

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 05.07.2016

CORAM:

THE HONOURABLE MR.JUSTICE A.SELVAM
and
THE HONOURABLE MR.JUSTICE P.KALAIYARASAN

O.S.A.No.349 of 2008

1. Sonia Exports
rep. by its Proprietor
Mr.K.K.Abdul Nazar,
Pearl Garden,
Chandriyur P.O,
Alleppey, Kerala State.
2. K.K.Abdul Nazer
M/s. Sonia Exports
Pearl Garden,
Chandriyur P.O.
Alleppy, Kerala State ... Appellants

Vs.

1. ITC Limited
International Business Division,
No.31, Sarojini Devi Road,
Secunderabad - 500 003
Rep. by its Regional Manager,
Mr.D.Baskara Reddy,
No.3-D, Century Plaza,
No.560-562, Mount Road,
Chennai - 600 002.

2. Mr.N.Mohandoss
Arbitrator
No.64, Armenian Street,
Catholic Centre,
Rear Block
Chennai - 600 001. ..Respondents

Original Side Appeal under Clause 15 of the Letters Patent read with Order XXXVI Rule 1 of Original Side Rules against the Order, dated 28.08.2007 made in O.P.No.750 of 2003.

For appellants : Mr.Kalyan
for M/s. Surana & Surana

For respondents : Mr. V.Haribabu for R1
R2 - Arbitrator

J U D G M E N T

(Judgment of the Court was delivered by
P.KALAIYARASAN, J)

This Original Side Appeal has arisen from the common order, dated 28.08.2007 made in O.P.No.638 and 750 of 2003, filing for setting aside the Award of the Arbitrator / second respondent, dated 16.05.2003 made in C.P.No.1 of 1999.

2. The learned single Judge dismissed the Original Petition, confirming the Award passed by the Arbitrator. Aggrieved against that order, the petitioners have preferred this appeal.

3. The brief facts are narrated hereunder :

(i) The first appellant and the first respondent / claimant entered into an agreement, dated 30.04.1993 at Madras, agreeing that the claimant will purchase the marine food products from the appellants on the terms mentioned therein. On the expiry of the said agreement, dated 30.04.1993, they renewed the agreement, which was effective till 20.04.1996. On reconciliation of accounts, the claimants found that the respondents owe them dues as on 31.03.1995 and issued notice, dated 09.04.1998. Subsequent to the legal notice, the claimant confirmed from the stock statement of the appellant, dated 06.05.1995 that the appellant held with them stocks belonging to the claimant worth Rs.58,28,794.30/-. The appellant is also liable to pay Rs.5,51,821.59/- towards loss transaction, as per the agreement.

(ii) According to the appellants, there was no final settlement of accounts and abruptly, the claimant / first respondent failed to take delivery of the finished goods, which were kept in cold storage. The goods were subject to deterioration and because of the failure of the claimant to take delivery of the same, the appellant had no option, but to destroy the same as they became unmarketable. The entire stock was not fully paid by the claimant and there were certain invoices, for which payments were yet to be made. The appellant submitted a counter claim. The claimant had moved this Court in O.P.No.451 of 1998 for appointment of Arbitrator, to refer the dispute. This Court passed an order, dated 10.11.1998 appointing an Arbitrator to decide the disputes between the parties.

(iii) The appellant filed O.P.No.251 of 2001 before this Court, to terminate the mandate, alleging that the arbitrator was not acting in a fair manner, during the pendency of arbitral proceeding. The said Original Petition was disposed of. The Arbitrator continued with the hearing and passed an Award on 16.05.2003.

3. The learned counsel appearing for the appellant repletely argued that the proceedings was not conducted in a fair manner; that arbitrator has misconducted himself by shutting out the appellant from being heard; that the appellant was not given opportunity to cross-examine the claimant's witness. He further contends that much indulgence was shown to the claimant by the Arbitrator, whereas the requests of the appellant were turned down without any consideration. It is also contended that the Arbitrator acted in bias. The Arbitrator had not given opportunity to the appellant to let in evidence to prove its counter claim or to advance defence arguments. According to the learned counsel for the appellant, the learned single Judge, without giving any weightage to the above aspects, passed the impugned order.

4. The learned counsel for the first respondent contends that the learned single Judge, after carefully analysing the entire proceedings of the Arbitrator, decided that proceedings was conducted in a fair manner and upheld the Award.

5. Before going into the merits of the claim made by both the parties, it is useful to refer Section 34 of the Arbitration and Conciliation Act, 1996, which is a provision relating to "Recourse against Arbitral Award " :

" 34. Application for setting aside arbitral award.-- (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section(3).

(2) An arbitral award may be set aside by the Court only if--

(a) the party making the application furnishes proof that--

(i) a party was under some incapacity; or
(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings

or was otherwise unable to present his case;

or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that--

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

....."

6. The Courts jurisdiction to decide the Award is circumscribed by the provisions of Section 34 of the Act. The scope and interference by Courts under Section 34 have been explained by the Hon'ble Supreme Court in various decisions.

7. In (2006) 11 SCC 181 (McDermott International Inc. vs. Burn Standard Co. Ltd., and others), the Hon'ble Supreme Court has held as follows :

"52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."

8. In (2015) 3 SCC 49 (Associate Builders vs. Delhi Development Authority), it has been held by the Supreme Court as follows :

"It must be remembered that under the Explanation to Section 34(2)(b), an award is said to be in conflict with the public policy of India, if the making of the award was induced or affected by fraud or corruption."

9. Therefore, the supervisory role of the Court is at minimum level. The Court should not reappraise the evidence as an appellate Court and the court can interfere only under certain specified circumstances.

10. It is not the case of the appellant that he was not given notice for his first appearance. His contention is that after presenting the claim, he was not informed by the Arbitrator; but perusal of the dates and proceedings discloses that after filing of the claim statement on 04.08.1999, notice was sent with the copies of claim statement to the appellant by RPAD and after several hearings, the appellant appeared through counsel and took a month's time for filing vakalath. But the counsel for the appellant reported no instructions on 15.12.1999, after two adjournments and the Arbitrator set the appellant exparte. The petition filed by the appellant to set aside the exparte order was also allowed on terms by the Arbitrator. Thus, the appellant was set exparte, as his counsel reported no instructions and even that exparte order was subsequently set aside at the instance of the appellant.

11. The following factual aspects will also fortify how the proceedings was prolonged at the instance of the appellant :

"(a) When the counsel for claimant represented on 27.02.2001 that he was ready to argue the matter with the available pleadings and materials, informing that filing of proof affidavit is not necessary, the appellant took adjournment.

(b) When the matter was posted on 06.08.2001 before the Arbitrator, the appellant's counsel filed a petition under Section 12 (3) (a) of the Arbitration and Conciliation Act, 1996, seeking the Arbitrator to withdraw from the office. The claimant opposed the application and the Arbitrator, after examining the application, with reference to relevant provisions, dismissed the same and after dismissal, the matter was adjourned to 13.08.2001. On that date, in the presence of

the appellant's counsel, on the side of the claimant, one witness was examined in chief and documents C1 to C20 were marked. The counsel for the appellant had not raised objection for marking of any of the documents and the matter was adjourned to 08.09.2001. On that day, a memo was filed by the appellant saying that High Court had granted an order of stay.

(c) The claimant, who failed in his attempt before the Arbitrator by filing petition under Section 12 (3) (a) of the Act, approached the High Court, by filing O.P.No.251 of 2001 to terminate the mandate. Thus, from 08.09.2001 to 28.03.2003, till the counsel for the claimant filed memo stating that the stay obtained had expired and it has not been extended for more than a period of 14 months and requested to continue the proceedings. Thus, under the guise of stay and even after the expiry of the stay, the appellant took time for about 18 months. Thus from very inception till disposal, the appellant prolonged the proceedings. Cursory perusal of the date and proceedings depicts that the arbitrator had not showed any partiality in granting adjournment or even in conducting the arbitration proceedings.

12. The contention of the learned counsel for the appellant that the appellant was not given opportunity to cross-examine P.W.1 and also to advance argument is also not correct. The date and proceedings shows that in spite of the opportunity given to the appellant, he had not availed the opportunity. For sake of raising a ground, he now focusses, as if opportunity was not given to him.

13. The argument with respect to payment of fee to the Arbitrator is also not acceptable, as the entire factum of fee is specifically incorporated in the Award and there is no arbitrariness in fixing the same.

14. The learned single Judge has elaborately discussed by putting the dates and proceedings of the arbitral proceedings in tabulation form from inception to the end, i.e., from 08.02.1999 to 16.05.2003 and concluded that the learned Arbitrator, after giving fullest opportunity to both sides, with much patience decided the dispute between the parties.

15. The learned Arbitrator dealt with question of limitation, claim made by the claimant and the counter claim made by the appellant and he answered the issues, after analysing the available evidence on record.

16. As already pointed out, this Court cannot sit in appeal over the decision of the Arbitrator, except under certain circumstances. The learned single Judge has rightly held that the decision of the learned Arbitrator on merits cannot be assailed.

17. For the aforesaid reasons, this Court is of the considered view that there is no merit in the appeal and the decision of the learned single Judge does not require any interference and therefore, the present Original Side Appeal is liable to be dismissed.

18. In fine, this Original Side Appeal is dismissed with costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

tsvn

1. The Sub Assistant Registrar
Original Side,
High Court, Madras.

2. Mr.N.Mohandoss
Arbitrator
No.64, Armenian Street,
Catholic Centre,
Rear Block
Chennai - 600 001.

1 cc to Mr.Surana & Surana, Advocate, sr.37704
1 cc to Mr.K.Madhavan, Advocate, sr.37944

O.S.A.No.349 of 2008

pur co
kra 09.08.2016