IN THE HIGH COURT OF JUDICATURE AT MADRAS
Reserved on : 03-11-2016
Pronounced on: 24-11-2016
Coram:
The Hon'ble Mr.Justice A.SELVAM
and
The Hon'ble Mr. Justice P.KALAIYARASAN

O.S.A.No.254 of 2009

M/s. Texmaco Infrastructure & Holdings Limited
Birla Building
9/1, R.N. Mukerjee Road
Kolkata 700 001 .. Appellant

(Name of the sole appellant amended vide order of Court dated 24-03-2014 made in M.P.No.1 of 2014 in O.S.A.No.254 of 2009)

Vs.

1. Union of India
Ministry of Railways by the Director
Railway Stores (W)
Railway Board, Rail Bhavan
Raisina Road
New Delhi - 110 001

2. Mr. M.V. Ramani
(Sole Arbitrator)
II Floor, "Ramaneeyam"
New No.10 (Old No.21)
Chari Street
T.Nagar
Chennai 600 017 .. Respondents

Original Side Appeal preferred under Order XXXVI Rule 1 of Original Side Rules against the order of this Court dated 26-03-2009 made in O.P.No.199 of 2005.

For Appellant : Mr. M.S. Krishnan, Senior Counsel for M/s. Surana & Surana

For Respondents : Mr. G. Rajagopalan, Addl.Solicitor General assisted by Mr.M.T. Arunan, ACGSC for R1
R2- Arbitrator

JUDGMENT

(JUDGMENT OF THE COURT WAS DELIVERED BY A.SELVAM, J.)

This Original Side Appeal is directed against the order dated 26-03-2009 passed in O.P.No.199 of 2005 by the learned Single Judge of this Court.

2. The first respondent herein as petitioner has filed O.P.No.199 of 2005 under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the award dated 14-04-2004, passed by the second respondent/Arbitrator in Arbitration Case Nos.99/RS(1)/954/25/1342 dated 16-07-1999 and 98/R(1)/954/12/1295 dated 10-03-1998 wherein the present appellant has been arrayed as first respondent.

3. The material averments made in the petition are that the petitioner has issued a tender on 23-07-1997 for manufacture and supply of wagons of different specifications. The first respondent has submitted its quotation and the same has been accepted by the petitioner and placed orders to manufacture and supply of various quantities and types of wagons as per the following description and specification:

(1) BG BOGIE OPEN WAGON TYPE 'BOXN' at the rate of Rs.4,96, 313/- each	481 Nos.
(2) BG BOGIE COVERED WAGON TYPE 'BCNA' at the rate of Rs.5,34,590/- each	698 Nos.
(3) BOGIE 'POL TANK' WAGON TYPE 'BTPN' at the rate of Rs.5,82,521/-	150 Nos.

It is further averred in the petition that the first respondent has failed to adhere the terms and conditions of the tender. The delivery of wagons has to be commenced from 01-04-1998 and the same should be completed on or before 31-03-1999. The interest free advance has also been received by the first respondent. The first respondent from April 1998 to September 1998 has cleared only 422 'BOXN' and 349 'BCNA'. But the first respondent has claimed as if the Wheel sets are not available to make delivery of 101 BCNA wagons. The contention put forth on the side of the first respondent is not true. Since the first respondent has failed to deliver the wagons as agreed, the petitioner opted to deduct the quantity to be supplied by the first respondent. The petitioner has exercised the said option only due to non-performance of the obligation on the part of the first respondent. The first respondent has referred the dispute by way of arbitration. The second respondent/Arbitrator without considering the terms and conditions of the tender has erroneously passed the impugned award. Under the said circumstances for setting aside the same, the present petition has been filed.

4. The learned Single Judge after considering the rival contentions put forth on either side has allowed O.P.No.199 of 2005, and thereby, setaside the award passed by the second respondent/Arbitrator. Against the order passed by the learned Single Judge, the present Original Side Appeal has been preferred at the instance of the first respondent, as appellant.

5. Before contemplating the rival submissions made on either side it would be useful to refer the following admitted facts:

It is an admitted fact that the first respondent/petitioner has issued a tender on 23-07-1997, for manufacture and supply of wagons of different specifications and the same has been accepted by the appellant/first respondent. It is also equally an admitted fact that the appellant/first respondent has not supplied the entire quantity of wagons in consonance with the terms and conditions of the tender, in question. The appellant/first respondent has referred the dispute to the second respondent/Arbitrator and the Arbitrator has passed an executable award and thereby, directed the first respondent to give the amounts mentioned therein to the appellant/first respondent.

6. The learned Single Judge in Paragraph No.23 of the order has observed as follows:

> "23. From the above, it is very clear that the Option Clause was invoked by the petitioner Railways and the same was also put on notice to the first respondent. Thereafter, at the request of the first respondent, the petitioner Railways decided for restoration with certain conditions and made it very clear that unless those conditions were accepted unconditionally by the first respondent they would stick on to their invocation of the Option clause. Having received the restoration offer with the reduction in price of the wagons, the first respondent accepted the same unconditionally and having accepted the restoration of the reduction unconditionally and having received the payment, it is not open to the first respondent to raise a dispute to contend that the invocation of the Option clause is not proper and they are entitled to the difference in prices of the wagons."

7. From a close reading of the observation made by the learned Single Judge, it is made clear that the appellant/first respondent has accepted restoration of offer with reduction in price of the wagons. Under the said circumstances, the appellant/ first respondent is not entitled to refer the matter to an arbitration. In a nutshell, the learned Single Judge has observed that the dispute between the parties has been referred to arbitration unnecessarily and that too, against the terms and conditions of the contract.

8. The learned Senior Counsel appearing for the appellant/first respondent has vehemently contended to the effect that even though in the contract, Quantity Option Clause is available and subsequently, various communications have become emerged between the parties. Under the said circumstances, the second respondent/ Arbitrator after considering the subsequent communications made between the parties has rightly passed the award, in question and the learned Single Judge without considering the subsequent communications emerged between the parties has erroneously set aside the award by way of passing the impugned order and therefore, the same is liable to be set aside.

9. In fact, the learned Senior Counsel appearing for the appellant/first respondent has accentuated the Court to look into various communications and this Court has perused all those communications and those things are not helpful to the appellant/first respondent.

10. On the side of the appellant/first respondent, the following decisions are relied upon:

(1) 2004 (2) SCC 663 (Chairman and Md. NTPC Ltd.,Vs. Reshmi Constructions, Builders & Contractors) wherein at Paragraph Nos.27 to 29, the Honourable Supreme Court has observed as follows:

> "Even when rights and obligations of the parties are worked out the contract does not come to an end inter alia for the purpose of determination of the disputes arising thereunder, and, thus, the arbitration agreement can be invoked. Although it may not be strictly in place but we cannot shut our eyes to the ground reality that in the cases where a contractor has made huge investment, he cannot afford not to take from the employer the amount under the bills, for various reasons which may include discharge of his liability towards the banks, financial institutions and other persons. In such a situation, the public sector undertakings would have an upper hand. They would not ordinarily release the money unless a 'No Demand Certificate' is signed. Each case, therefore, is

required to be considered on its own facts.

Further, necessitas non habet legem is an old age maxim which means necessity knows no law. A person may sometimes have to succumb to the pressure of other party to the bargain who is on a stronger position.

We may, however, hasten to add that such a case has to be made out and proved before the Arbitrator for obtaining an award."

(2) In 2006 (1) SCC 181 (Mc Dermott International Inc. Vs. Burn Standard Co. Ltd.,) in Paragraph Nos.112 and 113, the Honourable Supreme Court has observed as follows:

"It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement, is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot, be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See Pure Helium India (P) Ltd. v. Oil & Natural Gas Commission, (2003) 8 SCC 593 and D.D. Sharma v. Union of India (2004) 5 SCC 325].

Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award."

(3) In 2011 (2) SCC 400 (R.L. Kalathia and Company Vs. State of Gujarat) wherein at Paragraph Nos. 12 and 13, the Honourable Supreme Court has observed as follows:

"8) In National Insurance Company Limited vs. Boghara Polyfab Private Ltd., (2009) 1 SCC 267, the question involved was whether a dispute raised by an insured, after giving a full and final discharge voucher to the insurer, can be referred to arbitration. The following conclusion in para 26 is relevant:-

"26. When we refer to a discharge of contract by an agreement signed by both the parties or by execution of a full and final discharge voucher/receipt by one of the parties, we refer to an agreement or discharge voucher which is validly and voluntarily executed. If the party which has executed the discharge agreement or discharge voucher, alleges that the execution of such discharge agreement or voucher was on account of fraud/coercion/undue influence practised by the other party and is able to establish the same, then obviously the discharge of the contract by such agreement/voucher is rendered void and cannot be acted upon. Consequently, any dispute raised by such party would be arbitrable."

9) From the above conclusions of this Court, the following principles emerge:

(i) Merely because the contractor has issued "No Due Certificate", if there is acceptable claim, the court cannot reject the same on the ground of issuance of "No Due Certificate".

(ii) Inasmuch as it is common that unless a discharge certificate is given in advance by the contractor, payment of bills are generally delayed, hence such a clause in the contract would not be an absolute bar to a contractor raising claims which are genuine at a later date even after submission of such "No-claim Certificate".

(iii) Even after execution of full and final discharge voucher/receipt by one of the parties, if the said party able to establish that he is entitled to further amount for which he is having adequate materials, is not barred from claiming such amount merely because of acceptance of the final bill by mentioning "without prejudice" or by issuing `No Due Certificate'."

(4) In 2015 (5) SCC 698 (Navodaya Mass Entertainment Limited Vs. J.M. Combines) wherein at paragraph No.8, the Honourable Supreme Court has observed as follows:

"6. In our opinion, the scope of interference of the Court is very limited. Court would not be justified in reappraising the material on record and substituting its own view in place of the Arbitrator's view. Where there is an error apparent on the face of the record or the Arbitrator has not followed the statutory legal position, then and then only it would be justified in interfering with the award published by the Arbitrator. Once the Arbitrator has applied his mind to the matter before him, the Court cannot reappraise the matter as if it were an appeal and even if two views are possible, the view taken by the Arbitrator would prevail. (See: Bharat Coking Coal Ltd. Vs. L.K. Ahuja, (2004) 5 SCC 109; Ravindra & Associates Vs. Union of India, (2010) 1 SCC 80; Madnani Construction Corporation Private Limited Vs. Union of Page 7 7 India & Ors., (2010) 1 SCC 549; Associated Construction Vs. Pawanhans Helicopters Limited, (2008) 16 SCC 128; and

Satna Stone & Lime Company Ltd. Vs. Union of India & Anr., (2008) 14 SCC 785.)”

(5) In 2015 (3) SCC 49 (Associate Builders Vs. Delhi Development Authority) wherein in Paragraph Nos.29, 33 and 34, the Honourable Supreme Court has observed as follows:

“29. It is clear that the juristic principle of a “judicial approach” demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

....

33. It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd., (2012 (1) SCC 594 =

2012 (1) SCC (Civ) 342) , this Court held:

“21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.”

It is with this very important caveat that the two fundamental principles which form part of the fundamental policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood."

11. The learned Senior Counsel appearing for the appellant/first respondent has also relied upon Section 28(3) of the Arbitration and Conciliation Act, 1996 and the same reads as follows:

"In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

12. The sum and substance of the argument put forth on the side of the appellant/first respondent is that even though in the contract, Quantity Option Clause is available, as per trade usage, in a particular transaction, the appellant/first respondent is entitled to get the amount mentioned in the award.

13. In order to rebut the contentions put forth on the side of the appellant/first respondent, the learned Additional Solicitor General appearing for the first respondent/petitioner has meticulously drawn the attention of the Court to a specific condition of the contract. In Clause No.18 of the Contract, it is stated like thus:

"18.0 QUANTITY OPTION CLAUSE:

The purchaser reserves the right to increase or decrease the ordered quantity upto 30% of the ordered quantity during the currency of the contract on the same price and terms and conditions with suitable extension in delivery period."

14. A bare reading of that Clause would clearly go to show that the purchaser is having unfettered right of increasing or decreasing the quantity upto 30% or ordered quantity, during subsistance of contract. In the instant case as pointed out earlier, the appellant/first respondent has failed to adhere the terms and conditions of the contract and also failed to supply agreed quantity of wagons within the stipulated period. Under the said circumstances, the first respondent/petitioner has opted to invoke the clause mentioned supra. After invoking the said clause by the first respondent/petitioner, the dispute between the parties has been referred to the second respondent/Arbitrator. The Arbitrator without considering the Clause mentioned supra and also unfettered right of the first respondent/petitioner has erroneously passed the award, in question.

15. The only point that comes up for consideration in the present lis is as to whether an Arbitrator is entitled to pass an executable award beyond the terms and conditions of the contract, in question.

16. On the side of the first respondent/petitioner, the decisions reported in 2003 (5) SCC 705 (Oil & Natural Gas Corporation Ltd.,Vs. Saw Pipes Ltd.,) is relied upon wherein the Honourable Supreme Court has observed that an award contrary to substantive provisions of law or the provisions of Arbitration and Conciliation Act or against the terms and conditions of contract is patently illegal.

17. In the instant case, it has already been pointed out that only by virtue of the Option Clause mentioned supra, the first respondent/petitioner has exercised its option and proper communications have also been sent to the appellant/first respondent. Therefore, the action of the first respondent/petitioner is well within the contour of the terms and conditions of the contract.

18. The second respondent/Arbitrator without considering the Option Clause and also without considering the Option exercised by the first respondent/petitioner has erroneously passed the award, in question and therefore, it is easily discernible that the award passed by the second respondent/Arbitrator is totally against the terms and conditions of the contract and the same is nothing but illegal. Since the award passed by the second respondent/Arbitrator is nothing but illegal as per Sections 34 of the Arbitration and Conciliation Act, 1996, the same is liable to be set aside.

19. The learned Single Judge, as mentioned earlier, has rightly come to the conclusion that the award, in question, has been passed against the terms and conditions of the contract. In view of the foregoing enunciation of both the factual and legal aspects, this Court has not found any material defects nor illegality in the order passed by the learned Single Judge and therefore, the present Original Side Appeal deserves to be dismissed.

In fine, this Original Side Appeal is dismissed with costs. The order passed in O.P.No.199 of 2005 dated 24-03-2009 by the learned Single Judge of this Court is confirmed.

-s/d-
Assistant Registrar

True Copy
Sub-Assistant Registrar

To

1.The Sub Assistant Registrar
Original Side High Court Madras

+1 cc to M/s.Surana & Surana Advocate sr 68728
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