opposed to public policy and being contrary to the provisions of the 1996 Act, as well as being in violation of the principles of natural justice and suffering from material illegality in grounds I, XIV, XIX and XX of the existing petition. The provisions of the Sale of Goods Act and related case law and quantum of damages are new grounds which cannot be traced in any of the existing grounds as contained in the arbitration petition.

8. The next issue is whether the proposed amendments can be unobtrusively placed in the statutory scheme contemplated under section 34 of The Arbitration and Conciliation Act, 1996. Section 34 provides for a two-pronged recourse to a party for setting aside an Award. Under 34 (2)(a), a party can challenge an award primarily on procedural lapses, including absence of an equal opportunity to a party to present its case, lack of proper notice or the composition of the arbitral tribunal being contrary to the agreement etc. (34 (2) (i), (iii), (v)). The other two sub-clauses deal with an arbitration agreement being invalid and decisions being made outside the scope of reference (34 (2) (ii), (iv)). This part is subject to the following conditions;

> ***34. (2)*** *An arbitral award may be set aside by the Court only if –*
>
> *(a) the party making the application furnishes proof that -*
>
> *(i) a party was under some incapacity; or*
>
> *(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or*
>
> *(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*
>
> *(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; or*
>
> *.....*
>
> *(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part;"*

9. The bulk of the matters involving a challenge to an award however falls within 34 (2)(b) and 34 (2-A) on the grounds that the subject matter of the dispute is not capable of settlement by arbitration under the existing law (34 (2)(b)(i)) or if the Award is found to be in conflict with public policy of India (34 (2)(b)(ii)) or found to be vitiated by patent illegality appearing on the face of the Award (34 (2-A)). The conflict with the public policy of India has been clarified to apply only to the three sub-clauses to *Explanation 1* to 34 (2) (b) (ii) pertaining to the award being induced by fraud or corruption or against sections 75 or 81, is in contravention of the fundamental policy of Indian law, or is in conflict with the most basis notions of morality or justice (sub-clauses (i), (ii), (iii), used disjunctively). 34 (2) ends with *Explanation 2* qualifying that the test of fundamental policy of Indian law shall exclude a review on the merits of the dispute. A similar curb on re-appreciation of evidence is found in the proviso to 34 (2-A).

10. As opposed to Section 34(2)(a), which starts with *".....the party making the application establishes on the basis of the record....."*, the mantle shifts to the court in Section 34(2)(b)); "*an Arbitral Award may be set aside.....if the court finds that*" repeated as *".....may also set aside by the court, if the court finds that the Award is vitiated by patent illegality appearing on the face of the Award*" in 34(2-A). The onus on the court to test the legality of the Award against the two clauses of 34(2)(b) is further clarified by the sub-clauses to *Explanation 1*. The shift from "the party" to "the court" in 34(2-A) for the ground of patent illegality was inserted by the 2015 Amendment. The question which would then naturally arise is whether anything turns on the burden being shifted to the court for putting an

Award through the test of public policy and patent illegality? A probable answer could be the shift of emphasis from the procedural infirmities in the making of the award which only a participant in the arbitration can prove to the more fundamental questions of law and public policy which a court is equipped to enquire into. But the legislative intent underlying the transfer of burden from a party to the court is not the focus here; the nub of the matter is whether a party who seeks to enlarge the scope of challenge to an award by adding to the grounds (already filed within the statutory time-frame) is impacted by the baton being handed over to the Court from section 34 (2) (b) onwards.

11. The test whether an amendment is permissible or not, as held in the decisions cited by counsel, is whether the proposed amendments would warrant a fresh application under Section 34. This means that the grounds which are sought to be brought in by way of an amendment would necessarily be new and independent grounds without having a foundation in the original Section 34 application. This also means that each case must be decided on the nature of the amendments.

12. In the present case, the existing grounds for challenging the impugned Award is of the Award being opposed to public policy (ground I); that the Award suffers from material irregularity and bias (ground II); has failed to treat the parties equally (ground IV); is in disregard of public policy of India and the provisions of the 1996 Act (grounds XII and XIV); is in violation of principles of natural justice (ground XIV); the Arbitrator has gone beyond the scope of reference (ground XXIV) and has failed to appreciate the

provisions of Section 34 (grounds XIV – XXVI). A few of the proposed amendments are that the Arbitral Tribunal erroneously applied the provisions of the Sale of Goods Act, 1930 and erred in concluding that the respondent no.1 is entitled to recover damages for loss suffered under section 55 of the said Act (grounds IC and ID). A related ground is that the Tribunal should have considered the effect of a notice for resale of perishable goods not being served on the respondent to recover damages against the petitioner (ground IQ). Grounds IX and IZ relate to the Award being "*judicially perverse*" and contrary to the public policy of India and the fundamental policy of Indian law. The other grounds sought to be brought in relate to the Tribunal failing to appreciate that the property in the goods can only pass after the respondent no.1 is in receipt of full payment for the said goods. The remaining grounds relate to various decisions of the Supreme Court on the application of the Sale of Goods Act and that appropriate reasons must be given for quantification and awarding of a claim for damages.

13. On perusing the Grounds, it is apparent that the petitioner seeks to bring in grounds relating to the Tribunal not taking into account the relevant provisions of the Sale of Goods Act and the factual dispute between the parties as to whether the respondent no.1 was entitled to claim and recover damages as an unpaid seller against the petitioner under the said Act. The ground of perversity and the Award being opposed to the public policy of India are also part of the proposed amendments. If the existing grounds and the proposed amendments are compared, it would be clear that the grounds pertaining to the Sale of Goods Act do not have a foundation in

the section 34 application already filed. However, the grounds pertaining to a pure question of law is really not necessary to be taken as a legal argument and can be made by a party during the course of the submissions before a court; Order XLI Rule 1(2) and Rule 2 of the CPC (Form of Appeal-What to accompany Memorandum and Grounds which may be taken in appeal) may be referred to in this context.

14. While section 34 of the 1996 Act curtails the scope of judicial intervention by prefacing the grounds with the use of the words "*.....may be made only by.....", ".....only if.....",* etc., the section also allows sufficient breadth of interpretation under the ground of public policy of India. Although, *Explanation 1* clarifies the expression "*in conflict with the public policy of India"* in the form of the three sub-clauses, the words *"in contravention with the fundamental policy of Indian law"* again opens the gates in terms of interpretation of any law forming part of the body of laws governing the Indian system of jurisprudence at a given point of time. Therefore, the petitioner's ground of the Award failing to consider the provisions of the Sale of Goods Act would be covered under public policy of India which has already been taken in Ground I of the existing grounds. It may fairly be assumed that the petitioner not only has the liberty of urging the legal position under the Sale of Goods Act but also the case-laws which are the subject matter of the amendments. The blanket ground of the Tribunal failing to appreciate the provisions of section 34 of the 1996 Act will also permit the petitioner to argue on the entirety of section 34 and the various sub-heads under it on the planks of challenge to the Award. *"Perversity"* (proposed ground XIV) would be open for arguments to the

petitioner in all its ramifications for similar reasons. The construction proposed by the petitioner that a court must independently examine an Award to decide whether the Award should be set aside or not even if there is no contest to the section 34 application on the strength of the expression *"if the court finds"* would mean that enumerating the grounds for challenge in a section 34 becomes unnecessary as long as the court trains its lens to scour the sustainability of the Award and decides accordingly. In other words, amendment of the grounds, in appropriate cases, would not be necessary at all. This in turn would stretch the construction of 34(2)(b) and 34(2-A) only to snap at the point of what is reasonable and what is not.

15. Now to the case-law. The decisions cited by counsel can be divided into those where amendment was allowed and those where it was rejected. The nature of the amendment or what was proposed to be brought in was a crucial consideration for deciding for/against allowing the amendment. In *Venture Global*, the Supreme Court allowed material facts pertaining to fraud to be brought in as a relevant ground for setting aside the award; *Fiza Developers* was concerned with framing of issues in an application under section 34 which the Supreme Court found not to be an integral part of the section 34 proceedings. The principle enunciated in *Fiza Developers* was approved in *Emkay Global* where the Supreme Court reiterated that framing of issues would impede the summary nature of a proceeding under section 34 of the Act and in *Bijendra Nath Srivastava,* the amendments were disallowed on the ground that the facts brought in were not 'material particulars' of what had already been pleaded in the original objection as envisaged under Order VI Rule 4 of the CPC.

16. *Fiza Developers* considered the necessity of framing of issues in a proceeding under Section 34. The Supreme Court was of the view that the scope of inquiry in such a proceeding is restricted to a consideration of the existence of any one of the grounds mentioned in Section 34(2) for setting aside the Award. Considering the summary nature of the proceedings under Section 34, the Court held that an exercise to frame issues would only delay the proceedings. The Supreme Court also held that unlike a regular civil suit where a court can pronounce judgment even in the absence of a defence, in an application under Section 34, the court cannot set aside the Award only on the basis of the averments contained in the application. The relevant part of the decision is set out below;

> *"But in an application under Section 34, even if there is no contest, the court cannot, on the basis of the averments contained in the application, set aside the award. Whether there is contest or not, the applicant has to prove one of the grounds set out in Sections 34(2)(a) and (b). Even if the applicant does not rely upon the grounds under clause (b), the court, on its own initiative, may examine the award to find out whether it is liable to be set aside on either of the two grounds mentioned in Section 34(2)(b)."*

Fiza was approved in *Emkay* in which the Supreme Court took note of the object of the 1996 Act for speedy resolution of arbitral disputes and clarified that an application under Section 34 will not "ordinarily" require anything beyond the record of what was before the Arbitrator and anything which was not contained in such record but is relevant for the adjudication of the issues arising in the application under 34, may be brought to the notice of the court by way of affidavits. Both *Fiza and Emkay* noticed the framing of 34(2)(b) and 34(2)(a) through the words "*if the court finds"* – as discussed above.

17. The prayer for amendment was rejected by the Supreme Court in *Hindustan Construction* (cited by both parties) as the grounds were found to be new without having a foundation in the application for setting aside. *Hindustan Construction* was a case concerning an amendment for bringing in additional grounds of the Arbitral Tribunal exceeding its jurisdiction in awarding a percentage for hidden expenses and committing an error of jurisdiction in granting the claim pertaining to revision of rate, etc. The Supreme Court gave an expansive construction in favour of allowing amendments in applications under Section 34 for incorporation of additional grounds and held that leave to amend an application can be granted in "very peculiar circumstances" if the court finds that such liberty is required to be given in the interest of justice. Relying on *L.J. Leach & Co. Ltd. vs. Jardine Skinner & Co. (AIR 1957 SC 357)* and *Pirgonda Hongonda Patil vs. Kalgonda Shidgonda Patil (AIR 1957 SC 363),* the Court reiterated that although amendments, where a fresh suit on the amended claim would be barred by limitation, would be declined as a matter of rule, this would not affect the court's power to allow amendment if required in the interests of justice. The Supreme Court was also of the view that the principle of *Leach vs. Skinner* would apply to an application for amendment of the grounds in a setting aside application. Most significantly, in *Hindustan Construction,* the Court considered the relevance of *Vastu Invest* and *Bijendra Nath Srivastava,* (both cited on behalf of the respondent) and held that the dictum in *Vastu* was not intended to lay down an absolute rule that amendment would not be allowed in any application for setting aside of an Arbitral Award after expiry of the period of limitation provided under 34(3). The Supreme Court explained the

decision in *Bijendra Nath Srivastava* as calling for a sound exercise of judicial discretion keeping in view the distinction between amendments which are permissible and those which are not.

18. It should be reiterated that although *Hindustan Construction* spoke in favour of an expansive view of amendments in the interest of justice, the proposed amendments in that decision were ultimately disallowed since they were found to constitute new grounds which did not have a foundation in the original application. In the present case, the grounds relating to the Sale of Goods Act cannot be traced to the existing grounds and would therefore constitute new grounds in that sense (as opposed to *Venture Global,* where subsequent facts, disclosed after the passing of the Award, were allowed as having a causative link with the facts, constituting the Award). In the considered view of this court, the test for allowing or rejecting an amendment to existing grounds in an Arbitration Petition is whether the proposed grounds would necessitate filing of a fresh application for setting aside of the Award. As several of the new grounds also do not have a foundational basis in the existing petition, the petitioner cannot enter through the 'amplification' route as has been contended and if the amplification recourse fails, the petitioner has no other statutory cushion to fall back on under the existing law.

19. In the present case, the grounds relating to the provisions of the Sale of Goods Act and related grounds concerning the issues of damages are new grounds which would take the application for amendment outside the purview of "*amplification*" of the existing grounds as contended by the

petitioner. Since this Court is inclined to follow the dictum of *Fiza* and *Emkay* in that an application for setting aside will ordinarily not require anything beyond the record of what was before the Arbitrator, the present amendment is not one which should be permitted.

For the above discussion and reasons, G.A. 394 of 2020 is dismissed without any order as to costs.

Urgent Photostat certified copy of this Judgment, if applied for, be supplied to the parties upon compliance of all requisite formalities.

(MOUSHUMI BHATTACHARYA, J.)