I Pay Clearing Services Private Limited vs Icici Bank Limited on 3 January, 2022

Author: R. Subhash Reddy

Bench: Hrishikesh Roy, R. Subhash Reddy

C.A.@S.L.P.(C)No.24278 of 2019

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7 OF 2022
[arising out of S.L.P.(C) No.24278 of 2019]

I-Pay Clearing Services Private Limited

vs.

ICICI Bank Limited

J U D G M E N T

R. SUBHASH REDDY, J.

1. Leave granted.

2. This appeal is filed, aggrieved by the order dated 16.07.2019 passed by the High Court of Judicature at Bombay, in Commercial Notice of Motion No.1549 of 2019 in Commercial Arbitration Petition No.190 of 2018.

3. In the Commercial Arbitration Petition No.190 of 2018, filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act'), the Reason: respondent–ICICI Bank has challenged the award dated 13.11.2017, of the learned Sole Arbitrator. By the C.A.@S.L.P.(C)No.24278 of 2019

aforesaid award, learned Arbitrator directed the respondent-ICICI Bank as under:-

> "a) The respondent (ICICI Bank) is ordered and directed to pay to the claimant (I-pay) an amount of

Rs.50,00,00,000/- (Rupees Fifty Crores) together with interest thereon to be calculated at the rate of 18% per annum as from the date of award till payment or realization, whichever is earlier;

b) The respondent (ICICI Bank) is ordered and directed to pay to the claimant (I-pay) Rs.50,000/- (Rupees Fifty Thousand) as cost on the application under Section 16 made before this Arbitral Tribunal."

4. In the petition, filed by the respondent-ICICI Bank under Section 34(1) of the Act, it has taken out Notice of Motion No.550 of 2018 seeking interim order to stay the effect, operation, implementation and execution of the award dated 13.11.2017, passed by the learned Arbitrator. In the same petition, the appellant/I-Pay has taken out Notion of Motion No.1549 of 2019, under Section 34(4) of the Act, seeking directions to adjourn the proceedings for a period of three months or such other time as may be determined by the Court, and direct the learned Arbitrator to issue appropriate directions/ instructions / additional reasons and / or to take such necessary and appropriate action. The High Court by a common order, has passed the conditional order in the Notice of Motion taken out by the respondent and C.A.@S.L.P.(C)No.24278 of 2019 dismissed the Notice of Motion No.1549 of 2019, taken out by the appellant herein, under Section 34(4) of the Act. Aggrieved by the order of dismissal, dismissing the Notice of Motion No.1549 of 2019 filed under Section 34(4) of the Act, this Appeal is filed.

5. The appellant is a Private Limited Company incorporated under Companies Act, 1956 and is in the business of providing card personalization, transaction and reconciliation management for Smart Card based loyalty programs, for which they have an operations facility at Mumbai, with operational hubs in various cities. The respondent–ICICI Bank is a company incorporated under the Companies Act, 1956, is licensed under Banking Regulations Act, 1949 and carries on the business of providing banking facilities, retail financial assistance and related activities. The HPCL (Hindustan Petroleum Corporation Limited) which was originally impleaded as Defendent No.2 in the Suit, is a Public Sector Company, which is engaged in refining and selling petroleum products through their retail outlets all over India.

6. It is the case of the appellant that it has entered into an agreement with the respondent on 04.11.2002 to provide technology and manage the operations and processing of the Smart Card based loyalty programs for C.A.@S.L.P.(C)No.24278 of 2019 HPCL. It was for HPCL, which was to improve fuel sales at their retail outlets. The appellant was required to develop various software application packages for management of Smart Card based loyalty programs. The said agreement was followed by another agreement dated 04.02.2003, as per which, the appellant was to develop a software for postpaid Smart Card Loyalty Program akin to a Credit Card under the name "Drive Smart Software". It is the case of the appellant that to further expand their customer base, the respondent herein, requested the appellant to also develop a "Drive Track Fleet Card" management

solution for the fleet industry and requested by letter dated 10.12.2003 to treat it as an extension for the Service Provider Agreement and appointed the appellant for that purpose and it was named as "Drive Track Program".

7. It is the grievance of the appellant that in view of sudden move by the Respondent herein, in abruptly terminating the Service Provider Agreement dated 04.11.2002, it has suffered losses of over Rs.50 crores, on account of loss of jobs of its employees, losses on account of employee retrenchment compensation, etc. It is also their case that on account of sudden termination of the agreement all its operations were paralyzed. The appellant made a total claim of Rs.95 crores against the C.A.@S.L.P.(C)No.24278 of 2019 respondent. At first instance, a suit was filed in O.S. No.1094 of 2012 on its Original Civil Jurisdiction in the High Court of Judicature at Bombay. As there was a clause in the Agreement for arbitration, the High Court has referred the dispute to arbitration under Section 8 of the Act by appointing Mr. Justice R.G. Sindhakar (Retd.) as a Sole Arbitrator for resolving the dispute between the parties.

8. Mr.Justice R.G.Sindhakar (Retd.), who was appointed as Sole Arbitrator, has passed award dated 13.11.2017, directing the respondent herein, to pay to the appellant – claimant an amount of Rs.50,00,00,000/- (Rupees Fifty Crores) together with interest @18% per annum from the date of award till payment and further directed to pay an amount of Rs.50,000/- (Rupees Fifty Thousand) towards the costs.

9. Aggrieved by the award of learned Sole Arbitrator, the respondent–ICICI Bank has filed application under Section 34(1) of the Act for setting aside the award. In the said application, it is the case of the respondent that there was accord and satisfaction between the parties and the contractual obligations between the parties was closed mutually and amicably. Reliance is placed on the letter dated 01.06.2010, which was signed by both the parties recording the terms of closure of C.A.@S.L.P.(C)No.24278 of 2019 the contract entered between the parties and other communications. The award of the learned Arbitrator was mainly questioned on the ground that it suffers from patent illegality, inasmuch as there is no finding recorded in the award to show that the respondent-ICICI Bank has illegally and abruptly terminated the contract. The learned Arbitrator has framed five points for determination and Point No.1 was, "Whether the contract was illegally and abruptly terminated by the respondent?". The main ground in the application filed under Section 34(1) of the Act by the Respondent, is that the learned Arbitrator without recording any finding on Point No.1, has awarded Rs.50 crores to the appellant/I-Pay. It is pleaded in the application that the award of the Arbitrator does not reveal the exact nature of the purported breach and the date of alleged termination. It is the case of the respondent that without addressing the vital issue viz. whether there was an illegal and abrupt termination of the contract or not, as pleaded, the learned Arbitrator has allowed the claim to the extent of Rs.50 crores, as such, the same is patently illegal and erroneous.

10. In the arbitration petition filed by the respondent, the appellant/I-Pay has taken out Notice of Motion under Section 34(4) of the Act, for adjourning C.A.@S.L.P.(C)No.24278 of 2019 the proceedings for a period of three months by directing the learned Arbitrator to issue appropriate directions/ instructions / additional reasons and / or to take such necessary and appropriate action.

In the impugned order, the High Court has prima facie found that unless and until a finding is recorded on point no.1 first, the learned Arbitrator could not have proceeded to record findings on the claims made by the appellant, as such, the learned Arbitrator has committed jurisdictional error.

The High Court was of the view that the defect in the award is not curable, as such, there is no merit in the application filed by the appellant under Section 34(4) of the Act and dismissed the same.

11. We have heard Dr. Abhishek Manu Singhvi and Mr. Nakul Dewan, learned Senior Counsels appearing for the appellant/I-Pay and Mr. K.V.Vishwanathan, learned Senior Counsel appearing for the respondent–ICICI Bank.

12. By impugned order, the Notice of Motion moved by the appellant for remitting the matter to the Sole Arbitrator under Section 34(4) of the Act, has been rejected. It is the case of the appellant that though the Arbitrator has awarded compensation/damages in view of the case of the appellant that the contract between the parties was illegally and abruptly terminated by the C.A.@S.L.P.(C)No.24278 of 2019 respondent, but he has not recorded detailed reasons on the said point. On the other hand, it is the case of the respondent, that there was full accord and satisfaction between the parties, as such, appellant is not entitled for any compensation/damages, as claimed for. To prove the case that there was 'accord and satisfaction' between the parties, the respondent has filed certain communications between the parties including letter dated 01.06.2010. It is the contention of Dr.Abhishek Manu Singhvi, learned senior counsel appearing for the appellant, that though the issue was resolved by the Arbitrator by holding that there was no accord and satisfaction between the parties, however, he has omitted to give adequate reasons in support of point no.1. Thus, it is pleaded that in view of settled legal position that lack of reasons or gaps in the reasoning, is a curable defect under Section 34(4) of the Act, award can be remitted to the arbitrator to give reasons. In support of said plea that lack of reasons or gaps in reasoning in the award of the Arbitrator is a curable defect, reliance is placed on the judgments of this Court, in the cases of Kinnari Mullick and Anr. v. Ghanshyam Das Damani1, Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.2 and also in Som Datt Builders (2018) 11 SCC 328 (2019) SCC ONLINE SC 1656 C.A.@S.L.P.(C)No.24278 of 2019 Limited v. State of Kerala3. It is submitted that the language of Section 34(4) of the Act, is couched in very wide terms and provides for remission of the matter to enable the Arbitrator to take such steps, as may be necessary for elimination of grounds for setting aside the award. It is submitted, though there is sufficient evidence in support of the point no.1, the Arbitrator has not given adequate reasons in support of the said point in the award. It is pleaded that Section 34(4) of the Act is based on the Article 34(4) of UNCITRAL Model Law on International Commercial Arbitration, which came up for consideration before the Singapore Court of Appeals in the case of AKN & Anr. v. ALC & Ors.4, wherein, it was held that remission is a 'curative alternative' to setting aside the award. Reference is also made to the judgment of Singapore High Court in the case of Permasteelisa Pacific Holdings Ltd. v. Hyundai Engineering & Construction Co. Ltd.5.

13. Shri Nakul Dewan, learned senior counsel for the appellant, supplementing the arguments, has submitted that the power to remit was conceived of as an alternative to setting aside the award. It is submitted that categorical statutory aim of sending a matter back to the Arbitral Tribunal for remission, is to eliminate (2009) 10 SCC 259 (2015) SGCA 63 (2005) SGHC 33

C.A.@S.L.P.(C)No.24278 of 2019 defects which would preserve the award. Thus, it is submitted that all the defects in an arbitral award, which are capable of being remedied, ought to be addressed in remission proceedings, if an application under Section 34(4) of the Act is filed. Again referring to the judgment of this Court in the case of Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.2, learned senior counsel has submitted that the provision under Section 34(4) of the Act can be utilised in cases where the arbitral award does not provide any reasoning or if the award has some gaps in the reasoning. Learned senior counsels, with the above submissions, requested to set aside the impugned order and to issue directions for remitting the award to Arbitral Tribunal for consideration of the issue, on abrupt and illegal termination of the agreement entered between the parties and to give detailed reasons.

14. On the other hand, Shri K.V. Vishwanathan, learned senior counsel for the respondent has made following submissions:

> The Notice of Motion moved by the appellant is dismissed by the High Court by assigning valid reasons in the impugned order and in view of the same, no interference is called for. No grounds are made out in the application filed by the appellant for remitting the C.A.@S.L.P.(C)No.24278 of 2019 matter to the Arbitrator, and in fact, the Arbitrator has not considered the relevant documentary evidence produced on behalf of the respondent, and passed the award. As the Arbitrator has passed the award by ignoring important and relevant evidence on record, it suffers from perversity and patent illegality, which cannot be cured on remittal under Section 34(4) of the Act by the Arbitrator. Under guise of adding reasons, the Arbitrator cannot take contrary view against the award itself. The Arbitrator in resumption proceedings cannot change his award and the same would be contrary to provision under Section 34(4) of the Act and would amount to Arbitrator assuming the role of the Court, which alone is empowered to set aside the award. It is submitted that in spite of sufficient evidence on record to prove that there was 'accord and satisfaction' between the parties, without considering such evidence, the Arbitrator has proceeded on the premise that there was no 'accord and satisfaction' and passed the award in favour of the appellant. The findings recorded on the plea of 'accord and satisfaction' in the award without considering the entire evidence on record, constitute patent illegality, as such, same is to be considered only by the Court while considering the application filed under Section 34(1) of the Act. Even assuming that on remittal, the Arbitrator wants to consciously hold C.A.@S.L.P.(C)No.24278 of 2019 that there was accord and satisfaction of claims and there was no abrupt and illegal termination of the contract, he would not be able to do so, as he cannot change his own award. The Judgments relied on by learned counsel for the appellant are distinguishable on facts and would not render any support to the case of the appellant. Oral submissions made before this Court, run contrary to pleadings on record in the application.

15. To differentiate between 'findings' and 'reasons', learned senior counsel Mr. K. V. Vishwanathan relied on the judgment of this Court in the case of Income Tax Officer, A Ward, Sitapur v. Murlidhar

Bhagwan Das6. It is also submitted that the Notice of Motion moved by the appellant under Section 34(4) of the Act, is belated and afterthought and is made only to protract the litigation, and prayed for dismissal of the appeal.

16. Before we consider the various submissions made on behalf of both sides, we need to notice certain relevant provisions of the Arbitration and Conciliation Act, 1996. Section 31 of the Act deals with 'form and contents of arbitral award'. As per the same, an arbitral award shall be made in writing and shall be signed by the members of the Arbitral Tribunal. The arbitral award shall state the reasons, upon which it is AIR 1965 SC 342 C.A.@S.L.P.(C)No.24278 of 2019 based, unless parties agree that no reasons are to be given, or the award is an arbitral award on agreed terms under Section 30 of the Act. Chapter VII of the Act provides recourse against arbitral award. The recourse to a Court against an arbitral award is to be in terms of Section 34(1) of the Act. As per Section 34(2A) of the Act, if the arbitral award arising out of arbitrations other than international commercial arbitrations, is vitiated by patent illegality, same is a ground for setting aside the award. Sections 34(2A), (3) & (4) of the Act, read as under:

> "34.(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:
>
> Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.
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> (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal;
>
> Provided that if the Court is satisfied that the application was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.
>
> (4) On receipt of an application under sub-

section (1), the Court may, where it is appropriate and it is so requested by a C.A.@S.L.P.(C)No.24278 of 2019 party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

17. From a reading of Section 34(4) of the Act, it is clear that on receipt of an application under sub-section (1), in appropriate cases on a request by a party, Court may adjourn the proceedings for a period determined by it in the order to give the Arbitral Tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of Arbitral Tribunal, will eliminate

the grounds for setting aside the arbitral award.

18. It is the case of the appellant that in view of abrupt and illegal termination of agreement by the respondent, it has suffered losses of more than Rs.50 crores as all operations were paralysed, and the appellant had to pay its employees retrenchment compensation, etc. On the aforesaid grounds, a total claim of Rs.95 crores was made against the respondent. On the other hand, it is the case of the respondent that there was 'accord and satisfaction' between the parties and the same is evident from several letters, which are part of record in the arbitration proceedings. Reliance is placed on the documentary evidence i.e. letters dated C.A.@S.L.P.(C)No.24278 of 2019 01.06.2010, 17.06.2010, email dated 02.08.2010 and letters dated 08.11.2010 & 20.01.2011. It is the specific case of the respondent that learned Arbitrator failed to appreciate such evidence, which would establish their case that there was accord and satisfaction between the parties and there was no abrupt termination or any breach on their part. It is their case that in view of such omission to consider vital evidence on record, findings recorded by the Arbitrator are perverse and constitute patent illegality within the meaning of Section 34(2A) of the Act. The Notice of Motion filed under Section 34(4) of the Act by the appellant, clearly states that the said Motion was moved as an abundant precaution and they are seeking remission to the Arbitrator to provide detail and express reasons in addition to reasons already stated in the arbitral award dated 13.11.2017. It is also their case that it is essential that additional reasons are made available by learned Arbitrator in support of his findings recorded in the award. On the other hand, it is the case of the respondent, that there is no finding at all, on the issue viz. "whether the contract was illegally and abruptly terminated by the respondent?", and in spite of the same, the Arbitrator without considering the important documents/communications between the parties, which throw light on accord and satisfaction between the C.A.@S.L.P.(C)No.24278 of 2019 parties, has proceeded to pass the award stating that there was no 'accord and satisfaction'.

19. As contended by learned senior counsel for the appellant, it is true that Section 34(4) of the Act is couched in a language, similar to Article 34(4) of the UNCITRAL Model Law on International Commercial Arbitration. In the case of AKN & Anr. v. ALC & Ors.4, by considering legislative history of the Model Law, it was held by Singapore Court of Appeals that remission is a 'curative alternative'. In the case of Kinnari Mullick and Anr. v. Ghanshyam Das Damani1, relied on by learned senior counsel for the appellant, the question which fell for consideration was whether Section 34(4) of the Act empowers the Court to relegate the parties before the Arbitral Tribunal after setting aside the arbitral award, in absence of any application by the parties. In fact, in the said judgment, it is held that the quintessence for exercising power under Section 34(4) of the Act is to enable the Tribunal to take such measures which can eliminate the grounds for setting aside the arbitral award, by curing the defects in the award. In the judgment in the case of Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.2, it was a case where there was no inquiry under Section 34(4) of the Act and in the said case, this Court has held that the legislative C.A.@S.L.P.(C)No.24278 of 2019 intention behind Section 34(4) of the Act, is to make the award enforceable, after giving an opportunity to the Tribunal to undo the curable defects. It was not a case of patent illegality in the award, but deficiency in the award due to lack of reasoning for a finding which was already recorded in the award. In the very same case, it is also clearly held that when there is a complete perversity in the reasoning, then the same is a ground to challenge the award under Section 34(1) of the Act. The

case of Som Datt Builders Limited v. State of Kerala3 is also a case where no reasons are given for the finding already recorded in the award, as such, this Court held that in view of Section 34(4) of the Act, the High Court ought to have given Arbitral Tribunal an opportunity to give reasons.

20. The aforesaid case law cited by the learned counsel appearing for the appellant, is distinguishable on facts and would not render any assistance in this case. When it is the specific case of the respondent that there is no finding at all, on point no.1 viz. "whether the contract was illegally and abruptly terminated by the respondent?", remission under Section 34(4) of the Act, is not permissible. In our view, Section 34(4) of the Act, can be resorted to record reasons on the finding already given in the award or to fill up the gaps in the C.A.@S.L.P.(C)No.24278 of 2019 reasoning of the award. There is a difference between 'finding' and 'reasons' as pointed out by the learned senior counsel appearing for the respondent in the judgment in the case of Income Tax Officer, A Ward, Sitapur v. Murlidhar Bhagwan Das6. It is clear from the aforesaid judgment that 'finding is a decision on an issue'. Further, in the judgment in the case of J. Ashoka v. University of Agricultural Sciences and Ors.7, this Court has held that 'reasons are the links between the materials on which certain conclusions are based and the actual conclusions'. In absence of any finding on point no.1, as pleaded by the respondent and further, it is their case that relevant material produced before the Arbitrator to prove 'accord and satisfaction' between the parties, is not considered, and the same amounts to patent illegality, such aspects are to be considered by the Court itself. It cannot be said that it is a case where additional reasons are to be given or gaps in the reasoning, in absence of a finding on point no.1 viz. "whether the contract was illegally and abruptly terminated by the respondent?"

21. Further, Section 34(4) of the Act itself makes it clear that it is the discretion vested with the Court for remitting the matter to Arbitral Tribunal to give an opportunity to resume the proceedings or not. The words (2017) 2 SCC 609 C.A.@S.L.P.(C)No.24278 of 2019 "where it is appropriate" itself indicate that it is the discretion to be exercised by the Court, to remit the matter when requested by a party. When application is filed under Section 34(4) of the Act, the same is to be considered keeping in mind the grounds raised in the application under Section 34(1) of the Act by the party, who has questioned the award of the Arbitral Tribunal and the grounds raised in the application filed under Section 34(4) of the Act and the reply thereto. Merely because an application is filed under Section 34(4) of the Act by a party, it is not always obligatory on the part of the Court to remit the matter to Arbitral Tribunal. The discretionary power conferred under Section 34(4) of the Act, is to be exercised where there is inadequate reasoning or to fill up the gaps in the reasoning, in support of the findings which are already recorded in the award. Under guise of additional reasons and filling up the gaps in the reasoning, no award can be remitted to the Arbitrator, where there are no findings on the contentious issues in the award. If there are no findings on the contentious issues in the award or if any findings are recorded ignoring the material evidence on record, the same are acceptable grounds for setting aside the award itself. Under guise of either additional reasons or filling up the gaps in the reasoning, the power conferred on the Court cannot C.A.@S.L.P.(C)No.24278 of 2019 be relegated to the Arbitrator. In absence of any finding on contentious issue, no amount of reasons can cure the defect in the award. A harmonious reading of Section 31, 34(1), 34(2A) and 34(4) of the Arbitration and Conciliation Act, 1996, make it clear that in appropriate cases, on the request made by a party, Court can give an opportunity to the arbitrator

to resume the arbitral proceedings for giving reasons or to fill up the gaps in the reasoning in support of a finding, which is already rendered in the award. But at the same time, when it prima facie appears that there is a patent illegality in the award itself, by not recording a finding on a contentious issue, in such cases, Court may not accede to the request of a party for giving an opportunity to the Arbitral Tribunal to resume the arbitral proceedings. Further, as rightly contended by the learned counsel appearing for the respondent, that on the plea of 'accord and satisfaction' on further consideration of evidence, which is ignored earlier, even if the arbitral tribunal wants to consciously hold that there was 'accord and satisfaction' between the parties, it cannot do so by altering the award itself, which he has already passed.

22. For the foregoing reasons, we do not find any merit in this appeal so as to interfere with the impugned C.A.@S.L.P.(C)No.24278 of 2019 order passed by the High Court. Accordingly, this Civil Appeal is dismissed, with no order as to costs.

……J [R. Subhash Reddy] ……J [Hrishikesh Roy] New Delhi January 3, 2022.