BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 18.10.2016

CORAM

THE HONOURABLE MR.JUSTICE K.KALYANASUNDARAM

C.M.A(MD) No.759 of 2016
and
CMP(MD)Nos.7384 to 7386 of 2016

Tuticorin Coal Terminal Private Limited,
a Private Limited Company incorporated
under the provisions of the Companies Act,
1956 having its registered office at Office
No.3C, 2nd Floor, Amerchand Mansion,
16, Madam Cama Road, Mumbai-400 039. : Appellant/Petitioner

Vs

1.V.O.C.Chidambaranar Port Trust,
a Statutory body constituted under
the provisions of the Major Port Trusts
Act, 1963 and having its office at Tuticorin
628 004 represented by the Chairman
of the Board of Trustees of V.O.Chindambaranar
Port Trust.

2.The Hon'ble Presiding Arbitrator,
Mr.Justice Shivaraj V.Patil,
Former Judge, Supreme Court,
Having his address at "Sparsh"
254, 18th Cross, Sadashivnagar,
Bangalore-560 080. : Respondents/Respondents

Prayer : Civil Miscellaneous Appeal is filed under Sec.37(a) of the Arbitration and Conciliation Act, 1996, against the order, dated 17.06.2016 in I.A.No.150 of 2016 in Ar.O.P.No.99 of 2016 on the file of the Principal District Judge, Tuticorin.

ORDERS RESERVED DT: 02.09.2016
ORDER DELIVERED DT: 18.10.2016

For Appellant : Mr.R.Murari
Senior Counsel
for Mr.K.Govindarajan

For 1st respondent: Mr.Yashood Vardhan
Senior counsel
for Mr.V.R.Shanmuganathan

JUDGMENT

This appeal arises out of the order passed by the Principal District Judge, Tuticorin, in I.A.No.150 of 2016 in Ar.O.P.No.99 of 2016, dated 17.06.2016.

2.The brief facts are that the first respondent herein, a statutory body constituted under the Provisions of the Major Port Trusts Act, 1963 floated a global tender on 23.06.2009 inviting bids for development of North Cargo Berth-II ("NCBII") for handling bulk cargo at the Tuticorin Port, on a Design, Build, Finance, Operate and Transfer ("DBFOT") basis for a period of 30 years. One ALBA Asia Private Limited submitted its request for qualification on 08.01.2010 and request for proposal on 06.08.2010. The first respondent, by its letter of award, dated 12.08.2010 accepted the proposal. The said ALBA incorporated the appellant as a special purpose vehicle to execute the Project. On 11.09.2010, a contract was executed and as per the conditions stipulated therein, the first respondent determined the date of award of the concession to be 1st March 2012 and the date of commencement of commercial operations was 1st March 2014.

3.According to the appellant, it had immediately commenced work on the project and as on 31.08.2015 incurred the capital expenditure of Rs.330 crores and approximately completed 90% of the construction work. While so, the first respondent in violation of the Article 12.2(c) of the Contract, issued tender to mechanization work for Berth No.9. So, it was challenged by the appellant in Ar.O.P.No.115 of 2015 before the District Court, Tuticorin and when the proceedings arising therefrom was pending, Arbitral tribunal was constituted. The 2nd respondent, the Hon'ble Presiding Arbitrator passed an awarded on 30.12.2015. Against the award, the appellant preferred Ar.O.P.No.99 of 2016 before the Principal District Judge, Tuticorin under Section 34 of the Arbitration and Conciliation Act, 1996.

4.Pending appeal, the appellant filed I.A.No.150 of 2016 in the Arbitration Original Petition seeking the following the reliefs:-

> (a)Pass an order restraining Respondent No.1, its trustees, officers, employees, agents and servants be from handling coal through the additional/competing facilities" at Berth No.9;
>
> (b)Without prejudice to the above and in the alternative to prayer (a) pass an order restraining Respondent No.1, its trustees, officers, employees, agents and servants from handling coal through the "additional/competent facilities" more than 2-3 million tons per annum at Berth No.9 during exclusivity period;

(c)Without prejudice to the above and in the alternative to prayer (a) and (b) above, pass an order referring the matter back to the Hon'ble Arbitral Tribunal under Section 34(4) of the Arbitration and Conciliation Act 1996, with a direction that the Hon'ble Arbitral Tribunal should clarity that Respondent No.1 is permitted to handle coal through the additional/competent facilities at Berth No.9 only upto 2-3 million MT per annum.

(d)for ad-interim reliefs in terms of prayers (a) to (c) above;

(e)for costs; and

(f)for such further and other orders and directions as the nature and circumstances of the case may require.

5.The application was resisted by the first respondent, by filing a detailed counter, refuting the allegations made in the petition. The learned Principal District Judge, dismissed the application. Aggrieved over the same, the present appeal is filed.

6.Mr.M.Murari, learned Senior counsel appearing for the appellant would mainly contend that the Hon'ble Arbitral Tribunal has not given any reasons or justifications for fixing the Calendar year 2015 as the benchmark and permitting the first respondent to handle coal through the additional/competing facilities at Berth No.9 to the extent of coal handled during the calendar year 2015 and that the representation of the first respondent was that the coal handled from Berth No.9 only is 2-3 MT per annum and therefore, the matter has to be referred back to the Arbitral Tribunal for further clarification. The learned Senior counsel has relied on the judgment reported in (2009)10 SCC 259 [Som Datt Builders Ltd. vs. State of Kerala] in support of his contention.

7.Per contra, Mr.Yashood Vardhan, learned Senior counsel appearing for the first respondent would submit that the main relief sought for in Ar.O.P.No.99 of 2016 and the interim prayer in the application are one and the same; that the award has given reasons for fixing the coal handled in the year 2015 as being the benchmark and the reasons given by the Arbitral tribunal cannot be faulted and that the application in terms of Section 34(4) is an extraordinary power and it can be exercised only in cases, where the award suffers from grave errors like not containing any reasons or receiving fresh evidence after the conclusion of the proceedings and passing an award thereafter without giving an opportunity to the other side. It is further urged that admittedly, there is no error in the award and therefore, the appeal is to be rejected.

8.Heard the rival submission and perused the records.

9.In the decision relied on by the learned Senior counsel appearing for the appellant in the case of Som Datt Builders Limited Vs. State of Kerala, an award of the arbitral tribunal was challenged under Section 34 of the Arbitration and Conciliation Act before the II District Judge, Ernakulam. The learned Judge, dismissed the application observing that there were sufficient reasons recorded by the Arbitral tribunal. The award was further challenged before the Kerala High Court. The Division Bench of Kerala High court, allowed the appeal in part on the ground that the finding thereon do not have any supporting reasons. In that case, the Hon'ble Supreme, after considering the earlier decisions, set aside the order of the High Court and held as follows:-

> "28.The award under Claim 5 is interrelated to Claim 1. Objections to Claim 6 may also be re-examined by the Additional District Judge now since the petition under Section 34 is being restored to the file of that court. We, accordingly, dispose of these two appeals by the following order:-
>
> (i)The judgment of the High Court, dated 3-6-2005 and the judgment dated 23-2-2005 passed by the II nd Additional District Judge, Ernakulam are set aside.
>
> (ii)The petition (OP Arb.No.71 of 2004) filed by the State of Kerala against the award dated 20-12-2003 is restored to the file of the II nd Additional District Judge, Ernakulam for fresh hearing and consideration of the objections in respect of Claims 1, 4-B, 5 and 6.
>
> (iii)However, the II nd Additional District Judge, Ernakulam shall first remit the award to the Arbitral Tribunal for stating their reasons in support of Claims 1 and 4-B and after receipt of the reasons from the Arbitral Tribunal proceed with the hearing and disposal of objections.
>
> (iv)Parties shall bear their own costs."

10.It would be useful to refer Section 34 of the Arbitration and Conciliation Act, 1996, reads as follows:-

"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. Explanation. -- Without prejudice to the generality of sub-clause (ii) of clause (b), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

11.In the decision relied on by the learned Senior counsel appearing for the first respondent, the award passed by the Arbitral tribunal was challenged under Section 34(4) of the Arbitration and Conciliation Act, before the District Court, Tuticorin. An interlocutory application in I.A.No.206 of 2007 was filed under Section 34(4) of the Act seeking to remit the award back to the Arbitrator so as to eliminate the grounds for setting aside the award. The District Judge, while allowing the IA, remitted back the matter to the Arbitrator for fresh consideration. This court in well considered order, after comparing the relevant provisions of the Arbitration and Conciliation Act and Section 16 of the Arbitration Act, 1947 and Section 34(4) of the Arbitration and Conciliation Act, 1996 has held as follows:-

"27. Therefore, the Civil Revision Petition is allowed to a limited extent, modifying the order of the Principal District Court, Tuticorin, dated 4.2.2008 in I.A.No.206 of 2007 in Arbitration O.P.No.127 of 2006, to the following effect:-

(a) The Arbitration O.P.No.127 of 2006 shall stand adjourned for a period of 3 months with effect from the date of receipt of a copy of this order.

(b) It is now open to the Arbitrator (second respondent) either to resume the proceedings or to take such other action, as in his considered opinion would eliminate the grounds raised for setting aside the award. Since the discretion is entirely left to the second respondent, it is open to him to form an opinion as to whether such an exercise would be undertaken by him at all and if so, the extent to which and the manner in which the exercise would be undertaken by him. In case, the Arbitrator chooses to resume the proceedings, he shall issue notice to both parties, fix a date for hearing and proceed further.

(c) The Arbitrator is requested to communicate his decision, within a period of 3 months to the Principal District Court, Tuticorin as well as to the parties, to enable the Court below to proceed further with Arbitration O.P.No.127 of 2006, if necessary.

(d) It is made clear that the finding recorded both by the District Court and by this Court that there exist grounds for setting aside the award, is only a prima facie finding and not a conclusive finding. Therefore the Arbitrator and the District Court (while resuming the proceedings in the main O.P.) shall consider the matter, uninfluenced by any finding recorded here or in the District Court."

12.The only grievance of the petitioner is that the Hon'ble Arbitral Tribunal has not assigned any reason for fixing the Calendar year 2015 as benchmark and permitting the first respondent to handle the coal at Berth No.9 to the extent of coal handling during the calendar year 2015, on the basis of the representation of the first respondent that the coal handled from Berth No.9 is 2-3 MT per annum. However, the first respondent, by their letter, dated 03.06.2016 provided that the quantity of coal handled in Berth No.9 for the relevant period was 51,02,787 tonnes. Hence, the ambiguity has to be clarified by the Arbitral tribunal.

13.In the light of the dictum of the Apex court and this court, further taking into consideration the grievance of the petitioner, I am not able to accept the contention of the learned Senior counsel appearing for the 1st respondent.

14.Considering the grievance of the appellant and the finding of the Arbitral Tribunal and keeping in mind the decision cited supra, I am of the considered opinion that during the pendency of the Arbitral proceedings, the parties can be permitted to approach the arbitral tribunal for necessary clarification.

15.In the result, this appeal is allowed and the impugned order is set aside. The matter is remitted back to Arbitral Tribunal.

(i)The Arbitral Tribunal may consider the grievance of the appellant and pass necessary orders in terms of Section 34(4) of the Act; and

(ii)The Arbitral Tribunal is requested to complete the exercise within a period of three months from the date of receipt of a copy of this order and communicate their decision to the Principal District Judge, Tuticorin.

No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/
Assistant Registrar(RTI)

/True Copy/

Sub Assistant Registrar.

To
1 The Principal District Judge,Thoothukudi.

2 The Hon'ble Presiding Arbitrator,
Mr.Justice Shivaraj V.Patil,
Former Judge, Supreme Court,
Having his address at “Sparsh”
254, 18^{th} Cross, Sadashivnagar,
Bangalore-560 080.

Copy to:
The Section Officer,
V.R. Section,
Madurai Bench of Madras High court,
Madurai.
+1CC to M/S.K.Govindarajan, Advocate, SR.No. 65155
+1CC to Mr.V.R.Shanmuganathan, Advocate, SR.No.43335

Judgment made in
CMA(MD)No.759 of 2016
18.10.2016

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AM/MPA/22.12.2016/8P/6C