

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

WEDNESDAY, THE 13TH DAY OF SEPTEMBER 2017

THE HON'BLE DR.JUSTICE ANITA SUMANTH

A.No.4714 of 2017
in
O.P.No.644 of 2016

O.P.No.644 of 2016:

In the matter of Arbitration &
Conciliation Act 1996 And In
the matter of dispute between
M/s.Consolidated Construction
Consortium Limited &
Dhanalakshmi Srinivasan
Charitable and Educational
Trust And In the matter of
Tender Document dated
20/05/2009.

M/s.Consolidated Construction Consortium Limited
Rep.by its Authorised Signatory,
Mr.S.Raghavendran,
No.5, 2nd Link Street,
C.I.T. Colony, Mylapore,
Chennai- 600 004

...Petitioner

Vs

Dhanalakshmi Srinivasan Charitable and
Educational Trust
Rep, By its Board of Trustees,
Having its Registered office at
274C, Thuraiyur Road,
Perambalur - 621 212

...Respondent

A.No.4714 of 2017:

Dhanalakshmi Srinivasan Charitable and
Educational Trust
Represented by its Board of Trustees,
Having its Registered office at

274C, Thuraiyur Road,
Perambalur - 621 212

..Applicant/Respondent

vs

M/s.Consolidated Construction Consortium Limited
Rep.by its Authorised Signatory,
Mr.S.Raghavendran,
No.5, 2nd Link Street,
C.I.T. Colony, Mylapore,
Chennai- 600 004

..Respondent/Petitioner

Application praying that this Hon'ble Court be pleased to issue an order RECALLING the order dated 18.11.2016 issued in O.P.No.645 of 2016 and dismiss the O.P.No.645 of 2016 as being barred by limitation;

This application coming on this day before this court for hearing the court made the following order:

The present application is filed praying for recall of an order of this Court in O.P.No.655 of 2016 dated 18.11.2016.

2. The original petition had been filed by the respondent in the present application under Section 11 of the Arbitration and Conciliation Act, 1996 (in short 'Act') seeking appointment of an arbitrator to adjudicate upon disputes that have, admittedly, arisen between the parties. The order of the Chief Justice dated 18.11.2016, passed by consent of both parties, states thus:

'The learned counsel for parties state that instead of a panel of Arbitrators, a Sole Arbitrator be appointed and they jointly suggested the name of Mrs. Justice Chitra Venkatraman, a retired Judge of this Court. The learned counsel for parties also state that the arbitration proceedings be held under the aegis of the Madras High Court Arbitration Centre.

2. I, thus, appoint Mrs. Justice Chitra Venkatraman, a retired Judge of this Court, as the Sole Arbitrator to enter upon the reference and adjudicate the disputes inter se the parties. As requested, the arbitration proceedings will be conducted under the aegis of the Madras High Court Arbitration Centre and the parties will be governed by the Rules of the Centre.

1. The original petition is, accordingly, allowed, leaving the parties to bear their own costs.'

3. Pursuant thereto, the parties have been appearing before the learned sole Arbitrator and proceedings are on-going. A claim petition was filed by the claimant, to which a defence was filed. Issues were framed and proceedings for trial were to commence. At that stage, an application under section 16(2) of the Arbitration and Conciliation Act (in short Act), dated 21.6.2017 was filed before the learned Arbitrator seeking the dismissal of the claim raised by the claimant on the ground that the petition under section 11 had been filed belatedly as a result that the Tribunal did not have the jurisdiction to

entertain the claim, and that the claim raised in the petition was itself barred by limitation.

4. A counter was filed by the claimant to the aforesaid application. After hearing the parties, a detailed order was passed on 17.7.2017. The learned Arbitrator notes that the challenge to the merits of the claim on the ground of limitation had been framed as one of the issues in the proceedings for arbitration and as such, will be a matter to be decided after considering the evidence let in and the submissions of the parties.

5. With respect to the challenge to the constitution of the Tribunal, the learned Arbitrator, placing reliance upon the judgment of the Supreme Court in the case of *S.B.P. & Co vs M/s.Patel Engineering Ltd and another* (AIR 2006 SC 450), holds the challenge not maintainable. That apart, she also notices that the order of appointment of the Tribunal was by consent of parties and thereafter both parties had continued freely with the proceedings, filing a claim petition, a statement of defence, framing issues and participating in the process of trial. It was only at that advanced stage of proceedings that the petition under section 16(2) had been filed.

6. Detailed submissions of Mr. Muthukumaraswamy, learned Senior counsel on behalf of Mr. Abhishek Jenasenan, learned counsel appearing for the applicant and

Mr. T.V.Ramanujam, learned Senior Counsel appearing for Mr.S.S.Rajesh, learned counsel for the respondent have been heard and taken into consideration.

7. This petition praying for a recall has been filed in terms of Order 14, Rule 8 of the Madras High Court Original Side Rules read with section 11 of the Arbitration and Conciliation Act 1996. The first issue to be considered is the power of this Court to recall an order passed in terms of section 11(6) of the Act. The Act, perse, does not provide for the recall of an order passed under section 11 of the Act. An order of appointment of Arbitrator under section 11(6) is final in terms of section 11(7), extracted below, with no appeal provided against the same.

'11. Appointment of arbitrators.-(1)

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to 3 [the Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court is final and no appeal including Letters Patent Appeal shall lie against such decision'

8. Dispute resolution by Arbitration has been conceived as a specialised and expedited process as compared to traditional litigation. The Act contains stringent timelines and specific remedies for each process that call for strict compliance. This is in the interest of the entire mechanism and the avowed intention of the Act. The

scheme of section 11(6) read with 11(7) makes it apparant that the appointment of an arbitrator shall be final and any modification thereof shall only be by the Supreme Court, under Article 136 of the Constitution of India, by Special Leave.

9. The breadth and width of the power to be exercised by the Chief Justice/designate under section 11(6) in the appointment of an arbitrator was considered by a Bench of seven Judges of the Supreme Court in the case of *S.B.P. & Co vs M/s.Patel Engineering Ltd and another* (AIR 2006 SC 450) in the following terms:

"It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense, whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview

of the arbitration clause. It will be appropriate to leave that question to be decided by the arbitral tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under [Section 11\(6\)](#) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral tribunal."

10. Thereafter, a Division Bench, in *National Insurance Co. Ltd vs M/S. Boghara Polyfab Pvt.Ltd* 2009 (1) SCC 267 culled the applicable principles in the following terms:

'17. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under section 11, the duty of the Chief Justice or his designate is defined in *SBP & Co.* This Court identified and segregated the preliminary issues that may arise for consideration in an application under section 11 of the Act into three categories, that is

- (i) issues which the Chief Justice or his Designate is bound to decide;
- (ii) issues which he can also decide, that is issues which he may choose to decide; and

(iii) issues which should be left to the Arbitral Tribunal to decide.

17.1) The issues (first category) which Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under section 11 of the Act, is a party to such an agreement. 17.2) The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the arbitral tribunal) are:

(a) Whether the claim is a dead (long barred) claim or a live claim.

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

17.3) The issues (third category) which the Chief Justice/his designate should leave exclusively to the arbitral tribunal are :

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration.'

11. The Bench, in SBP, in the course of discussion, also discusses the authority/competence vested in the Arbitral Tribunal in terms of Section 16 of the Act as follows:

"Section 16 is said to be the recognition of the principle of Kompetenz - Kompetenz. The fact that the arbitral tribunal has the competence to rule

on its own jurisdiction and to define the contours of its jurisdiction, only means that when such issues arise before it, the Tribunal can and possibly, ought to decide them. This can happen when the parties have gone to the arbitral tribunal without recourse to [Section 8](#) or [11](#) of the Act. But where the jurisdictional issues are decided under these Sections, before a reference is made, [Section 16](#) cannot be held to empower the arbitral tribunal to ignore the decision given by the judicial authority or the Chief Justice before the reference to it was made. The competence to decide does not enable the arbitral tribunal to get over the finality conferred on an order passed prior to its entering upon the reference by the very statute that creates it. That is the position arising out of [Section 11\(7\)](#) of the Act read with [Section 16](#) thereof. The finality given to the order of the Chief Justice on the matters within his competence under [Section 11](#) of the Act, are incapable of being reopened before the arbitral tribunal."

12. With the amendment to the Act in 2015, the power of appointment exercised by the Chief Justice/designate is set out in terms of section 11(6A) of the Act as follows:

'11. Appointment of arbitrators.-(1)

(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.'

13. The parametres as set out in *S.B.P. & Co.* (supra) and reiterated in *Boghara* (supra) in relation to those aspects of the matter that would be examined by the Chief Justice/designate at the time of appointment of an arbitrator would, post the 2015 amendment, be restricted to an examination, as envisaged under 11(6A), to the aspects in the first category as detailed in *Boghara* (supra) alone. Thus, the Chief Justice/designate will, at the time of appointment of arbitrator, confine the examination to whether the party has approached the correct High Court and whether the party approaching the court with the prayer u/s 11 is a party to the Arbitration agreement. A challenge to the maintainability of the prayer for appointment of arbitrator will thus have to be made only at the stage of consideration of the prayer by the High Court and not thereafter. Section 16 entitles a party to challenge the jurisdiction of the Arbitral Tribunal itself, as a preliminary issue. However, there can be no challenge before the Tribunal as to jurisdiction exercised by the High Court in appointment of the Tribunal itself, as held by the Supreme Court in *S.B.P. & Co.* (supra).

14. In the present case, the Original Petition u/s 11(6) was filed on 04.08.2016, beyond a period of three years from the letter invoking the arbitration clause, dated 08.11.2012. However, the right to challenge the

maintainability of the prayer under section 11(6) was available to the applicant only at the stage of appointment of arbitrator itself, and not thereafter. The applicant, in this case had not only consented to the prayer for appointment of arbitrator but acquiesced in the proceedings for arbitration and participated in the same at various stages.

15. There is yet another aspect of the matter. Section 4 of the Act reads as follows:

'4. Waiver of right to object.—A party who knows that— (a) any provision of this Part from which the parties may derogate, or (b) any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.'

16. The applicant in the present case was represented at the time of appointment of the arbitrator and consented to the same. Thus, by virtue of section 4, it is deemed to have waived the challenge to maintainability of the petition under section 11.

17. The scheme of the Arbitration and Conciliation Act is intended to provide a time bound and effective remedy and cannot come to the aid of the present applicant who has missed the bus before the Chief Justice at the time of

hearing of the section 11 petition, particularly when the objection raised is severely belated.

18. Mr.Muthukumaraswamy would quote the provisions of section 3 of the Limitation Act 1963 that provide that, subject to the provisions of sections 4 to 24 of the Limitation Act, the bar of limitation, even if not canvassed or set up as a defence, should be taken into consideration by the Court. Reliance is placed on the following judgments - *J.C.Budhraja Vs. Chairman, Orissa Mining Corporation Limited* ((2008) 2 SCC 444), *Vishindas Bhagchand vs Chairman MSEB, Mumbai* ((2002) 1 Mh.L.J.222) *National Dairy Development Board Anand (Gujarat) vs Suraj Singh* ((2002) 2 M.P.L.J. 72) *Rameshwara Homes and Apartments vs Manojlal Seal* (2007 SCC Online Cal 619) *Mangla Advisory vs Cybizcall* (ILR (2010) I Delhi 331) *Leaf Biotech vs Municipal Corporation of the city of Nashik* ((2010) 6 Mh.L.J.316) and *Suryachakra Power Corp. Ltd., Vs. Electricity Department* ((2016) 16 SCC 152).

19. In Bhudraja's case, the Tribunal while considering a challenge of limitation, holds as follows:

'18. The learned counsel for the appellant submitted that the limitation would begun to run from the date on which a difference arose between the parties, and in this case the difference arose only when OMC refused to comply with the notice dated 4.6.1980 seeking reference to arbitration. We are afraid, the contention is

without merit. The appellant is obviously confusing the limitation for a petition under [section 8\(2\)](#) of the Arbitration Act, 1940 with the limitation for the claim itself. The limitation for a suit is calculated as on the date of filing of the suit. In the case of arbitration, limitation for the claim is to be calculated on the date on which the arbitration is deemed to have commenced. [Section 37\(3\)](#) of the Act provides that for the purpose of [Limitation Act](#), an arbitration is deemed to have been commenced when one party to the arbitration agreement serves on the other party thereto, a notice requiring the appointment of an arbitrator. Such a notice having been served on 4.6.1980, it has to be seen whether the claims were in time as on that date. If the claims were barred on 4.6.1980, it follows that the claims had to be rejected by the arbitrator on the ground that the claims were barred by limitation. The said period has nothing to do with the period of limitation for filing a petition under [section 8\(2\)](#) of the Act. Insofar as a petition under [section 8\(2\)](#), the cause of action would arise when the other party fails to comply with the notice invoking arbitration. Therefore, the period of limitation for filing a petition under [section 8\(2\)](#) seeking appointment of an arbitrator cannot be confused with the period of limitation for making a claim. The decisions of this Court in [Inder Singh Rekhi vs. Delhi Development Authority](#) - (1988) 2 SCC 338, [Panchu Gopal Bose vs. Board of Trustees for Port of Calcutta](#) - (1993) 4 SCC 338 and [Utkal Commercial Corporation vs. Central Coal Fields](#) - (1999) 2 SCC 571 also make this position clear.'

(Emphasis supplied)

20. No doubt, while drawing a distinction between limitation with respect to a claim and in the context of a petition under Section 11, the Bench states that the cause of action for the latter would arise when the other side fails to comply with the notice. This objection has however to be raised at the appropriate time and during the hearing of the petition under Section 11. The decision of the Delhi, Calcutta and Bombay High Courts proceed on facts when the objection was raised in the course of the Section 11 petition itself and are distinguishable for this reason.

21. In *Suryachakra* (supra), the Bench considers the condonation of delay beyond the period prescribed by the Statute and holds that such delay ought not to have been condoned. The present case turns on different facts.

22. In conclusion:

(i) A petition u/s 16 before the Arbitral Tribunal challenging a petition under section 11(6) as being barred by limitation is not maintainable. Once a prayer for appointment under section 11(6) is allowed to be proceeded with without any objection as to the limitation for the filing thereof, such a plea cannot be entertained thereafter. A party will have to object to the maintainability of a petition u/s 11 then and there, at the time of the hearing of the petition, or forever hold his peace.

(ii) As regards the challenge of limitation with regard to the claim itself, the issue shall be considered and decided by the Tribunal in due course.

23. The application is dismissed . No costs.

Sd/.A.S.M.J
13.09.2017

//Certified to be a true copy//

Dated this the day of 2017.

DL/21.11.2017

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.