

In the High Court of Judicature at Madras

Dated : 13.08.2015

Coram :

<i>Date of Reserving the Order</i>	<i>Date of Pronouncing the Order</i>
24.07.2015	13.08.2015

THE HON'BLE MR. JUSTICE T.S.SIVAGNANAM

O.P.No.301 of 2013

R.Velusamy

.. Petitioner

-VS-

1.The Union of India,
Rep., by the General Manager,
Southern Railway,
Chennai – 600 003.

2.The Divisional Railway Manager (Works),
Salem Division,
Southern Railway,
Salem – 636 005.

3.The Divisional Engineer (Central),
Salem Division,
Southern Railway,
Salem – 636 005.

.. Respondents

Petition filed under Sections 11 of the Arbitration and Conciliation Act, 1996, read with Clause 2 of the Appointment of Arbitrator's Scheme by the Chief Justice of Madras High Court's Scheme, 1996, to appoint an Arbitrator to adjudicate all the disputes

and claims totalling to Rs.27,07,000/-, arising out of the Agreement No:SA/28, dated 30.01.2012 and to direct the respondents to pay the cost of the petition and pass such further or other orders.

For Petitioner : Mr.Amalaraj S.Penikilapatti
For Respondent : Mr.A.P.Srinivas

* * * * *

ORDER

This petition filed under Section 11 of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as the 'Act') is for appointment of an Arbitrator to adjudicate all the disputes and claims including the petitioner's 12 claims arising out of an agreement, dated 30.01.2012.

2. The petitioner was awarded the construction work namely, "ADEN/KRR – Sub Division – Manning of unmanned Level Crossings – Construction of gate lodges, watering arrangements, provision of lifting barriers etc., in ED-TP Section (5 Nos)", for a value of Rs.91,70,300/- with currency up to 22.05.2012, from the date of issue of letter of approval, dated 23.11.2011. An agreement was entered into between the petitioner and the respondent Railway

Administration on 30.01.2012. The petitioner would state that after receipt of the letter of acceptance, he was waiting for the officials to identify the precise location of the proposed gate lodges and the petitioner came to know that the post of SSE/Works/KRR was vacant and that the presence of the said officer is mandatory. The petitioner would state that even to commence the contract work, the Railway Administration ought to have first posted the said Officer. Finally Thiru.Balamurugan, was posted as SSE/W/KRR on 06.01.2012, and thereafter the petitioner recorded initial levels and commenced the earth works and during the period between 13.01.2012 and 24.01.2012, the work was stopped due to Pongal holidays and again restarted on 25.01.2012. The petitioner would state various other reasons, which caused the delay in progress of the work and he sent the letters to the respondents explaining the reason for the wastage of the first two months of the contract duration. The petitioner was issued a seven day notice on 06.03.2012, followed by a 48 hours notice, dated 19.03.2012 and ultimately the contract was terminated by order dated 02.04.2012. The petitioner would state that the termination of the contract is illegal and inequitable on several grounds which have been mentioned in paragraph 10 of the petition. The petitioner vide notice dated 14.07.2012 requested the first respondent to appoint Arbitrators to refer the 12 claims for

arbitration. The petitioner further stated that the 12 claims have to be referred for arbitration without any deletion or modification whatsoever and if all the 12 claims are not mentioned in the terms of reference, he will reject the appointment of Arbitrators as invalid and will approach this Court for appointment of an independent Arbitrator to adjudicate all the claims. By proceedings dated 16.01.2013, the first respondent appointed Shri.K.Masthan Rao, Dy.CE/EWS/AJJ, as the sole Arbitrator for adjudicating the dispute which had arisen in the agreement, dated 30.01.2012. On receipt of the said communication, the petitioner by letter dated 24.01.2013, reiterated his request for reference of all the 12 claims for arbitration. The first respondent vide communication dated 08.02.2013, addressed to the Arbitrator referred three of the Twelve claims for arbitration with a request to the Arbitrator to allow the Railway's counter claims if any during the Arbitration proceeding. By letter dated 06.03.2013, the petitioner was informed that two of his claims were not included in the Terms Of Reference (T.O.R) as they fall within the scope of "excepted matters" (matters not arbitrable). The petitioner by letter dated 23.03.2013, informed the respondents 1 and 2 as well as the Arbitrator and reiterated the stand taken by him earlier with regard to reference of all the 12 claims for arbitration and stated that he was shocked to receive the letter dated 06.03.2013, which was incomplete and

another letter dated, March 2013, addressed to M/s.Thiruchendur Murugan Builders, who has no connection with the petitioner. The petitioner therefore stated that the communication of the first respondent, dated 06.01.2013 is to be rejected as void as all the 12 claims made by the petitioner were not referred for arbitration. Therefore, the petitioner stated that he has no other option except to approach this court and accordingly the petitioner has filed this petition for the aforementioned relief.

3. The learned counsel appearing for the petitioner after reiterating the factual averments, submitted that the Railway Administration was bound to refer all the claims and restricting the reference only three claims, is illegal and it is submitted that under similar circumstances, this Court in the case of *M/s.Unique Builders vs. The Union of India*, in O.P.No.364 of 2011, dated 22.08.2014 and *U.Murugesan vs. The Union of India* in O.P.No.807 of 2012, dated 27.03.2015, had referred all the claims and prayed for similar order in this petition.

4. The learned Standing counsel appearing for the respondent referred to the counter affidavit filed by the second respondent, submitted that the petitioner could not complete all the

works within the currency period and therefore, he was issued a seven day notice vide letter dated 06.03.2012 and inspite of the same, the petitioner did not show any earnestness to progress with the work, which necessitated the issuance of a 48 hours notice, dated 19.03.2012. Inspite of the same, since the progress was not satisfactory, the Railway Administration terminated the contract under clause 62 of the General Conditions of Contract (GCC) vide letter dated 02.04.2012. It is further submitted that the Railway Administration accepted the request of the petitioner and nominated an Arbitrator to decide three claims and the terms of reference was intimated to the petitioner vide letter dated 08.02.2013. Further, it was submitted that the petitioner was informed by letter dated 06.03.2013 that the other claims come under 'excepted matters', which are not arbitrable. It is further submitted that the Arbitrator entered upon reference on 14.03.2013 and the claimant was directed to submit his statement of claims on or before 08.04.2013. However, the petitioner failed to comply with the same despite intimations by the Arbitrator on five occasions. Therefore, the Arbitrator vide proceedings dated 25.09.2013, terminated the arbitration proceeding. The learned counsel submitted that in the light of the above factual position, the petition for appointment of an Arbitrator is not maintainable and the petitioner is not entitled for any relief as he has

suppressed material facts in this petition. The learned counsel further submitted that only remedy available to the petitioner is to challenge the award passed by the Arbitrator in the manner provided under the Act and the question of appointing an Arbitrator at this juncture does not arise. In support of such contention, reliance has been placed on the decision of the High Court of Delhi in *Chemical Sales Corporation vs. M/s.A&A.Laxmi Sales and Service in I.A.No.2313 of 2009 in C.S.(OS)No.47 of 2005, dated 13.09.2011*.

5. Heard the learned counsel appearing for the parties and perused the materials placed on record.

6. Three issues arise for consideration in this petition:-

- (i) whether the Railway Administration was justified in not referring all the 12 claims for arbitration as requested by the petitioner?;
- (ii) whether the Railway Administration was justified in not taking into consideration the petitioner's representation to refer all claims for arbitration and not affording sufficient opportunity to the petitioner by communicating the correct details when he had specifically pointed out that he has not received the full text of the communication, dated 06.03.2013?;

(iii) whether the petitioner can seek for appointment of an Arbitrator by filing this petition before this Court after the Arbitrator appointed by the respondent organisation, had terminated the proceeding?.

7. The petitioner while requesting for reference for arbitration of the dispute, which has arisen under the agreement vide notice dated 14.07.2012, requested 12 claims to be referred for arbitration. The Railway Administration accepted the request of the petitioner for reference of the claim to the Arbitrator, but chose to restrict the terms of reference only to three claims. The petitioner reiterated his request that all the 12 claims should be referred for arbitration. In response to such communication, the Railway Administration informed the petitioner vide letter dated 06.03.2013 that the other claims fall within the 'excepted matter' and therefore, are not arbitrable. The petitioner's complaint is that he did not receive the full text of the letter dated 06.03.2013 and received only the first page. This averment made in the petition has not been denied by the respondents in the counter affidavit. In all fairness, the petitioner should have been communicated with the full text of the letter, dated 06.03.2013.

8. Be that as it may the only reason assigned for not referring all the claims is by contending that the other claims fall under the category of 'excepted matters' and not arbitrable. The question as to whether the matters which are stated to be 'excepted matters' could be referred for arbitration is no longer *res integra* and it is beneficial to refer to the decision of the Hon'ble Chief Justice in the case of ***M.Rajkumar vs. The General Manager, Southern Railway*** reported in ***2015 (2) CTC 353***, wherein it was pointed out that even the scope of the dispute and defence, the claim was liable to be referred to the Arbitral Tribunal and to examine as the claim would fall in the category of "excepted matters" which was one of the defence raised by the Railway Administration in the said case. Therefore, the contention raised by the respondents in this regard does not merit acceptance.

9. The petitioner had contended that the full text of the communication dated 06.03.2012, was not furnished to the petitioner. The learned counsel for the respondent, Railway Administration produced the copy of the original file which contains the communication dated 06.03.2012. On a perusal of the said communication, it is seen that 9 out of 12 claims have not been

subject matter of reference on the ground that they are “excepted matters”. By applying the decision in the case of **M.Rajkumar** (supra), it has to be necessarily held that the question as to whether a particular claim would fall within the ambit of “excepted matters” is also an arbitrable dispute, as the stand taken by the Railways Administration is in the nature of the defence to refuse to refer 9 claims of the petitioner. Therefore, this Court is fully convinced that all the 12 claims made by the petitioner ought to have been referred for arbitration.

10. Having held so, it may not be necessary to go into the question as to whether the petitioner was communicated with the full text of the letter dated 06.03.2012, though *prima facie* it appears that the petitioner was not given the full text and in the absence of any denial to the said allegation in the counter affidavit filed by the respondent, it can be safely presumed that the petitioner was served only with the first page of the communication dated 06.03.2012. This undoubtedly has put the petitioner in a disadvantage position. Accordingly, the question Nos.1 & 2 are answered in favour of the petitioner.

11. The third issue is as to whether the present petition

under Section 11(6) of the Act is maintainable when the Arbitrator terminated the arbitral proceedings as the petitioner did not appear before the Arbitrator.

12. The learned counsel for the respondent placed reliance on the decision of the Delhi High court in *Chemical Sales Corporation vs. M/s.A&A.Laxmi Sales and Service in I.A.No.2313 of 2009 in C.S.(OS)No.47 of 2005, dated 13.09.2011*. The said case arose out of an application under Sections 14(2) and 15(2) of the Act, praying to appoint a substitute independent Arbitrator and direct all parties to submit to the jurisdiction. It was held that a conjoint reading of Sections 14 & 15 makes it clear that the mandate of an Arbitrator shall terminate if he becomes *de jure* or *defacto* unable to perform his function or for any other reason fails to act without undue delay or he withdraws from his office for any reason or the parties agree to terminate his appointment and in case, the mandate of an Arbitrator terminates for any of the reasons as envisaged under Sections 14 and 15 of the Act, a substitute Arbitrator shall be appointed, according to the rules that were applicable to the appointment of an Arbitrator being replaced, as provided under Section 15 (2) of the Act. It was further pointed out that another Arbitrator shall have to be appointed in case mandate of an arbitrator terminates for any of the reasons as

provided under Sections 14(1) and 15(1) of the Act.

13. In the instant case, the Arbitrator passed the award on 25.09.2013, terminating the arbitral proceedings, the reason being the petitioner, who was the claimant therein had not attended the second hearing as well as not submitted the statement of claims before the date fixed. In the case of *Chemical Sales Corporation (supra)*, High Court of Delhi also considered Sections 25, 30, 32, 33 & 34 of the Act except in cases where the Sections 33 and 34(4) of the Act are attracted. It was held that the Arbitral Tribunal has power to terminate the arbitral proceedings under Section 25(1) upon default of the claimant to communicate his statement of claim; under Section 30(2) upon settlement of dispute by the parties and under Section 38(2) upon failure of the parties to pay the amount of deposit fixed by the Arbitral Tribunal. It was further held that the termination of arbitral proceedings is different from termination of the mandate of Arbitrator and that the mandate of arbitrator, depending upon the facts and circumstances of a case, may come to an end but not the arbitral proceedings and illustration was given in the said decision, where parties to the arbitration agreement had fixed a time limit of six months for completion of arbitral proceedings and making of an award and upon failure to adhere to the time limit, the mandate of

Arbitral Tribunal shall come to an end but not the arbitration proceedings and in such an eventuality, if a substitute Arbitrator is appointed then he shall have to continue with the arbitration proceedings from the stage the same had been left by the earlier Arbitrator.

14. It was further held that in case arbitration proceedings are terminated within the meaning of Section 32 of the Act resulting in termination of mandate of the Arbitrator, the same cannot continue merely by appointing another arbitrator and in such a scenario, first of all, the arbitration proceedings have to be revived after setting aside the order of Arbitral Tribunal terminating the arbitral proceedings.

15. In the instant case, the sole Arbitrator has not referred to any specific provision under the Act, under which the arbitral proceedings are terminated. From a reading of the award, it appears that the proceedings were terminated for two reasons as the petitioner/claimant did not attend the second hearing nor submitted statement of claim before the date fixed. Both the contingencies, which resulted in the termination of the arbitration proceedings fall within the ambit of Section 25 of the Act. By applying the decision of the Delhi High Court in the case of *Chemical Sales Corporation*

(*supra*), to such a contingency, it has to be held that the arbitral proceedings, was not terminated but only the mandate of the Arbitrator. This is more so on the facts of the case, which are very germane and cannot be ignored. The petitioner made a request for referring 12 claims for arbitration. The request for arbitration was accepted, but all claims were not referred and the terms of reference contained only three claims. On a representation made by the petitioner stating that he would not be able to participate in the arbitration, unless all 12 claims are referred, a reply was sent on 06.03.2012, stating that the remaining 9 claims are "excepted matters" and not arbitrable. This has been resisted by the petitioner by submitting several representations which evoked no response.

16. As pointed out earlier whether a claim is an 'excepted matters' is also an arbitral dispute as the contention raised by the Railway Administration that a particular claim is an 'excepted matters' is in the nature of defence raised to the claim made by the claimant. Thus considering the entire facts and circumstances of the case, this Court is of the view that the arbitral proceedings has not been terminated, but only the mandate of the Arbitrator on account of reasons falling within the scope of Section 25 of the Act. At this

stage, it is beneficial to rely upon the decision of the Hon'ble Chief Justice in *M/s.Unique Builders vs. The Union of India*, in O.P.No.364 of 2011, dated 22.08.2014. In the said case a similar issue arose for consideration and Arbitrators were appointed as agreed upon by the Railway Administration. Accordingly, issue No.3 is decided in favour of the petitioner and it is held that there is no necessity for the petitioner to first set aside the award of the arbitral Tribunal and then seek for appointment of Arbitrator.

17. In result, the Original Petition is allowed and the Railway Administration is directed to appoint a new Arbitrator in accordance with terms stipulated under the General Conditions of contract of the petitioner and within a maximum period of 15 days from the date of receipt of a copy of this order and the Arbitrator so appointed, shall endeavour to conclude the arbitration within a period of six months of its first sitting. The first sitting should be held not later than one month from the date of appointment of the Arbitrator. There shall be no order as to costs.

13.08.2015

pbn

Index :Yes/No

Internet:Yes/No

To

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T.S.SIVAGNANAM, J.
pbn

Pre-Delivery Order in
O.P.No.301 of 2013

13.08.2015