Arbitration Case Insights

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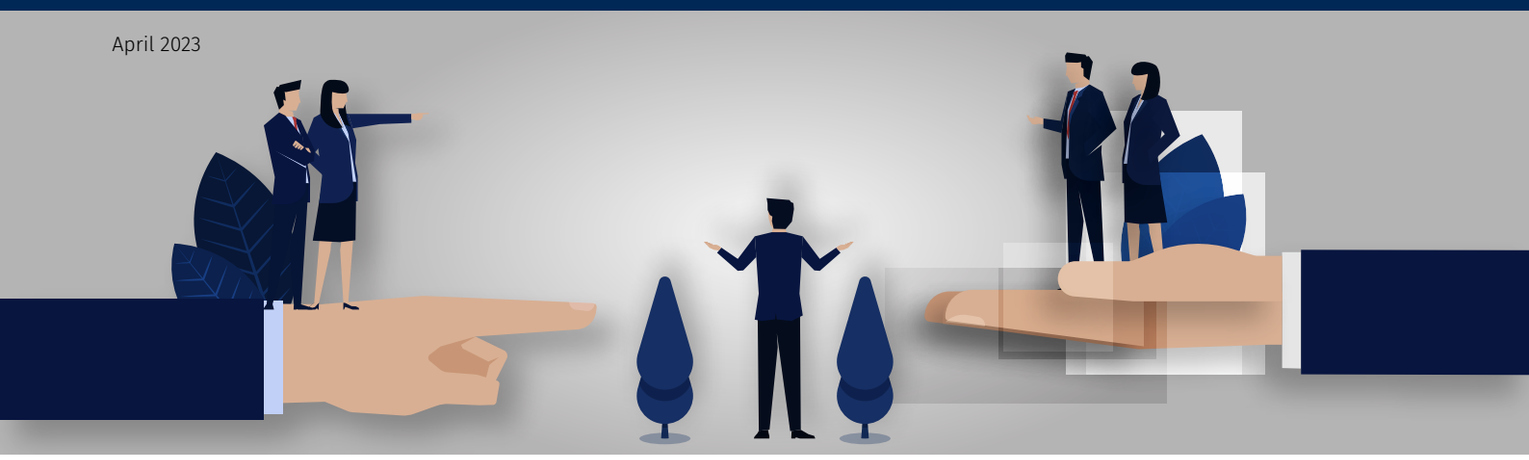

High Court of Delhi holds that recourse to Section 34(4) of the Arbitration and Conciliation Act, 1996 cannot be opted for consideration of new material evidence[1]

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Brief Facts

Air Liquide North India Private Limited ("**Respondent**") entered into a Sales and Purchase Agreement ("**Agreement**") wherein it was supposed to supply Liquid Oxygen and Liquid Nitrogen to Inox Air Products Private Limited ("**Petitioner**"). However, disputes arose between the Petitioner and the Respondent ("**Parties**") during the performance of the agreement, which were referred to arbitration.

During the course of the arbitral proceedings, the Petitioner (Respondent in the arbitration) filed documents which were taken on record, and it was further recorded by the arbitral tribunal ("**Tribunal**") that the documents in any case would have to be proved in accordance with law. However, after cross examination of the Respondent's (Claimant in the arbitration) witness, it was agreed between the Parties to dispense with oral evidence and that the matter will straight away be fixed for arguments. It was also agreed that whatever oral evidence was recorded will not be read.

After culmination of the arbitral proceedings, the Tribunal passed the award ("**Award**") in favour of the Respondent which was challenged before the Hon'ble High Court of Delhi ("**Court**") on the ground that the Tribunal failed to consider the additional documents filed by the Petitioner.

After notice was issued in this matter, the Respondent moved an application under Section 34(4) of the Arbitration and Conciliation Act, 1996 ("**Act**") seeking to eliminate the ground for setting aside the Award, relating to non-consideration of the Petitioner's documents.

Issue

Whether the invocation of Section 34(4) of the Act by the Respondent for eliminating the ground of challenge to the Award by remanding the matter to the Tribunal, justified in light of the facts and circumstances of this case?

Judgment

On application of the principles established by the existing judgments on the current issue, the Court was of the opinion that it would not be a fit case to take recourse to Section 34(4) of the Act. The issue of the Petitioner herein pertains to non-consideration of material evidence and not where the finding in the Award has been rendered without any, or adequate reasons. However, it was also opined that as per the settled law in ***Ipay Cleaning Services Private Limited v. ICICI Bank Limited***,[2] ***Bentwood Seating System Ltd v. Airport Authority of India***,[3] ***Coal India Limited v. Hyderabad Industries Ltd.***[4] and ***BTP Structural (I) Pvt. Ltd. v. Bharat Petroleum Corp. Ltd.***[5], if the matter is taken back to the Tribunal, the Petitioner's ground of challenge can be only eliminated if the Tribunal considers the documents which it failed to do so in the first instance, thereby exceeding the power under Section 34(4) of the Act.

This course would also fall foul of the principle established in ***Kinnari Mullick v. Ghanshyam Das Damani***[6] and ***Radha Chemicals v. Union of India***[7] which puts the recourse under Section 34(4) of the Act on the same footing as a remand, but even less effective, as it is a remand without the power to reach a different conclusion. Hence, the consideration of the evidence by the Tribunal which was not done in the first instance would be meaningless as the conclusion has to remain unchanged. Accordingly, the Respondent's application was dismissed by the Court.

Analysis

As is evident from this case, there is no dearth of precedents on the legal recourse that can be taken under Section 34(4) of the Act but the Court was crystal clear in reiterating that consideration of the material left out at the first instance would be effective only if the Tribunal had the jurisdiction to reconsider or alter the ultimate award, which is not the case.

The Court did not agree with the argument of the Respondent that the Supreme Court in ***Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.***[8] has left open the possibility of other grounds in which Section 34(4) of the Act can be invoked. This is primarily because this judgement is referred to in the landmark cases of ***Ipay*** and ***Bentwood*** (*supra*), the decisions of which clearly indicate that consideration of fresh material does not fall within the grounds available.

Dismissing the Respondent's application, the Court observed that although there have been cases where the Tribunal was required to rehear the case, but fact-based conclusions cannot be allowed to take away from the analysis in the above-mentioned judgments with regard to the scope and effect of Section 34(4) of the Act, which, in no scenario can allow the arbitral tribunal to reopen the conclusion arrived at.

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Endnotes

1 Authored by Gauhar Mirza, Partner and Shiv Azad Sharma, Associate; *Inox Air Products Private Limited v. Air Liquide North India Private Limited*, O.M.P. (COMM.) No. 212/2018 & I.A. No. 6847/2018, High Court of Delhi, 2023 SCC OnLine Del 1778, judgment dated 24 March 2023.

Coram: Prateek Jalan, J.

2 2022 SCC OnLine Del 7167.

3 2021 SCC OnLine Del 3989.

4 2021 SCC OnLine Cal 518.

5 2012 SCC OnLine Bom 639.

6 (2018) 11 SCC 328.

7 Civil Appeal No. 10386 of 2018, Supreme Court of India, order dated 10 October 2018.

8 (2019) 20 SCC 1.

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