IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.09.2018

CORAM

THE HON'BLE MR. JUSTICE **D. KRISHNAKUMAR**

O.P. No.855 OF 2010

1. The Senior General Manager,
   Shree Ambika Sugar Limited,
   Eraiyur - 606 111,
   Thittakudi Taluk,
   Cuddalore District. ..Petitioner

Vs.

1. The Chief Executive,
   Perambalur Sugar Mills Limited,
   Eraiyur - 621 133
   Veppanthattai Taluk,
   Perambalur District.

2. The Commissioner Sugar
   Cane Commissioner/
   Sole Arbitrator,
   690, Anna Salai,
   Chennai - 600 035. ..Respondents

The Original Petition under Section 34 of the Arbitration and Conciliation Act, 1996 has been filed to set aside the Arbitration Award dated 28.07.2009 in Arbitration Claim No.11869/Cane 2/2008 passed by the second respondent.

For Petitioners : Ms. Anupama

(M/s. Satish Parasaran)

For Respondent-1 : Mr.V. Anand

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O R D E R

The Original Petition under Section 34 of the Arbitration and Conciliation Act, 1996 has been filed to set aside the Arbitration Award dated 28.07.2009 passed by the second respondent in Arbitration Claim No.11869/Cane 2/2008.

2. The brief facts of the case are as follows:

Pursuant to the letter dated 03.03.2006 in Rc.No.2358/Cane-2/2006 issued by the Director of Sugar, a Memorandum of Understanding, (hereinafter referred to as M.O.U.) was entered between the petitioner, viz., M/s. Shree Ambika Sugars Ltd, and the first respondent, viz., M/s.Perambalur Sugar Mills Ltd on 30.05.2006, for diverting of 1,00,000 M.Ts. of registered cane from the first respondent Mill to the petitioner Mill for the year 2006-2007 crushing season. On the basis of the M.O.U., the first respondent mill had registered and raised 1,00,000 M.Ts. of additional sugar-cane to be delivered to the petitioner mill. But, the petitioner mill declined to draw the said quantity of sugar cane from the first respondent mill as per the M.O.U., in view of the letter dated 26.09.2006 in 2358/Cane-2/2006, issued by the second respondent cancelling the earlier order dated 03.03.2006, resulting in, the first respondent mill suffered loss of Rs.2,31,44,000/- (Rupees Two Crores thirty one lakhs and forty four thousand only). Therefore, the first respondent mill has initiated Arbitral proceedings against the petitioner mill to claim the loss incurred by the first respondent mill for not drawing 1,00,000 M.Ts. of sugar-canes by the petitioner mill as per the M.O.U. Hence, the dispute arose between the parties was referred to before the arbitrator.

2.1. While the M.O.U. is enforceable between the parties, the petitioner failed to lift the agreed quantity of canes which were already planted in pursuance of M.O.U., violates the M.O.U. Further, under Clause (8) of M.O.U provides for settlement of disputes between the parties through arbitration, by the Commissioner of Sugar, the sole arbitrator. The Second respondent/sole arbitrator passed an award dated 28.07.2009 in Arbitration claim no.11869/cane-2/2008 directing the petitioner mill to pay a sum of Rs.2,31,44,000/- (Rupees Two Crores thirty one lakhs and forty four thousand only) towards the loss sustained by the first respondent mill due to non-compliance of terms of the M.O.U. by the petitioner mill. Assailing the aforesaid impugned arbitral award, the present original petition has been preferred by the petitioner mill before this Court.

3. The learned Counsel appearing for the petitioner would submit that initially, the Director of Sugar/the second respondent had granted order of permission for planting additional cane by letter dated 03.03.2006 in Rc.No.2358/Cane-2/2006, in Perambalur District to be delivered to the petitioner mill. Subsequently, the same authority, viz., the Director of sugar cancelled the aforesaid permission in his proceedings dated 26.09.2006 in 2358/Cane-2/2006 and the same was communicated to the Co-operative sugar mills. Therefore, the registered Canes were not lifted by the petitioner mill from the first respondent mill. As per the aforesaid proceedings, the petitioner mill has to follow various conditions which, inter alia, including a condition (v) which reads as follows:

> "Any instructions or modifications issued by Director of Sugar / Cane Commissioner in this regard should have followed by both the sugar mills mentioned in Col.(2) and Col.(4) i.e PSM & SASL, Pennadam".

The petitioner mill could not comply with the terms and conditions of the M.O.U, in view of the proceedings of the second respondent dated 26.09.2006 in R.C.No.2358/Cane-2/2006 cancelling the earlier proceedings dated 03.03.2006 in R.C.No.2358/Cane-2/2006.

4.According to the petitioner, the first respondent mill has wrongly interpreted Clause (8) of M.O.U. and referred the dispute to the Arbitrator. Clause (8) of the M.O.U. reads as follows:

> "8. Disputes, if any, arises between the two mills in respect of the Cane Diversion / Drawl, the decision of the Director of Sugar shall be final and binding on both the mills."

On reading the aforesaid Clause, the decision of the Director of Sugar shall be final and binding on both the mills. In the absence of clause to refer the dispute to Arbitrator under the Arbitration & Conciliation Act. 1996, the second respondent cannot act as an Arbitrator to decide the dispute arose between the parties. The second respondent passed an order dated 26.09.2006 in R.C.No.2358/Cane2/2006 cancelling the earlier order dated 03.03.2006 in R.C. No.2358/Cane2/2006, issued by him. Hence, the earlier order granting permission to purchase 1,00,000 M.Ts. Sugar-cane stands cancelled. Hence, the claim petition filed before the arbitrator is not maintainable. It is further submitted by the learned counsel for the petitioner, if any grievance, the respondent mill has to seek appropriate forum, but not invoking arbitration proceedings, under Section 34 of the Arbitration and Conciliation Act, 1996.

5. The learned counsel for the petitioner mill would further contend that the Director of Sugar is the authority who passed an

order in favour of the first respondent mill, vide order dated 03.03.2006 in Rc.No.2358/Cane-2/2006 and subsequently, the same authority cancelled the earlier order dated 26.09.2006 and in view of the above, the second respondent, viz., Commissioner of Sugar cannot act as an arbitrator to decide the dispute arising out of his own order dated 26.09.2006, that too in the arbitral proceedings, which is not maintainable. Hence, the impugned award passed by the Arbitrator in his own capacity, is unsustainable in law, as he cannot be a judge of his own decision.

6. Per contra, the learned counsel appearing for the first respondent mill would submit that the objections raised by the petitioner mill are baseless and untenable. The cancellation order dated 26.09.2006 in Rc.No.2358/Cane-2/2006 issued by the Second respondent was not sent either to the first respondent mill, viz., M/s.Perambalur Sugar Mills Ltd, or to the petitioner mill, viz., M/s. Shree Ambika Sugars Ltd. It is submitted by the counsel for the first respondent mill that when there is no written communication or cancellation of M.O.U. entered into between the parties, M.O.U. cannot be considered as cancelled. Further, the contract is between the petitioner mill and the first respondent mill. In the absence of any

cancellation of M.O.U, the M.O.U. is in force. As the petitioner mill failed to purchase the registered sugar-cane from the first respondent mill, the first respondent mill sustained loss of Rs.2,31,44,000/- (Rupees Two Crores thirty one lakhs and forty four thousand only). Having considered the above facts, the sole arbitrator has rightly passed the award in favour of the first respondent and hence, he prayed for dismissal of the Original Petition.

7. Heard, the arguments advanced by both sides and perused materials on record.

8. The learned counsel for the petitioner mill has referred to the order of the Commissioner of Sugar, dated 26.09.2006 in Rc.No.2358/ Cane-2/2006 under which, the earlier order dated 03.03.2006 in Rc.No.2358/Cane-2/2006 stands cancelled. In the earlier order dated 03.03.2006 in Rc.No.2358/Cane-2/2006, it is clearly stated that any further modification or instruction issued by the Director of Sugar shall be binding on both the parties.

9. Further, the learned counsel for the petitioner mill has

referred to the provision under Section 12 of the Arbitration and Conciliation Act. 1996, for challenging the arbitration proceedings.

12. Grounds for challenge. -

> (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.
>
> (2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.
>
> (3) An arbitrator may be challenged only if-
>
> (a) Circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or
> (b) He does not possess the qualifications agreed to by the parties.
>
> (4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

10. In the instant case, the primary issue raised by the learned counsel for the petitioner is that the Arbitration proceedings is not maintainable under the provisions of the Arbitration and Conciliation Act, 1996. However, the first respondent mill has invoked Section 34 of the Act., by filing claim petition after the expiry of M.O.U. which was entered into between the parties for crushing season 2006-2007. The petitioner mill did not draw the sugar cane in view of the proceedings

of the second respondent dated 26.06.2006 in R.C. No.2358/Cane-2/2006 cancelling the earlier proceedings dated 03.03.2006. As per clause (8) of the M.O.U., the decision of the Director of Sugar shall be final and binding on both the mills.

11. In this regard, this Court has already considered the similar issue in the case of **"The General manager Vs. The Chief Executive and others wherein it is held observing the Supreme Court decision reported in (2011) 7 SCC 406 (State of Orissa and others Vs. Bhagyadhar Dash in O.P. No.550 of 2010 dated 22.11.2012.)**

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> 29. Following the observation of this Supreme Court in Catenna of authorities as stated above, this Court has no hesitation in holding that clause 9 does not amount to arbitration agreement as it does not provide for any reference for settlement of dispute through arbitration and it only makes the decision of the Director of Sugar with regard to the cane diversion or drawal to be final and binding on both parties and nothing more. The Director of sugar is not vested with any power to decide any dispute judicially and his decision is only conclusive in respect of particular aspect and not in respect of any dispute arising out of the contract, as such, in the absence of one such arbitration clause, the arbitral proceedings initiated by

AASML and appointment of commissioner of Sugar as arbitrator is not legally sustainable and the final decision arrived at by cane Commissioner cannot be construed as arbitral award.

12. It is rightly submitted by the learned counsel for the petitioner that the M.O.U. entered into between the parties is on the strength of the order dated 03.03.2006 in R.C. No.2358/Cane-2/2006 issued by the Director of Sugar and the same stood cancelled by the same authority on 26.09.2006 in a letter No.R.C. No.2358/Cane-2/2006. Therefore, the petitioner mill did not purchase sugar cane from the first respondent mill. The second respondent being the Director of Sugar, cancelled the earlier order dated 03.03.2006, cannot act as an arbitrator to decide the dispute arose out of his own order.

13. The parties are bound by the order dated 26.09.2006 passed in R.C. No.2358/Cane-2/2006, by the Director of Sugar cancelling the earlier order. Therefore, the second respondent in the capacity of Commissioner of Sugar is not competent to decide the dispute arose out of his own order, as he cannot be a Judge of his own decision, acting as Arbitrator. The contention of the learned counsel for the first respondent mill that by the order dated 26.09.2006 passed by the

Commissioner of Sugar and decided the dispute as an Arbitrator are in different capacities and it cannot be construed to be the proceedings of the same authority. Such contention of the learned counsel for the respondent mill cannot be accepted. Under clause (8) of the M.O.U, the second respondent cannot act as an arbitrator, therefore, the impugned award passed by him by allowing the claim petition, filed by the first respondent mill is perverse and the same is liable to be set aside.

14. At this stage, the learned counsel for the first respondent mill requested, this Court, to grant liberty to the first respondent to approach before the competent Civil forum for appropriate relief.

15. Having considered the facts and circumstances of the case, with the consent of the learned counsel for both parties, this Court is inclined to pass the order as follows:

(i) The impugned award dated 28.07.2009 in Arbitration claim No. 11869/Cane-2/2008 is set aside.

D. KRISHNAKUMAR, J.
lbm

(ii) It is open to the first respondent to seek his remedy before the competent Civil Court, if so advised, within a period of 8 weeks from the date of receipt of a copy of this order. If the first respondent approach Civil Court, the period of pendency of the Arbitration proceedings shall be excluded, for the purpose of 'Limitation' under the Civil Procedure Code.

16. Accordingly, the Original Petition is allowed in the above terms. There shall be no order as to costs.

26.09.2018

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Index: Yes
Internet: Yes
Speaking/Non-Speaking order

Copy to:
1. The Chief Executive,
Perambalur Sugar Mills Limited,
Eraiyur - 621 133
Veppanthattai Taluk, Perambalur District.

2. The Commissioner Sugar/Cane Commissioner
Sole Arbitrator,
690, Anna Salai, Chennai - 600 035.

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