

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.01.2018

CORAM

THE HON'BLE MS. INDIRA BANERJEE, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE ABDUL QUDDHOSE

O.S.A.No.377 of 2013

Madras Port Trust
Rajaji Salai, Chennai - 600 001,
rep. by its Chief Engineer. ... Appellant

Vs.

1. S&S Enviro Technologies Limited
204, AIEMA Towers, II Floor
First Main Road, Ambattur Industrial Estate
Chennai - 600 058.
(Name of 1st respondent amended
by order dated 11.1.2018 made
in C.M.P.No.6914 of 2017 in OSA No.377/2013)

(R2 to R4 deleted from the array
of respondents as per the order
dated 5.4.2017 made
in OSA NO.377/2013) ... Respondents

PRAYER: Appeal filed under Order XXXVI Rule 9 of the
Original Side Rules read with Clause 15 of the Letters
Patent against the order passed by this Court on 20.4.2009
in O.P.No.274 of 2004.

Under Indian Arbitration and Conciliation Act 1996 a)
filed to set aside the award dated 3/11/2003 and received
by the petitioner and made by the second, third and fourth
Respondents in the dispute between the petitioner and first
Respondent in the dispute between the petitioner and first
Respondent as illegal, without Jurisdiction and not a
proper disposal of the case

b)directing the first respondent to pay the cost of this petition.

For Appellant : Mr.R.S.Jeevarathinam
Senior Counsel
for Mr.R.Karthikeyan

For Respondents : Mr.Kuberan
for 1st respondent

JUDGMENT

(Delivered by Ms.Indira Banerjee, Chief Justice)

This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act") is against a judgment and order dated 20.4.2009 passed by the learned Single Judge dismissing a petition under Section 34 of the 1996 Act filed by the appellant for setting aside an award dated 3.11.2003 passed by an Arbitral Tribunal consisting of three Arbitrators, namely, Shri K.V.Kuppuswamy, Shri K.Natarajan and Shri B.Raghava, in relation to disputes that had arisen between the appellant and the first respondent with regard to a contract executed for the design, construction and commission of a 3.5 MLD Sewage Treatment Plant at the premises of the Madras Port Trust.

2. The first respondent is a company engaged in the execution of environmental engineering projects. The appellant, a major port under the Major Port Trusts Act, 1963, invited tenders for design, construction, testing and commissioning of a 3.5 MLD Sewage Treatment Plant at the premises of the Madras Port area on a turnkey basis. Pursuant to the aforesaid tender, the first respondent submitted its offer, which was duly accepted by the appellant and an agreement, being Agreement No.37 of 1995, was duly executed by and between the appellant and the first respondent, whereby the contract work was required to be executed at a contract value of Rs.2.55 Crores.

3. Disputes, however, arose between the appellant and the first respondent which were, as stated above, referred for arbitration to the Arbitral Tribunal. It is the case of the appellant that there was some difference in the views of different arbitrators. The Second Arbitrator did not agree with the other two Arbitrators in relation to their findings with regard to claim Nos.12, 3A, 3B, 4 and 11.

4. In the application for setting aside of the award filed by the appellant under Section 34 of the 1996 Act, it was urged as under:

"(a) The Petitioner submits that the scope of Arbitration is limited and conclusion of the Arbitrators are beyond the scope and as a result the award is liable to be set aside.

(b) The Petitioner submits that the Arbitrators are under duty bound to give reasons for arriving at their conclusions in making the award. The Arbitrators have failed to give valid reasons. The reasons themselves are unsustainable and cannot be accepted under Law.

(c) The Petitioner submits that the award is liable to be set aside for it was based on wrong parameters and also contain errors on the face of the award.

(d) The Arbitrator has not considered the evidence let in before than in the right prospective.

(e) The Arbitration award is more on surmises than the facts and figures contained in the records.

(f) The award is liable to be set aside on the ground that the Arbitral Tribunal had exceeded their jurisdiction in taking extraneous circumstances into consideration.

(g) The Arbitral Tribunal failed to consider the terms and conditions of the agreement which are binding on both parties which alone is the basis of finding out as to who is at fault and what is the cost of the fault and what are they entitled for the same.

(h) The Arbitrators had failed themselves in appraising the facts in the right perspective since the policy of the Petitioner is that the contractor has to adhere to the terms and conditions of the agreement even if they are not in favour especially when the agreement was signed the work was commenced.

(i) The Tribunal failed to appreciate the fact that the contractor has done only 1% of the total work after a prolonged period of several extensions of time."

5. The grounds urged are of a general nature, unsubstantiated by particulars. There can be no doubt that after the enactment of the 1996 Act and repeal of the Arbitration Act, 1940, an award which is not reasoned might be set aside on that ground alone, unless of course the arbitration

agreement expressly provides that no reasons need be given in support of the award. However, in this case, we find that the award is a reasoned award.

6. The reason in support of an award of an Arbitral Tribunal cannot be judged by the same standards as the judgment of a Court. In an application for setting aside an award, the Court is only to see whether the award indicates what weighed with the Arbitral Tribunal for arriving at its conclusion. In the instant case, the Arbitrators have indicated their mind. The mere fact that there may have been some difference between the majority Arbitrators and one Arbitrator in the minority, does not vitiate or invalidate an award.

7. In an Arbitral Tribunal comprising three Arbitrators, if two Arbitrators take the same view, which constitutes the majority view, that view would prevail. If two or more views are possible and the Court is of the view that another view is more acceptable, the Court cannot interfere with an award.

8. It would perhaps be pertinent to refer to Section 34 of the 1996 Act, which lays down the grounds on which an award can be set aside. Section 34 of the 1996 Act reads as under:

"Section 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) 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. An award might only be set aside if (i) the party making an application for setting aside furnishes proof that the party was under some incapacity, or (ii) the arbitration agreement was not valid under the law to which the parties had subjected it, or failing any indication thereof, under the law for the time being in force, or (iii) the party making the application had not been given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or (iv) the party applying had otherwise been unable to present his case, or (v) on the ground that the arbitral award dealt with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or (vi) it contained decisions on matters beyond scope of the submission to arbitration. None of the aforesaid grounds are attracted in the instant case. It is also not the case of the appellant that the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties.

10. There are two other grounds also on which a domestic award might be set aside. Such an award might be set aside if the Court finds that the subject matter of dispute is not capable of settlement by arbitration under the law for the time being in force or on the ground that the arbitral award is in conflict with the public policy of India. It is nobody's case that the subject matter of the dispute is not capable of settlement by arbitration under the law in force. The question is whether the arbitral award can be said to be in conflict with the public policy of India.

11. The learned Senior Counsel appearing on behalf of the appellant submitted that the Arbitral Tribunal erred in law in awarding compensation for loss of profit which was computed at 8%.

12. On a perusal of the award, it is apparent that there had been breaches on the part of the appellant which entitled the first respondent to compensation. The Arbitral Tribunal found that the first respondent was eager to perform its obligations, but could not do so due to breaches on the part of the appellant. The nature of the breaches have been enumerated in the award.

13. The learned Tribunal arrived at the conclusion that the termination of the contract by the appellant was not proper and valid, as there had been defaults on the part of the appellant.

Even though the period of the contract was 24 months, i.e., from 5.10.1993 to 4.10.1995, the contract had not been terminated till 24.1.1997. The majority members of the learned Tribunal, thus, formed the view that the first respondent was not solely responsible for the delay, rather lapses on the part of the appellant caused the delay. The learned Tribunal (the majority) arrived at the view that the first respondent would be entitled to be compensated for loss of profit at the rate of 8% of the contract value. It is the award on account of loss of profit computed at 8% of the contract value which has strongly been assailed by the learned Senior Counsel appearing on behalf of the appellant.

14. Attacking the award, the learned Senior Counsel for the appellant has relied on the judgment of the Supreme Court in P.Radhakrishna Murthy v. National Buildings Construction Corporation Limited, reported in (2013) 3 SCC 747, for the proposition that the learned Tribunal cannot ignore law or misapply it nor can it act arbitrarily, irrationally, capriciously or independent of contract while passing an award. The Arbitrator is not a Conciliator. He has to decide disputes according to legal rights of parties and not according to what he may consider to be fair and reasonable. There can be no doubt that the Arbitral Tribunal is bound by the law. He cannot ignore the contract, nor can he ignore the law in force.

15. The learned counsel also cited a decision in State of Rajasthan and another v. Ferro Concrete Construction Private Limited, reported in (2009) 12 SCC 1, where the Supreme Court held that while the quantum of evidence required to accept a claim might be a matter within the exclusive jurisdiction of the Arbitrator to decide, if there was no evidence at all and if the Arbitrator made an award of the amount claimed in the claim statement merely on the basis of the claim statement without anything more, it has to be held that the award on that account would be invalid. The Supreme Court held that the award under Claim (36) was wholly unsustainable.

16. Words and sentences in a judgment cannot be read in isolation. The precedential value of the judgment has to be assessed in the context of the facts in which the judgment had been rendered. It was in the context of determination of value and the per day loss that the Supreme Court made the aforesaid observations in P.Radhakrishna Murthy, supra, and in Ferro Concrete Construction Private Limited, supra. In any case, both the aforesaid judgments cited by the learned counsel were in proceedings under Section 30/33 of the Arbitration Act, 1940 for setting aside an arbitral award.

17. The 1996 Act is different from the Arbitration Act, 1940. The provisions of the 1996 Act have, therefore, to be interpreted and construed independently as held by the Supreme Court in *Sundaram Finance Limited v. NEPC India Limited*, reported in (1999) 2 SCC 479. As observed by the Supreme Court, reference to the Arbitration Act, 1940 might actually lead to misconstruction. The provisions of the 1996 Act would have to be interpreted uninfluenced by the principles underlined in the Arbitration Act, 1940. In view of such finding, the judgments rendered in the context of Section 30/33 of the Arbitration Act, 1940 cannot in themselves be treated as binding precedents for proceedings under Section 34 of the 1996 Act.

18. In *McDermott International Inc. v. Burn Standard Co. Ltd.*, reported in (2006) 11 SCC 181, the Supreme Court held that under the 1996 Act, the Court cannot correct errors of the Arbitrators. An award can only be set aside if it is contrary to (i) the fundamental policy of Indian Law; (ii) the interests of India; (iii) justice or morality, or (iv) if it is patently illegal or arbitrary. Such patent illegality must, however, go to the root of the matter. The public policy violation indisputably should be so unfair and unreasonable as to shock the conscience of the Court. Only if the Arbitrator acted contrary to or went beyond the expressed law of the contract Section 34 would be attracted.

19. We may refer to the recent judgment of the Supreme Court in *Associated Builders v. Delhi Development Authority*, reported in (2015) 3 SCC 49, where the Supreme Court unequivocally held that none of the grounds in Section 34(2)(a) of the 1996 Act deal with the merits of the decision rendered by an Arbitral Tribunal. It is only when the award is in conflict with the public policy of India as prescribed in Section 34(2)(b)(ii) of the 1996 Act, that the Court might interfere. Patent violation of Indian statutes, of course, which would adversely affect the administration of justice could be interfered with as contrary to the fundamental policy of Indian Law. However, this is not a case of patent violation of any statute.

20. In view of the findings arrived at by the learned Tribunal, which have been approved by the learned Single Judge, it cannot also be said that there was absence of judicial approach. Having arrived at the finding that there had been breaches on the part of the appellant, the learned Tribunal was of the view that the first respondent was entitled to be compensated for loss of damages. It is a well settled principle which needs no reiteration that contractual breaches give rise to claim for damages.

21. The Arbitral Tribunal has in effect and substance awarded damages. Unlike liquidated damages which have to be computed on the basis of evidence, damages in the nature of unliquidated damages for computation of loss of profit might be computed based on some amount of guesswork and/or estimation. Awarding of loss of profit at the rate of 8% of the contract value in a turnkey project cannot be held to be so unreasonable and if at all unreasonable, to be construed as against public policy. In our view, the learned Single Bench very rightly refused to set aside the award. We find no grounds for interference with the judgment under appeal.

The appeal is, accordingly, dismissed. No costs. Consequently, M.P.No.1 of 2013 and C.M.P.No.6914 of 2017 are closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To:

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

+1cc to Mr.R.Karthikeyan, Advocate, S.R.No.2483
+1cc to M/S.Rank Associates, Advocate, S.R.No.2587

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O.S.A.No.377 of 2013

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