IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
(Commercial Division)
Appellate Side

Present :- **Hon'ble Mr. Justice I. P. Mukerji**
Hon'ble Mr. Justice Biswaroop Chowdhury

FMAT (ARBAWARD) No.30 of 2022

MFAR Constructions Private Limited
Vs.
Bengal Shristi Infrastructure Development Limited

For the Appellant	**:-**	**Mr. Soumabho Ghosh,** **Ms. T. Bhattacharya,** **Mr. Anujit Mookherji,** **Mr. Prithish Chandra**
For the Respondent	**:-**	**Ms. Hasnuhana Chakraborti,** **Ms. Aasia Hasan,** **Mr. Pathik Chowdhury**
Judgment On	**: -**	**19.04.2024**

I. P. Mukerji, J.:-

A point of some importance is involved in this appeal. By his judgment and order dated 20th April, 2022 the learned judge, Commercial Court at Alipore set aside the arbitral award dated 29th December, 2017 on the solitary ground that the learned arbitrator had taken part in a conciliation exercise between the parties. The merits of the matter were not gone into by the learned judge.

The arbitrator was the Hon'ble Mr. Justice Amitava Lala, a former judge of this court and of the Allahabad High Court. The award was for a sum of Rs.1,54,86,728/- together with interest at the rate of 18% per annum from the date of the award till the date of payment. The counterclaim made by the respondent was rejected. There is no dispute that the learned arbitrator had made an endeavour to enable the parties to arrive at a settlement.

The effort which the learned arbitrator made towards settlement is recorded in the following words in the award.

> *"**Settlement by Conciliation:***
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> *On 6th June 2017 as and when drawing of Award was for delivery excepting completion of formalities, respondent's representative Mr. Sunil Jha and Mr. Badri Kumar Tulsyan, working in a sister concern of the respondent approached the Arbitrator to get the disputes settled amongst the parties by way of conciliation when the representative of the claimant Mr. P.K. Rao, upon being present, wanted to obtain specific proposal of terms of settlement from the respondent and 3 to 4 months time to get final approval from the Board of Directors of the claimant company, who works or lives in different places. Accordingly the Arbitrator thought that no chance of settlement should be ignor ignored at any stage but to give appropriate opportunity/s to the parties. Thus by consent of the parties, the time was allowed by holding 61 sitting on 6th June 2017.*
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> *After expiry of considerable period, again by a letter dated 17th November 2017 with a copy to the claimant, the representative of the respondent approached the Arbitrator to hold a sitting for further discussion about settlement. Accordingly upon notice to the parties, the Arbitrator held 62nd sitting on 30th November 2017 when representatives of both the parties, upon being present, made their respective submissions. Mr. P.K. Rao was present on behalf of the claimant when Mr. Sunil Jha, Mr. Badri Kumar Tulsyan and Mr. Ashish Jha were present on behalf of the respondent. The main contention on the part of the respondent was that they are not supposed to pay the retention money when the work was foreclosed. For the payment of bill amount under claim no. 1, the respondent prayed time to pay by installments. As against the quarry of Mr.P.K. Rao, the representative of the claimant, for payment of interest, Mr. Sunil Jha, the representative of the respondent, flatly refused to pay any interest. It is significant to note there under that the approach of Mr. Sunil Jha was contrary to basic element of conciliation. On the other hand, the approach of Mr. Badri Kumar Tulsyan was quite cordial and genuine. Approach of Mr. Ashish Jha was similar to Mr. Tulsyan. Apparently Mr. P.K. Rao, the representative of the claimant, seemed to be unhappy with the approach of Mr. Sunil Jha. Mr. Tulsyan wanted to control the damage but it became uncontrollable by such time.*
>
> *In any event, I approached Mr. P.K. Rao, representative of the claimant, to take time and think rationally thereafter come back on a date to be fixed by the Arbitrator.*
>
> *However, on 8th December 2017 the claimant wrote a letter to the Arbitrator with a copy to the respondent saying that the management of the claimant has duly considered the offer made by the respondent and hereby expresses its inability to accept such*

offer for settlement. Thus the Arbitrator cannot compel them to accept the proposal made by the respondent.

Hence, the settlement by way of conciliation in terms of Section 30 of the Arbitration and Conciliation Act, 1996 stands failed. The minutes of 61st and 62nd sittings held on 6th June 2017, 30th November 2017 respectively and letter dated 8th December 2017 are kept with the record. The Arbitrator did not charge fees for aforesaid two sittings due to failure of settlement at the initial stage."

Section 80 of the Arbitration and Conciliation Act, 1996 provides as follows:-

"**80. Role of conciliator in other proceedings.**- Unless otherwise agreed by the parties,

(a)the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings;

(b)the conciliator shall not be presented by the parties as a witness in any arbitral or judicial proceedings."

It was contended on behalf of the respondent award debtor that for taking part in the above exercise to reach a settlement between the parties the learned arbitrator had acted as a conciliator. Having so acted he could not have proceeded to adjudicate upon the disputes between the parties as an arbitrator and make and publish his award. Hence the award was against the law and public policy. It was invalid and liable to be set aside.

It is now very necessary to record to Section 30 of the said Act. It is as follows:-

*"**30. Settlement**- (1) It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.*

(2) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(3) An arbitral award on agreed terms shall be made in accordance with section 31 and shall state that it is an arbitral award.

(4) An arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute."

Now if you consider Section 30 it is quite similar to Section 89 read with Order 23 Rule 3 of the Civil Procedure Code. The material part of Section 89 is set out hereunder:-

> *"**89. Settlement of disputes outside the Court.**- (1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for*
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> *(a) arbitration;*
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> *(b) conciliation*
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> *(c) judicial settlement including settlement through Lok Adalat; or*
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> *(d) mediation.*
>
> *(2) Where a dispute had been referred-*
>
> *(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act.*
>
> *(b) …*
>
> *(c) …*
>
> *(d) for mediation, the court shall affect a compromise between the parties and shall follow such procedure as may be prescribed.]"*

Order 23 Rule 3 is as follows:-

> *"**Compromise of suit.** – Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise [in writing and signed by the parties], or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of suit, the Court shall order such agreement compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith [so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit]:*
>
> *[Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.]*
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> *[Explanation. An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule."*

During progress of a suit it is quite common that the judge discovers that there is a possibility of settlement. He requests the parties to explore it. The court may ask a party to conciliate so as to reach the settlement. The judge may himself play a role in it by pointing out the strength of a party's case and the weakness of the other. He might make a provisional adjudication and direct the parties to settle their dispute according to his observation. If a money decree is claimed, he might suggest a sum to be paid by the defendant to settle his provisional liability as assessed by the judge. Then he might leave it to the parties to agree to that amount or to continue the litigation to face the ultimate conclusion.

Once a settlement is reached between the parties without the intervention or with the intervention of the court it is recorded in a terms of settlement signed by the parties and their advocates. Thereafter, a decree is pronounced in accordance with it.

We find the provision of Section 30 of the said Act to be similar to the court procedure.

Conciliation is under Part-III of the Arbitration and Conciliation Act, 1996. It is conceived of as a formal independent proceeding like arbitration where one party invites another by writing to conciliate. Normally, there would be one conciliator but parties may agree to more than one who are required to act jointly. The parties may also agree on an institution to appoint a conciliator. Just like an arbitration a conciliator requests a party to submit a summary of his case or the dispute between the parties. The conciliator or conciliators acting in a fair and just manner would help the parties in their attempt at reaching a settlement (Section 67 of the Arbitration and Conciliation Act, 1996). In the end the conciliator would help the parties to draft the settlement agreement. A settlement reached on conciliation would have the effect of an award of an arbitral tribunal (see Section 73 and 74 of the Act).

Now conciliation is seen as an independent proceeding or an alternative dispute redressal forum the object of which is to reach a settlement between the parties. It has its own procedure and ultimate result. It is quite different from the other type of proceeding conceptualized in the said Act which is arbitration where the arbitrator acts as a court hears and determines the dispute between the parties by an award. A conciliator only helps the parties to reach a settlement. In those circumstances, Section 80 of the said Act lays down that a person cannot have two roles, one of a conciliator and the other of an arbitrator. Hence it restrains a conciliator from acting in a dual capacity.

Now, parliament fully conscious of this type of role of the conciliator in the said Act, included Section 30 in the said Act providing that the arbitrator should make an effort towards settlement of the disputes between the parties.

One has to make a difference between a proceeding termed as conciliation in Part-III of the said Act and conciliation as understood by the learned arbitrator and described in the impugned award. What the learned judge has referred to in the impugned award is an effort by which the parties would try to resolve their dispute during pendency of the arbitration, at the request of the arbitrator. This is more akin to the attempts at settlement which is made by a judge trying a case in court. The learned arbitrator has described the process as conciliation but to my mind it is more similar to the attempt of the judge in court to encourage the parties to arrive at a settlement.

Now, this kind of settlement effort by the learned arbitrator is recognized and encouraged in a civil suit by Section 89 of the Civil Procedure Code read with Order 23 Rule 3 and during arbitration by Section 30 of the said Act. In fact the learned arbitrator has described the effort made by him and one for settlement under Section 30 of the said Act.

The learned judge in passing the impugned judgment and order has made a complete error in viewing the attempts made by the learned arbitrator to encourage the parties to reach a settlement as a conciliation proceeding under Part-III of the said Act. Hence his allowing the Section 34 application by setting aside the award was equally erroneous.

The impugned judgment and order dated 20th April, 2022 is set aside.

The entire matter is remanded to the court below to rehear and re-determine the Section 34 application strictly on merits. The appeal is accordingly allowed.

Certified photocopy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

I agree.

(BISWAROOP CHOWDHURY, J.) **(I. P. MUKERJI, J.)**