

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.07.2016

CORAM

THE HONOURABLE MR.JUSTICE A.SELVAM

and

THE HONOURABLE MR.JUSTICE P.KALAIYARASAN

Original Side Appeal Nos.179 to 181 of 2009

Tamil Nadu Water Supply and

Drainage Board(TWAD),

rep.by its Managing Director,

TWAD House, Kamaraj Salai,

Chepauk, Chennai-5

...Appellant in all the OSAs./Petitioner

Vs.

The Pioneer Engineering Syndicate,

Engineers and Contractors,

6th Floor, Pioneer House,

Samajiguda, Hyderabad

..Respondent in all the OSAs./Respondent

Prayer:- Original Side Appeals preferred under Order 36 Rule 1 of the Original Side Rules, read with Clause 15 of the Letters Patent against the order dated 16.6.2008 in O.P.Nos.77, 78 and 79 of 1999, passed by the learned single Judge.

For Appellant : Mr.P.H.Arvind Pandian,A.A.G.
for Ms.S.Tamizharasi

For Respondent :Mr.K.Surendranath

COMMON JUDGMENT

(Judgment of the Court was delivered by A.SELVAM,J.)

These Original Side Appeals are directed against the common order, dated 16.6.2008, passed in O.P.Nos.77 to 79 of 1999, by the learned Single Judge of this Court.

2. The appellant herein, as petitioner, has filed O.P.Nos.77 to 79 of 1999, under Section 31 of the Arbitration and Conciliation Act, 1940, praying to set aside the common award, dated 28.10.1997, passed by the Arbitrator.

3. It is averred in all the Original Petitions that the Government of Tamil Nadu have decided to execute water supply project to three cities, namely, Coimbatore, Madurai and Salem. The appellant/petitioner has given necessary contract to the respondent to execute all the works and the contract has been signed by both parties, on 02.06.1988. During the course of execution of works, disputes have arisen. Under the said circumstances, an Arbitrator has been appointed to solve the disputes and accordingly, the Arbitrator has passed the common award in question and in order to set aside the same, the Original Petitions have been filed.

4. The learned Single Judge, after considering the rival contentions put forth on either side, has dismissed all the Original Petitions by way of passing a common order and the same has been challenged in these Original Side Appeals.

5. The short point that involves in these Original Side Appeals is as to whether the Arbitrator has had no jurisdiction to pass the awards in question.

6. The entire contention put forth on the side of the appellant/petitioner is based upon Arbitration Clause available in the contract and the same reads as follows:

"All disputes or differences either during the progress or after completion or after termination of breach of contract in respect of which the decision has not been final and conclusive, shall be referred to arbitration.

The Arbitrator, for fulfilling the duties set forth in the Arbitration Clause of the preliminary specifications to the TNDSS shall be as follows:

For claims upto Rs.50,000/- - Chief Engineer,

T

WAD Board other

t

han Chief Engineer,

TWAD Board, World

Bank Project,

Coimbatore,

nominated by the
Board.

For claims above Rs.50,000/- - Civil Court
having
jurisdiction.

Any litigation arising out of contract shall
be settled only in the jurisdiction of the
authority who have concluded the agreement. "

7. The learned Additional Advocate General has contended to the effect that the award in question has exceeded pecuniary limit of Rs.50,000/- and as per Clause 51 of the Contract in question, the Arbitrator has had no jurisdiction to decide the disputes and inspite of jurisdictional embargo, the Arbitrator has passed the common award in question and the same is nothing but void. Under the said circumstances, Original Petition Nos.77 to 79 of 1999 have been filed, but the learned Single Judge, without considering the jurisdictional error committed by the Arbitrator, has erroneously dismissed all the Original Petitions by way of passing a common order and therefore, the same is liable to be set aside and consequently, the award in question is also liable to be set aside.

8. The learned counsel appearing for the respondent has sparingly contended that before referring the disputes to the Arbitrator, a proceeding has been instituted before this Court, wherein, as per consent of both parties, the disputes in question have been referred to the Arbitrator and the Arbitrator, on the basis of order of this Court, has conducted arbitration proceedings, which culminated in passing of the arbitration award and even the point of jurisdiction has not been raised at the time of arbitration proceedings, but the same has been raised only at the time of argument. The Arbitrator has given proper answer and the same has been rightly considered by the learned Single Judge and therefore, the contention put forth on the side of the appellant/petitioner is sans merit and altogether these Original Side Appeals are liable to be dismissed.

9. The learned Additional Advocate General has relied upon the following decisions:

(i) In (1996) 3 Supreme Court Cases 568 - Union of India vs. G.S.Atwal & Co. (Asansole), the Hon'ble Supreme Court in paragraph Nos.6 and 7 has observed as follows:-

"6. To constitute an arbitration agreement, there must be an agreement that is to say the parties must be ad idem. Arbitrability of a claim depends upon the dispute between the parties and the reference to the arbitrator. On appointment, he enters upon that dispute for adjudication. The finding of the arbitrator on the arbitrability of the claim is not conclusive, as under Section 33 ultimately it is the court that decides the controversy. In U.P. Rajkiya Nirman Nigam Ltd. v. Indure Pvt.Ltd. & Ors. decided on February 9, 1996, a three-Judge Bench of this Court [to which one of us, K. Ramaswamy, J., was a member was to consider the question whether the arbitrator had jurisdiction to decide the arbitrability of the claim itself. In that context, the question arose: whether there was an arbitration agreement for reference to the arbitrator? It was held that the arbitrability of the controversy of the claim being a jurisdictional issue, the arbitrator cannot cloth himself with jurisdiction to conclusively decide, whether or not he had power to decide his own jurisdiction. Relying upon the passage in "Russel on Arbitration" [19th Edn.] at page 99, this Court had held that it can hardly be within the arbitrator's jurisdiction to decide whether or not a condition precedent to his jurisdiction has been fulfilled. The arbitrator had no power cide his own jurisdiction. The arbitrator is always entitled to inquire whether or not he has jurisdiction to decide the dispute. He can refuse to deal with the matter at all and leave the parties to go to the court if he comes to the conclusion that he has no power to deal with the matter; or he can consider the matter and if he forms the view that the contract upon which the claimant is relying on and from which, if established,

he alone has jurisdiction, he can proceed to decide the dispute accordingly. Whether or not the arbitrator has jurisdiction and whether the matter is referred to or is within the ambit of clause for reference of any difference or dispute which may arise between the parties, it is for the Court to decide it. The arbitrator by a wrong decision cannot enlarge the scope of the submission. It is for the court to decide finally the arbitrability of the claim in dispute or any clause or a matter or a thing contained therein or the construction thereof. It was, therefore, held that: (SCC p.674, para 14)

"... arbitrators cannot cloth themselves with jurisdiction to decide conclusively the arbitrability of the dispute." It is for the court under Section 33 or on appeal thereon to decide it finally".

There is no estoppel to challenge the action and to seek a declaration under Section 33. It was further held that: (SCC p.675, para 15)

"mere acceptance or acquiescence to the jurisdiction of the arbitrator for adjudication of the dispute as to the extent of the arbitration agreement or arbitrability of the dispute does not disentitle the appellant to have the remedy under Section 33 through the court."

The remedy under Section 33 is "the only right way for deciding the controversy." (SCC p.675, para 15)

7. In Law of Arbitration by Justice Bachawat [2nd (1987) Ed.] at page 90 it is stated that jurisdiction of the arbitrator is solely derived from the arbitration agreement. The arbitrator has jurisdiction to deal only with matters which on a fair construction of the terms of the contract, the parties agreed to refer to him. Whether or not the arbitrator acts within the jurisdiction depends solely upon the clause of

reference. The court may grant a declaration that the party appointed by the defendants as the arbitrator has no jurisdiction. The submission furnishes the source and prescribes the limit of the arbitrator's authority. The arbitrator take upon himself an authority which the submission does not confer on him. The award must in substance and form conform to the submission, It must comply in point of form to the directions contained in the submission. If the award determines any matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matters preferred, the award is invalid. It may be remitted to the arbitrator for reconsideration under Section 16 and if the arbitrator acts in excess of authority, the award should be set aside".

(ii) In 1999(8) Supreme Court Cases 122 - Steel Authority of India Ltd., vs. J.C.Budharaja, Government and Mining Contractor, the Hon'ble Supreme Court has held that the Arbitrator cannot exceed jurisdiction or go beyond the terms of agreement.

(iii) In (1996) 3 Supreme Court Cases 568 - Union of India vs. G.S.Atwal & Co.(Asansole), the Hon'ble Supreme Court has held that the Arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract.

(iv) In (1982) 2 Supreme Court Cases 38 - M/s.Sudhrsan Trading Co., vs. Government of Kerala and another, the Hon'ble Supreme Court has held that excess of jurisdiction of Arbitrator amounts to misconduct.

10. In order to dispel the contentions put forth on the side of the appellant/petitioner, the learned counsel appearing for the respondent has drawn the attention of this Court to the decision reported in (2010) 6 MLJ 124 - Tamil Nadu Water Supply and Drainage Board, rep.by its Managing Director, Chennai-5 vs. N.Abdul Kareem and Others, wherein a Division Bench of this Court has dealt with a similar question of law. In the said decision, the present appellant has been shown as appellant. The

Division Bench of this Court has held, in paragraph No.22, as follows:

" 22. Normally, any order, decision or decree or award made or passed without jurisdiction is a nullity. But under the new Act, Section 16 provides competence of Arbitral Tribunal to rule on its jurisdiction, and it also provides for the time to object. Admittedly, the question of jurisdiction was not an issue before the Arbitrators. Nevertheless, it was raised before the single Judge and also in these appeals."

Further, in paragraph No.25 it is held that in view of the aforesaid decision and language of Section 16 of the Act, we do not see any merit in the contention of the appellants.

11. From a cumulative reading of the decisions referred to supra, it is made clear that as per Arbitration Act 1940, the Arbitrator is bound to perform his work within the frame of a contract and further he should not exceed his jurisdiction. If he exceeds his jurisdiction, the same would amount to misconduct. Likewise, as per Arbitration and Conciliation Act (26 of 1996), on the basis of Section 16, the Arbitrator can act beyond the scope of contract.

12. It is a settled principle of law that each case has to be decided on its own factual situation.

13. In the instant case, it is an admitted fact that the Arbitrator has been appointed with the consent of both parties by the order of this Court. After giving consent, the appellant/petitioner has raised the present legal point.

14. For better adjudication, the Court has to look into the award passed by the Arbitrator. In paragraph No.33 of the award it is stated like thus:

"This contention was rejected on the ground that the appellant is claiming adjudication under Sec.33 of the Act, which the Court alone has jurisdiction with power to decide whether any valid agreement is existing between the parties. In this context, it was observed that mere

acceptance or acquiesce to the jurisdiction of the arbitrators for adjudication of the disputes as to the existence of the Arbitration Act or arbitrability of the dispute does not dis-entitle the Appellant to have the remedy u/s.33 through the Court. I am unable to see how the said principle applies to the facts of the present case. In that case, there was no concluded contract between the parties and the very existence of the agreement was in dispute. Since the said controversy can be decided only by a Court u/s.33 of the Act, the Supreme Court held that mere submitting to jurisdiction of the Arbitrator will not disentitle them to raise the said question before the Court. Here in the present case, the respondents having agreed for the appointment of the Arbitrator and submitted to the jurisdiction of the Arbitrator, cannot be permitted to say that the Arbitrator has no jurisdiction. Whether they can raise the question before the Court or not is a different question about which we are not concerned now. As far as the proceedings before the Arbitrator are concerned, they are bound by the principles of acquiescence. No other direct authority in support of the contention of the respondents has been cited before me."

15. A mere perusal of the observation made in the Arbitration award, it is made clear that the present appellant/petitioner has agreed for appointment of Arbitrator and submitted to the jurisdiction of Arbitrator. Since the appellant/petitioner has submitted to the jurisdiction of an Arbitrator, it is totally precluded, subsequently, from raising jurisdiction of the Arbitrator, by the principle of acquiescence.

16. Even at the risk of repetition, the Court would like to point out that the Arbitrator in question has been appointed only after getting consent of both parties by this Court and accordingly, the Arbitrator, after giving proper opportunities to both parties, has passed a common award. After giving consent for appointment of Arbitrator and also submission to jurisdiction of Arbitrator, it is needless to say that the appellant/petitioner is really stopped from raising this legal point subsequently and

further it has become usual practice of the appellant/petitioner to raise jurisdictional points after getting adverse awards. Therefore, viewing from any angle, the legal point raised on the side of the appellant/petitioner is sans merit.

17. The learned Single Judge, after considering the rival contentions put forth on either side and also after considering the observations made by the Arbitrator, has rightly dismissed all the Original Petitions. In view of the foregoing narration of both the factual and legal aspects, this Court has not found any attractive force in the contention put forth on the side of the appellant/petitioner and altogether these Original Side Appeals are liable to be dismissed.

In fine, these Original Side Appeals are dismissed with cost. The common order passed in Original Petition Nos.77 to 79 of 1999, by the learned Single Judge, is confirmed.

msk

Sd/-

Asst.Registrar

/true copy/

Sub Asst. Registrar

To

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

COPY TO:- THE MANAGING DIRECTOR,
TAMIL NADU WATER SUPPLY
AND DRAINAGE BOARD (TWAD)
(TWAD)HOUSE KAMARAJ SALAI,
CHEPAUK, CHENNAI-600 005.

+ 1 cc to M/s.S.Thamizharasi, Advocate Sr 42352

+ 3 ccs to M/s.G.Narasimhulu, Advocate Sr 42185 & 42186,
42187

KR/4/8/16

Original Side Appeal Nos.179 to 181 of 2009