

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.06.2018

CORAM:

THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE

OP No.851 of 2017

Mr.Sumit Kumar,
Proprietor,
No.33/1, Kabeer Nagar,
P.O.B.H.U, Durgakund,
Varanasi – 221 005.

...Petitioner

vs.

M/s.Redington (India) LTD,
Rep By, Mr.S.Srinivasan
SPL Guindy House,
No.95, Mount Road,
Guindy, Chennai – 600 032.

...Respondent

Prayer: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 12.12.2016 in A.C.No.05 of 2014 passed in favour of the Respondent and direct the respondent to pay the petitioner the costs of this petition.

For Petitioner

...

M/s.M.Anandaraj

For Respondent

...

Mr.S.S.Rajesh

ORDER

The instant petition has been under Section 34 of the Arbitration and Conciliation Act, challenging the Award dated 12.12.2016 passed against the petitioner. The petitioner placed orders with the first respondent for the purchase of computer equipments for which payments were not made. The first respondent raised several invoices and for the unpaid invoices the first respondent initiated Arbitration in accordance with Arbitration clause contained in the reverse side of each of the invoices. Clause 19 of the terms and conditions of the invoice is extracted hereunder:

"All contracts of the company including any dispute arising out of and in connection with this contract/transaction will be subject to Arbitration of sole Arbitrator to be appointed by Redington (India) Limited at Chennai and Buyer explicitly agrees for appointment of arbitrator as above. Such arbitration proceedings shall be initiated within 3 years from the date of dispute. Without prejudice to the above, courts in Chennai shall have exclusive jurisdiction to try all proceedings such as arbitration, civil or criminal including complaints u/sec. 138 of the N.I. Act on account of non-payment of negotiable instruments exchanged between the Buyer and Supplier."

2. In accordance with the Arbitration clause, the first respondent appointed Mr.K.Balasubramanian a retired District Judge as the Sole Arbitrator to decide the disputes on merits.

3. Even prior to the initiation of Arbitration, the first respondent issued a pre Arbitration notice to the petitioner informing the appointment of Mr.K.Balasubramanian as the Sole Arbitrator. The Sole Arbitrator Mr.K.Balasubramanian acted upon the reference and after issuing notice to both the parties in the dispute and after hearing them and also considering the materials available on record, passed the Award in favour of the first respondent directing the petitioner to pay a sum of Rs.1,16,07,480/- together with interest at the rate of 18% per annum from the date of the Award till the date of realization.

4. Aggrieved by the Award dated 12.12.2016, the petitioner has filed the instant petition under Section 34 of the Arbitration and Conciliation Act.

5. The learned Counsel for the petitioner made the following submissions:

(a) The claim made by the first respondent before the learned Arbitrator is barred by limitation.

(b) The claim arising out of each and every invoice gives rights to a separate cause of action. Hence, a single Arbitral claim cannot be made for all the invoices put together.

(c)The first respondent has suppressed initiation of the criminal proceedings in respect of dishonoured cheques which resulted in conviction of the petitioner. In the criminal proceedings, the petitioner was also directed to pay compensation which according to the learned Counsel for the petitioner amounts to simultaneous proceedings for recovery which is not permissible under law and the claim is barred by *res adjudicata*.

(d)The petitioner has made a payment of Rs.22 lakhs and to prove the same, he has filed documents namely exhibits-R2, R3 and R4, which are the statement of accounts before the learned Arbitrator and the learned Arbitrator has not considered those documents before passing the Award against the petitioner.

(e)The learned Counsel for the petitioner further submits that there is no necessity to let in oral evidence before the learned Arbitrator. Therefore, the learned Arbitrator ought not to have rejected the defence made by the petitioner on the ground that no oral evidence was let in by the petitioner before the learned Arbitrator.

7.Per contra, the learned Counsel for the respondent would submit that the learned Arbitrator has considered all the defences raised by the petitioner in accordance with law. He drew the attention of this Court to the Arbitral Award. As seen from the Arbitral Award,

the learned Arbitrator after considering the pleadings framed the following issues:

(1) Whether the appointment of Arbitrator is proper and legal.

(2) Whether the invoices raised in the claim statement are true, valid.

(3) Whether the respondents committed default in payment of the dues as alleged by the claimant.

(4) Whether the respondents are liable to pay a sum of Rs.1,16,07,480/- along with interest at the rate of 22% per annum.

(5) Whether the 53 invoices mentioned in the claim statement are time barred as contended by the respondent.

(6) What relief the claimant is entitled to.

8. According to the learned Counsel for the first respondent each and every issue framed by the learned Arbitrator were duly considered by him and only based on the materials available on record and only after hearing the submissions of both the parties to the dispute, the Award was passed.

9. Insofar as, the first issue is concerned, the learned Arbitrator has given a clear finding that the petitioner has not challenged the appointment of the learned Arbitrator in accordance with Section 13 of the Arbitration and Conciliation Act, i.e. within the 15 days period after the petitioner became aware of the constitution of the Arbitral Tribunal.

10.Insofar as, the second issue is concerned, the learned Arbitrator has given a categorical finding that the invoices raised by the first respondent have not been disputed by the petitioner.

11.Insofar as, the third issue is concerned, the invoices having not been disputed, the petitioner is liable to pay the value of the invoices. There is also a clear finding that the alleged payment of Rs.22 lakhs by the petitioner to the first respondent has not been proved by the petitioner either by letting in any oral or documentary evidence. The learned Arbitrator has also given a finding that no proof affidavit was filed by the petitioner disclosing the payments made to the first respondent.

12.Insofar as, the fourth issue is concerned, the claim of Rs.1,16,07,480/- made by the first respondent, the learned Arbitrator has concluded that the first respondent has filed invoices exhibit-C3 series along with the statement of accounts marked as exhibit-C8, which will establish that the petitioner has committed default in the payment and therefore, the claim will have to be allowed in favour of the first respondent. The learned Arbitrator has also observed that burden of disproving the claim of the first respondent is on the petitioner by letting in any contra evidence on his part which he has failed to do so.

13. Insofar as, the fifth issue is concerned, the learned Arbitrator has given a categorical finding that the petitioner has not let in any evidence on his part in support of the contention that the claim made by the first respondent is barred by law of limitation. The learned Arbitrator has observed that the petitioner could have appeared in person and explained his point by giving evidence before the Arbitral Tribunal.

14. On the other hand, the first respondent/claimant while categorically denying the allegations contended that the transactions between them and the petitioner involved a series of transactions before their actual completion since, they are all of credit sales category and further, there are admittedly some part payments made by the respondent without making any reference to any invoice and hence, the question of the 53 invoices becoming time barred as stated in the statement of defence does not arise at all. The learned Arbitrator has held that in the absence of sufficient material evidence on the part of the petitioner accepted the submission of the first respondent/claimant and held that the claim for unpaid invoices are not time barred and are payable.

15.As seen from the Arbitral Award, each and every defence raised by the petitioner has been duly considered in accordance with law by the learned Arbitrator and there is no perversity or patent illegality in the Award.

16.The Hon'ble Supreme Court in a Catena of decisions starting from **Renusagar Power Company Ltd vs. General Electric Company 1994 Supp (1) SCC 644** to the recent **Associated Builders Vs DDA (2015) 3 SCC 49** has held only under the following grounds the Arbitral Award can be challenged under Section 34 of the Arbitration and Conciliation Act:

(a) *Procedure contemplated under Arbitration and Conciliation Act was not followed by the Arbitrator.*

(b) *The Arbitral Award is a non speaking Award.*

(c) *The Arbitrator has transgressed his jurisdiction.*

(d) *The Arbitral Award is in conflict with the public policy of India.*

(iii) *An award would be regarded as conflicting with the public policy of India if:-*

(a) *it is contrary to the fundamental policy of Indian law, or*

(b) *it is contrary to the interests of India,*

(c) *it is contrary to justice or morality,*

(d) *it is patently illegal, or*

(e) *it is so perverse, irrational, unfair or unreasonable that it shocks the conscience of the court.*

(iv) An award would be liable to be regarded as contrary to the fundamental policy of Indian law, for example, if

(a) it disregards orders passed by superior courts, or the binding effect thereof, or

(b) it is patently violative of statutory provisions, or

(c) it is not in public interest, or

(d) the arbitrator has not adopted a "judicial approach", i.e. has not acted in a fair, reasonable and objective approach, or has acted arbitrarily, capriciously or whimsically, or

(e) the arbitrator has failed to draw an inference which, on the face of the facts, ought to have been drawn, or

(f) the arbitrator has drawn an inference, from the facts, which, on the face of it, is unreasonable, or

(g) the principles of natural justice have been violated.

(v) Insofar the "patent illegality" has to go to the root of the matter. Trivial illegalities are inconsequential.

(vi) Additionally, an award could be set aside if

(a) either party was under some incapacity, or

(b) the arbitration agreement is invalid under the law,

Or

(c) the applicant was not given proper notice of appointment of the arbitrator, or of the arbitral proceedings, or was otherwise unable to present his case, or

(d) the award deals with a dispute not submitted to arbitration, or decides issues outside the scope of the dispute submitted to arbitration, or

(e) the composition of the Arbitral Tribunal was not in

accordance with the agreement of the parties, or in accordance with Part I of the Act, or

(f) the arbitral procedure was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or

(g) the award contravenes the Act, or

(h) the award is contrary to the contract between the parties.

(vii) "Perversity", as a ground for setting aside an arbitral award, has to be examined on the touchstone of the Wednesbury principle of reasonableness. It would include a case in which

(a) the findings, in the award, are based on no evidence, or

(b) the Arbitral Tribunal takes into account something irrelevant to the decision arrived at, or

(c) the Arbitral Tribunal ignores vital evidence in arriving at its decision.

(viii) At the same time,

(a) a decision which is founded on some evidence, which could be relied upon, howsoever compendious, cannot be treated as "perverse",

(b) if the view adopted by the arbitrator is a plausible view, it has to pass muster,

(c) neither quantity, nor quality, of evidence is open to re-assessment in judicial review over the award.

(ix) "Morality" would imply enforceability, of the agreement, given the prevailing mores of the day. "Immorality", however, can constitute a ground for interfering with an arbitral award only if it shocks the judicial conscience.

17.The petitioner has not satisfied any of the above mentioned grounds to challenge the impugned Arbitral Award.

18.Accordingly, the petition shall stand dismissed. However, there shall be no order as to costs.

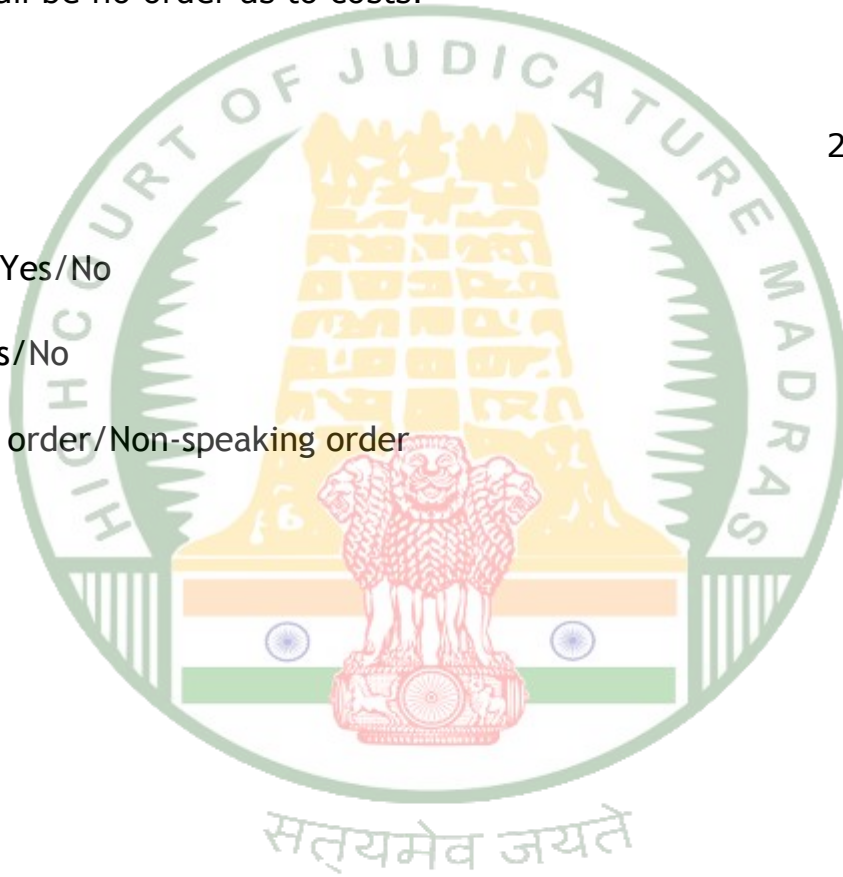
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