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Case Comment: Mysore Cements Ltd V. Svedala Barmac Ltd.

KUMAR KISHAN¹

ABSTRACT

Now-a-days, with the rapid increase in the economic development of a nation has resulted into the great increase in the commercial dispute as well. As a result, the alternative dispute resolution mechanism including arbitration and conciliation have become more crucial for businesses operating in India as well as for those who does their business with Indian firms. The Arbitration and Conciliation Act, 1996 ("the Act") is based on the UNCITRAL Model Law on international commercial arbitration and conciliation. Whereas, the term Conciliation is not defined in this Act. The term Conciliation defined as, it is a method of resolving the dispute, wherein an independent person helps the parties to arrive at a negotiated settlement. In other word, Conciliation is a process in which the parties to the dispute, with the assistance of a dispute resolution practitioner (the Conciliator), identify the issues in dispute, consider alternatives to reach an agreement. While on the other hand, Arbitration is a dispute settlement process in which an impartial third party is appointed to study the dispute and to arrive at a decision by hearing both of the parties. This case commentary intends to analyse history of this dispute, its ramifications, the merit it has and also the flaws it creates in Indian legal discourse. As the judgement of Mysore Cements Ltd. v. Svedala Barmac Ltd. (in appeal) by Supreme Court of India is the cornerstone to the very trust between the pragmatism of going Indian Legislature and the morality of the Arbitration and Conciliation Act, 1996, being protected by the judiciary. The methodology used in this case comment is 'Doctrinal research methodology'.

Keywords: Arbitration, Conciliation, Settlement Agreement, Conciliator, Compromise Petition, Arbitration Procedure, Arbitral Award, Memorandum Of Conciliation, Letter of Comfort.

I. CASE NOTE

Appeal (civil) 2321 of 2003

Petitioner - Mysore Cements Ltd.

¹ Author is a Student at Central University of South Bihar, India

Respondent	-	Svedala Barmac Ltd.
Year	-	12/03/2003.
Court	-	Supreme Court of India.
Bench	-	Doraiswamy Raju, Shivaraj V. Patil.
Country	-	India.
Area of Law	-	Civil Law and Arbitration and Conciliation Act, 1996.
Relevant Section	-	Arbitration and Conciliation Act, 1996 – Section 30, Section 36, Section 73, Section 74 and Section 76.

II. INTRODUCTION

This is a case of appeal in Supreme court of India, against the decision of the high court for dismissing the petitioned filed by the appellant in which it was argued that the respondent have to pay the amount of compensation which is mentioned in the letter of comfort, and which was filed with the Memorandum of Conciliation on the same day of conciliation proceeding. But the court rejected this petition by contending that there are some of the lacunas in the settlement agreement with regarding to some of the provisions of the Act which were not complied with. But, before analysing this case firstly, we have to understand some of the legal terms as well as some of the Sections, which the hon'ble court have pointed out while deciding this case. As this case deals with the Conciliation Proceeding so firstly, we have to understand who is conciliator? So, the Conciliator is a person who is to assist the parties to settle the dispute between them amicably². Now, the Settlement Agreement³ is an agreement drawn out by the conciliator when he finds that there is any possibility of amicable compromise between the parties. Thus, a successful conciliation proceeding comes to an end only when the settlement agreement signed by the parties come into existence and as per Section 74 of the Act, this type of agreement has the legal sanctity of an arbitral award⁴. Now, a Compromise Petition⁵ is an agreement between the parties to the suit, to settle a dispute or reach a settlement in which each gives some grounds rather to continue the dispute or go to the trial. Now, an Arbitration award is a determination on the merit by an arbitration tribunal in an arbitration and is analogous to the judgement in a court of law.

² Held in Haresh Dayaram Thakur v. State Of Maharashtra and Ors. [2000] 6 SCC 179.

³ Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996, section 73, (India).

⁴ Held in Haresh Dayaram Thakur v. State Of Maharashtra and Ors. [2000] 6 SCC 179

⁵ Order 23, Rule 3 of the Civil Procedure Code, 1908.

III. THE FACT OF THE CASE:

1) On April 22, 1994, and July 30, 1994, the appellant contracted with the respondent for the supply of two sets of Barmac 9600 DUPACTOR rock-crushing machines for its cement plant at Damoh. Appellant also contracted with another subsidiary of Berman Ltd for 4 Vibrating Ripo Flo screens.

2) Appellant served a notice for arbitration to the respondent for the non-compliance of their assurance as the machinery fails to crush the limestone. But at the request of the respondent, the appellant agreed to conciliation at New Delhi.

3) On December 18, 1997, a “Memorandum of Conciliation” signed by both the parties and was authenticated by the conciliator.

4) On the same day, as a part of the same transaction a “letter of comfort” was signed by both of the parties, in pursuant of Clause 9 and 10 of the Memorandum of Conciliation which provides that, in case of failure of completion or modification of the work on two lines, an amount of compensation is to be paid by the respondent to the appellant until the machinery was set right.

5) The appellant approached the high court for the execution of the same but was dismissed on the ground that the decision of the conciliator is not the decision within the meaning of Section 74 of the Act⁶, as there were no findings whereby the conciliator had fixed any compensation to be paid to the appellant in case the work is not completed within the stipulated time. Thus, the appellant filed an appeal challenging the dismissal of this execution petition.

Few more dates and events for proper appreciation of the above-stated facts: -

- a). From December 15, 1997, to December 18, 1997, the first round of Conciliation proceedings was held and terms were recorded in the Memorandum of Conciliation. Letter of Comfort issued on the same day in the favour of appellant to compensate at the rate of Rs. 20 Lacs per month per line in case the respondent failed to rectify Line II by April 30, 1998, and line I by August 30, 1998.
- b). Respondent couldn't complete the modification work of line II by April 30, 1998. From August 12, 1998, to August 13, 1998, third round of Conciliation proceeding were held but the parties not reach on any consensus and decided to call off.

⁶ Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).

- c). On August 27, 1998, the appellant issued a legal notice against the respondent demanding a refund for Rs. 937.56 Lac for Barmac Crushing System and associated equipment, along with an interest @12% per annum. In addition to that a demand of Rs. 567 Lacs as a damage for the loss incurred due to non-functioning of Barmac Crushing System and @ 40 Lacs per months the respondent has to compensate to the appellant in view of Memorandum of Conciliation and Letter of Comfort dated 18/12/1997.
- d). On October 30, 1998, the appellant filed execution petition no. 264/98 claiming Rs 40 Lacs per month from October 1998 onwards along with an interest @ 18% per annum.

IV. ISSUE OF THE CASE:

- 1) Whether the Letter of Comfort is enforceable as an arbitration award under section 74 read with section 30 and section 34 of the Arbitration and Conciliation Act, 1996?
- 2) Whether the appeal would be attainable in the court as per section 36 of the Arbitration and Conciliation Act, 1996?
- 3) Whether the appellant was entitled to compensation as per the letter of comfort which is signed by both of the parties on the same day of settlement agreement during conciliation?

V. JUDICIAL DECISION

The Hon'ble High Court dismissed the above petition for enforcement by the way of execution under section 36 of the Act by the impugned order for the reason that:-

- 1) The conciliator has not given any findings in his decision, as to what will happen in the event when the respondent will not carry out the modification work within the prescribed period mentioned herein;
- 2) The settlement agreement was not deemed to be a settlement agreement within the meaning of section 74 of the Act;
- 3) In the decision of the Conciliator, there were no findings that the Conciliator had fixed any compensation to be paid to the appellant in the event the work was not completed within the stipulated period;
- 4) Moreover, there was a dispute as to who will be held responsible if the work was not done within the period mentioning herein;

- 5) The letter of Comfort written by the respondent to the appellant for agreeing to pay the compensation in the event the work was not completed within the period mentioned, could not be enforced under section 36 of the Act;

Further, the Hon'ble Court analyses Clause (IX) of the Memorandum of Conciliation: -

- i. It was clearly stated that the respondent has agreed to give a Letter of Comfort in favour of the appellant that the modification work would be completed within the stipulated period but nowhere in the said Memorandum, it was mentioned that this Letter of Comfort deemed to be the part and parcel of it.
- ii. In the said clause it is only indicated that the respondent agreed to give a Letter, but nowhere it was mentioned that the said letter get incorporated in the said Memorandum.
- iii. In the said Memorandum the quantum of compensation is mentioned but nowhere it states that in the case of default of completion of the modification work what needed to be followed.
- iv. In the said Memorandum, the completion of modification of work was subject to the obligation performed by the appellant. So there also appears to be a dispute regarding satisfactory completion of the work and as to who committed the breach of obligation.

Further, the Hon'ble Court analyses the Letter of Comfort: -

- i. It starts with the sentence that “in pursuance of the agreement in Conciliation proceedings to undertake the modification work, assurance was given by the respondent that the modification work shall be completed within the mentioned time and if not done then compensation would be paid to the appellant, but nowhere in the Letter of Comfort it was mentioned that ‘what will happen in the case of dispute as to the satisfactory completion of modification work or otherwise arose’.
- ii. It also assures the payment of compensation but nowhere it was mentioned that in the event of a dispute as to the satisfactory completion of modification work, still the compensation amount has to be paid in the absence of any adjudication by any authority in this regard.
- iii. Further, the Letter of comfort at the beginning itself states that “in pursuance to the agreement in the Conciliation proceeding..” but nowhere it was mentioned that “this Letter of Comfort forms part of the Memorandum of Conciliation Proceeding”.

Now analysing Section 73 of the Act which provides provisions for Settlement Agreement.

The court observes that in this case the Settlement Agreement made by the Conciliator is not complied with Sub-Section (1)⁷ of Section 73 of the Act, as there were not any findings that the Conciliator has formulated or reformulated any terms of the Settlement. Therefore, it is made clear that all the requirements of section 73 are not complied with in this case.

Furthermore, the Supreme Court in the case of, **Haresh Dayaram Thakur v. State Of Maharashtra and Ors.**⁸, held that a conciliator requires to assist the parties to settle the dispute amicably and if the conciliator is of the opinion that there exists an element of settlement between the parties, then he can draw up an agreement under the provisions of Section 73 of the Act. The Settlement reaches its finality only when the Settlement agreement is signed by both/all of the parties in the dispute. Then, such a settlement agreement has the legal sanctity of arbitration under Section 74 of the Act.

VI. FINAL VERDICT

Now in the present case, looking to the Memorandum of Conciliation Proceeding and Letter of Comfort it is true that the parties have agreed to certain terms, but on the other hand, they cannot straight away enforce by taking up the execution proceedings. Like the High Court, stated in the impugned order that, based on Letter of Comfort the execution proceeding could not be taken under Section 36 of the Act. It again stated that the conciliator and both the parties also have signed the Settlement Agreement and they are agreed to the terms, but the procedure as indicated and various steps contemplated in Section 73 of the Act were not adhered to. Apart from that the said Memorandum neither states the consequences of the modification work will not be completed within the prescribed period, nor it fixes any amount of compensation which is needed to be paid for non-compliance of work. So, the Judges finds in their scrutiny that the Memorandum of Conciliation Proceeding and the Letter of Comforts either taken individually or even together, they or any one of them cannot legitimately claim to be entitled to or assigned the status of a Settlement Agreement within the meaning of Section 73 of the Act.

Furthermore, the Apex Court followed and reiterated its stand as taken by them in Haresh Dayaram Thakur⁹ case, that the Settlement agreement comes into existence under Section 73 satisfying the requirements stated therein, it gets the status and effect of an arbitral award on

⁷ “when it appears to the conciliator that there exist elements of settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit then to the parties for their observation. After receiving the observation of the parties, the conciliator may reformulate or formulate the terms of the possible settlement in the light of such observation”.

⁸Supra note 2.

⁹ Supra note 2.

agreed terms on the substance of dispute rendered by an Arbitral Tribunal under Section 30 of the Act. If a settlement agreement comes into existence under Section 73 satisfying the requirement therein, it gets the status and effect of an arbitral award rendered by the Arbitral Tribunal under Section 30 of the Act. It was further held that mere substantial compliance with Section 73 of the Act is not sufficient; all the statutory requirements must be complied with. As per Section 77 of the Act, the parties shall not initiate any arbitral or judicial proceeding during the Conciliation proceedings in respect of dispute which is the subject matter of the Conciliation proceedings except in a case where a party is of the opinion that the proceedings are necessary to preserve his right may initiate any arbitral or judicial proceedings. Thus, for the reason stated, the discussion made and having regard to the fact and circumstances of the case, the judges do not find any merit in this appeal and hence, the appeal is dismissed with no order as to cost.”

VII. CRITIQUE

Conciliation is a fundamentally different alternative dispute, in Conciliation, however, apart from the consensual selection of the forum, even the dispute is settled by the agreement and not by the adjudication. Under Section 74 read with sections 30 and 36 of the Act, Settlement Agreement is enforceable as if they are arbitration award, in a sense that a conciliation proceeding is analogous to the compromise agreement or consent order which is enforced by using the machinery of the court of law.

In a case where the aggrieved party has given up his right to go to a binding form such as arbitration or civil suit so that to go for conciliation proceeding at the request of other parties then the court should be extremely reluctant not to enforce a conciliation settlement agreement at the behest of the other party on such case where both of the parties were shown their subsequent conduct, they consider the conciliation settlement agreement to binding and enforceable. Hence to refuse to enforce the settlement agreement would amount to rewarding bad faith in the Conciliation process.

In the present case, the Conciliation Settlement Agreement dated December 18, 1997, entered into by the parties satisfying all of the requirements of Section 73 of the Act. Moreover, the Conciliation Settlement was drafted by the Conciliator and the parties, during the conciliation proceeding as provided in Section 73(2) of the Act and it also bears the signature of the representatives of both the parties at the end of the document as required by Section 73(3) of the Act and also at the end of the document it has been authenticated by the Conciliated as required by Section 73(4) of the Act. Consequently, the Settlement has become final and

binding on the parties as set out in Section 73(3) of the Act. Therefore, there is not any overlapping between the current proceeding for execution of Conciliation Settlement and the arbitration proceedings separately being conducted pursuant to the arbitration clause. Hence the two proceedings are distinct and independent and the Conciliation Settlement cannot be sent to the arbitral tribunal. Henceforth, in the present case, the Letter of Comfort must be treated as an integral part of the conciliation Settlement and binding on the parties because a reference in an agreement to another document such as Letter of Comfort, can result as being incorporated into the agreement, as in this case both the Settlement Agreement and the Letter of Comfort are incorporated on the same day contemporaneously.

Moving to the other side, Section 67 of the Act provides for the Role of the Conciliator. By analysing this judgement, I would rather say that although it seems to be that the Conciliation Agreement would not follow with some of the requirements of Section 73 read with Section 30 and 36 of the Act as argued by the respondent side but on the other hand, we have to think that the ultimate aim of the judiciary is to provide fair and just reasoning in its decision and by considering this view, I would rather say that the just situation has not been followed in this case. As it is unjust and unfair for the appellant to pay, for the fault of the Conciliator. As in every Conciliation Proceeding, a Conciliator is appointed who is assumed to be the one who has all the knowledge and skill which is required to be met within the conciliation proceeding. As per Sub-Section (1) of Section 67, the Conciliator has to assist the party in their attempt to reach to an amicable settlement of dispute but in this case, it is the role of the conciliator to assist the parties while making the Memorandum of Conciliation and Letter of Comfort that the procedure of Section 73 must be complied with in their agreement or not. Also, Sub-Section (2) of Section 67, provides that the Conciliator shall be guided by the principle of objectivity and the right and obligation of the parties but after knowing all the objectives for making this agreement neither he rectified the clauses of the agreement, nor directed to the appellant to rectify it and in a result of which the right of the appellant was infringed and in addition to that he had also incurred a great loss in his business which in itself seems to be unfair and unjustified.

At last, I would rather say that the Preamble of the Act states that, one of the objects of UNCITRAL Conciliation Rules embodied in Part III of the Act is to make, “a significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in International Commercial relation”. Hence the Court should ensure that the intention of the parliament reinforcing the system of Alternative Dispute Resolution in India is not frustrated by the hyper-technical approach taken by the respondent.

VIII. CONCLUSION

According to the fact and scenario of the case the Hon'ble court justifies their contention and made it clear that the Letter of Comfort in execution proceeding cannot be enforced as it doesn't meet with all the requirements of Section 73 of the Act. Furthermore, there is nothing to show that the Letter of Comfort is incorporated in the Settlement Agreement. Hence there was no termination of conciliation proceeding under Section 76(a) by the signing of the Settlement Agreement by the parties on the date of Conciliation proceeding. So, it was observed that Letter of comfort is only an interim arrangement and the dispute is pending before the Arbitrators. So, it was held that where a statute prescribes a procedure for doing something then the same course must be followed and the procedure prescribed must be adhered to. Since the Letter of Comfort and the Memorandum of Conciliation don't meet with the requirement of Section 73. Thus, they cannot be given the status of Settlement Agreement under Section 74 to deem them as an arbitral award under Section 30. Therefore, the appellant will not get the amount of compensation as for the reason stated above. Hence, I am very much satisfied with the judgement of the Hon'ble Supreme Court of India.
