

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.07.2017

CORAM :

The Hon'ble Ms.INDIRA BANERJEE, CHIEF JUSTICE
AND
The Hon'ble MR.JUSTICE M.SUNDAR

O.S.A. No.3 of 2017

and

C.M.P.No.485 of 2017

The Project Director,
Tamil Nadu Road Sector Project,
48, Dr.Muthulakshmi Salai,
Adyar, Chennai 600 020.

... Appellant

-Vs-

1. S.Subbaiah
Managing Partner,
M/s.S.Subbaiah & Company.
2. P.Sridharan
Chief Engineer (H) Retd.
3. K.G.Sukumaran
Chief Engineer (H) Retd.
4. B.Thanupillai
Chief Engineer (H) Retd.

... Respondents

Appeal filed under Order XXXVI Rule 1 of O.S. Rules 1994 read with Clause 15 of the Letters Patent against the order dated 04.03.2016 made in O.P.No.225 of 2014 on the file of original side of this Court.

O.P.No.225 of 2014 : Original Petition filed under Section 37(2) (6) of the Arbitration and Conciliation Act, 1996 praying to set aside the Arbitral Award dated 29.07.2013 passed by the 2nd to 4th Respondents.

For Appellant : Mr.T.Jayaramaraj
Special Government Pleader

For Respondents : Mr.D.Balaraman for R-1

J U D G M E N T

(Judgment of the Court was delivered by The Hon'ble Chief Justice)

This appeal under Section 37 of the Arbitration and Conciliation Act, 1996, hereinafter referred to as 'the 1996 Act', is against an order dated 4th March, 2016 of the learned Single Judge dismissing the application of the appellant under Section 34 of the 1996 Act for setting aside an arbitral award dated 29th July, 2013, rendered by an Arbitral Tribunal comprising three Arbitrators, namely, Thiru.P.Sridharan, Presiding Arbitrator and Thiru.K.G.Sukumaran and Thiru.B.Thanupillai, Arbitrators, collectively referred to as 'the learned Tribunal' hereinafter.

2.It appears that the award was challenged under Section 34 of the 1996 Act on the purported ground that the learned Tribunal had failed to note that the written agreement between the parties alone would be a criteria for deciding the dispute arising therefrom. There could be no dispute with such a proposition. However, it is well settled that an Arbitral Tribunal is fully competent to interpret the written agreement and that is exactly what the learned Tribunal has done.

3.From the judgment and order under appeal, it appears that it was argued that one of the general conditions incorporated in the agreement debarred arbitration in cases of claims exceeding Rs.2 lakhs. It was stated that as per the general conditions of contract, only the Civil Court was to be approached in cases of claims exceeding Rs.2 lakhs and therefore, the learned Tribunal had committed a jurisdictional error by entertaining and deciding the claim.

4.We have, however, perused the arbitration clause, which is extracted hereinbelow, for convenience:

4. ARBITRATION (GCC Clause 25.3)

The procedure for arbitration will be as follows:

- (a) In case of Dispute or difference arising between the Employer and a domestic contractor relating to any matter arising out of or connected with this agreement, such disputes or difference shall be settled in accordance with the Arbitration and Conciliation Act, 1996. The arbitral tribunal shall consist of 3 arbitrators one each to be appointed by the employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall act as Presiding arbitrator. In case of failure of the two

arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the Chairman of the executive committee of The Indian Roads Congress.

- (b) In the case of dispute with a Foreign contractor the dispute shall be settled in accordance with provisions of UNCITRAL Arbitration Rules. The Arbitral Tribunal shall consist of three Arbitrators one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties, and shall act as a presiding arbitrator. In case of failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding arbitrator shall be appointed by the Chairman of the executive Committee of the Indian Roads Congress.
- (c) If one of the parties fails to appoint its arbitrator in pursuance of sub-clause (a) above within 30 days after receipt of the notice of the appointment of its arbitrator by the other party, then the Presiding arbitrator shall be nominated by the Institution of Engineers (India)/both in cases of the Foreign Contractor as well as Indian Contractor, shall appoint the arbitrator. A certified copy of the order of the Chairman of the executive committee of The Indian Roads Congress making such an appointment shall be furnished to each of the parties.
- (d) Arbitration proceedings shall be held at Chennai, India, and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.
- (e) The decision of the majority of arbitrators shall be final and binding upon both parties. The cost and expenses of Arbitration proceedings will be paid as determined by the arbitral tribunal. However, the expenses incurred by each party in connection with the preparation, presentation, etc. of its proceedings as also the fees and expenses paid to the arbitrator appointed by such party or on its behalf shall be borne by each party itself.
- (f) Where the value of the contract is Rs.50 millions and below, the disputes or differences arising shall be referred to the Sole Arbitrator. The Sole Arbitrator should be appointed by agreement between the parties; failing such agreement, by the

appointing authority, namely the Chairman of the executive Committee of the Indian Roads Congress.

(g) Performance under the contract shall continue during the arbitration proceedings and payments due to the contractor by the owners shall not be withheld, unless they are the subject matter of the arbitration proceedings.''

5. On a perusal of the arbitration clause, it is patently clear that there is no cap of Rs.2 lakhs as sought to be argued. Learned counsel appearing for the appellant has also not been able to pinpoint any term in any existing contract between the parties, which puts such a cap. On the other hand, clause (f) quoted above clearly reads that where the value of the contract is Rs.50 million and below, the disputes or differences shall be referred to a Sole Arbitrator. The Sole Arbitrator is to be appointed by agreement between the parties and failing such agreement, by the Appointing Authority, namely, the Chairman of the Executive Committee of the Indian Roads Congress.

6. The learned counsel appearing on behalf of the appellant, before the learned Single Bench, had also contended that the Arbitral Tribunal had erred in not evaluating the documentary evidence adduced by the appellant and had passed an award in favour of the first respondent. Unfortunately, it is well settled by plethora of decisions that it is not for the Court exercising jurisdiction under Section 37 of the 1996 Act, to analyse or re-analyse or re-appreciate the evidence adduced before an Arbitral Tribunal. The entire challenge to the Award appears to have been on the merits of the award. In proceedings under Section 34, this Court does not sit in appeal over the award.

7. Our attention has not been drawn to any such infirmity in the impugned award, which calls for interference. The judgment and order of the learned Single Bench is well-reasoned and does not call for interference.

8. In this context, we may refer to Section 34 of the 1996 Act, set out hereinbelow for convenience.

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 subsection (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), 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.''

9. The 1996 Act is a complete code which deals with arbitrations and arbitral awards. Section 34 (1) categorically provides that recourse to a Court of law 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). Sub-section (2) provides that an arbitral award may be set aside, if the party making the application furnishes proof that the party was under some incapacity or the arbitration agreement was not valid under the law to which the parties had subjected it or under the law in force, the party making the application had not been given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case or the arbitral award deals with a dispute not contemplated or falling within the terms of submission to arbitration or the composition of the Arbitral Tribunal or arbitral procedure was not in accordance with the agreement of the parties, except when the agreement was in conflict with a provision of Part-I of the 1996 Act, from which the parties could not derogate or failing such agreement, was not in accordance with Part-I. None of the aforesaid clauses are attracted.

10. An arbitral award might also be set aside if the subject matter of the dispute was not capable of settlement by arbitration or the arbitral award was in conflict with the public policy of India. Those clauses are also not attracted.

11. The learned Tribunal has, on its analysis of the provisions of the contract, made an award. May be the award is in the range of Rs.1.9 crores, but that, in itself, is no ground for interference. The learned counsel referred to Exhibits C-17, C-18 and C-19 and submitted that the same had not properly been appreciated. It is not for us to re-appreciate the evidence in an appeal under Section 37 of the 1996 Act. We find no infirmity in the judgment of the learned Single Bench, which calls for interference.

The Original Side Appeal is, therefore, dismissed. No costs. Consequently, C.M.P.No.485 of 2017 is also dismissed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

sra

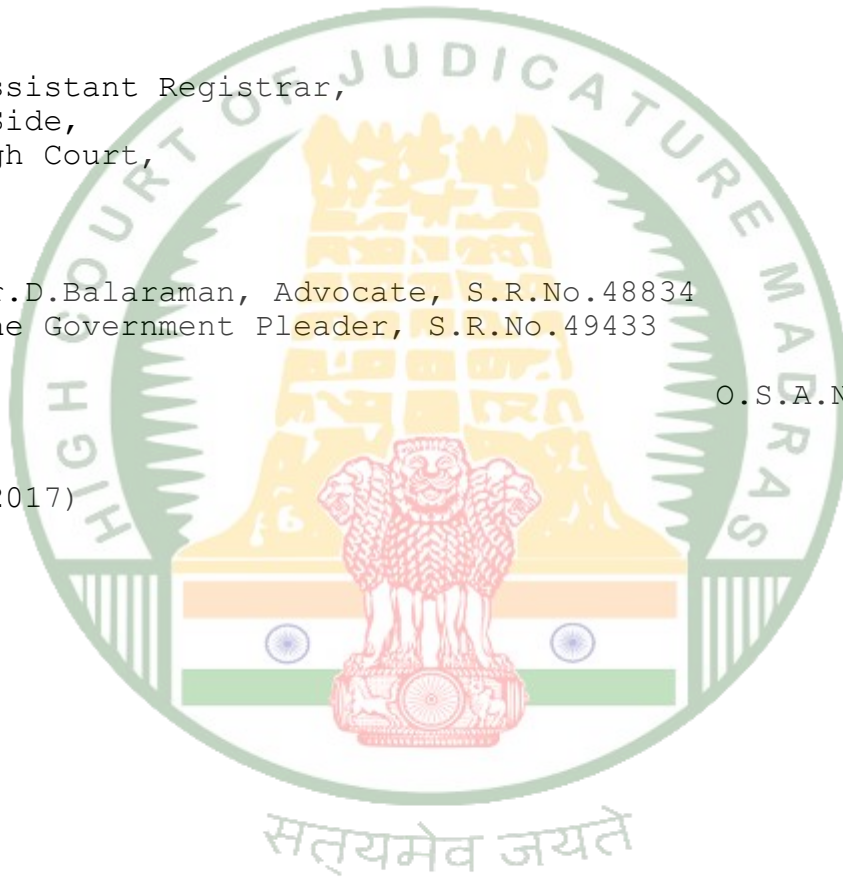
To

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

+1cc to Mr.D.Balaraman, Advocate, S.R.No.48834
+1cc to the Government Pleader, S.R.No.49433

O.S.A.No.3 of 2017

SCD(CO)
CA(31/08/2017)



WEB COPY