



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 01.03.2018

CORAM:

**THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN**

**and**

**THE HONOURABLE MRS.JUSTICE R.HEMALATHA**

C.M.A. (MD).No.975 of 2014

and

M.P.(MD).No.2 of 2014

New Sun Beam Builders Private Limited,  
(a registered company under the Company's Act),  
represented by its Managing Director,  
K.Kundavi,  
W/o. Komagan,  
Pachayappa Mudaliyar Street,  
Kumbakonam Town,  
Thanjavur District.

... Appellant

Vs.

M/s. Pujyashri Bhaskaracharya Memorial  
Foundation,  
Chennai, having his Office at  
New No.20, Old No.43,  
Babu Rajendran Prasad Ist Street,  
West Mambalam,  
Chennai.

... Respondent

Prayer: Civil Miscellaneous Appeal is filed under Section 37 of Arbitration and Conciliation Act, 1996, against the order dated 06.11.2013 made in Arbitration Original Petition No.72 of 2011 on the file of the Principal District Judge, Thanjavur.

|                |   |                   |
|----------------|---|-------------------|
| For Appellant  | : | Mr.A.N.Ramanathan |
| For Respondent | : | No appearance     |

### J U D G M E N T

(Judgment of the Court was delivered by M.SATHYANARAYANAN,J.)

The appellant is the respondent in the arbitration proceedings initiated by the respondent. Two Arbitrators, vide award dated 27.08.2010, held that the amount of Rs.1,67,000.00/- is overpaid to the second part and further held that the said sum is only an advance amount and therefore, the contractor / the appellant herein, should undertake the balance works for completion of the project work within the stipulated time (two months) from the date of award and for an amount of Rs.13,05,282.54 and in the event of the

contractor (Second part) refuses to undertake the work or commence the work within three days from the date of the award, observed that the contract stands terminated and the contractor / appellant should leave the site in "as is, where is" condition and the first part has all the right to engage other agencies to carry out the balance works. The appellant herein, who is the party of the second part to the said arbitral award, challenging the legality of the same, filed an appeal before the Court of Principal District Judge, Thanjavur in A.O.P.No.72 of 2011 and the said appeal, after contest came to be dismissed, vide order dated 06.11.2013 and challenging the legality of the same, has filed the Civil Miscellaneous Appeal.

2. Facts leading to the filing of this appeal, necessary for the disposal, are briefly narrated as follows:-

The respondent herein had engaged the services of the appellant to put up a construction and he filed a claim petition before two Arbitrators and the respondent therein / the appellant herein has filed a counter statement and on his pleadings, the Arbitrators had formulated the following points of disputes for adjudication:

A. Dispute regarding area & measurements of the structures.

B. Dispute regarding the rates adopted per sq.ft. of construction of Meditation Hall, Cottages, Annakootam, front E.B.room & Toilet block.

C. Pending work not done by the builder.

The evidence were let in and the Arbitrators after taking into consideration the pleadings, oral and documentary evidence and on appreciation of the same, had passed the award and it is relevant to extract the same.

#### Formulation of Award

##### Calculation as per item wise rate

|                                                                                                      |                          |
|------------------------------------------------------------------------------------------------------|--------------------------|
| Cost of construction of the buildings as per item wise rate                                          | = Rs.1,32,22,277.00      |
| Considering the contingencies, wastages and profit margin for the project in general practice of 10% | = Rs. 13,22,227.70 (+)   |
|                                                                                                      | -----                    |
|                                                                                                      | Rs.1,45,44,504.70        |
|                                                                                                      | -----                    |
| Cost of Extra works (mutually agreed by both parties)                                                | = 11,37,431.00 (+)       |
|                                                                                                      | -----                    |
| Total cost of the construction with the present condition                                            | = Rs. 1,56,81,935.70     |
|                                                                                                      | -----                    |
| Amount received by the contractor                                                                    | = Rs. 1,58,49,702.00 (-) |
|                                                                                                      | -----                    |
| Excess payment to the contractor                                                                     | (-) Rs.1,67,767.00       |

#### Award

<https://hcservices.courts.gov.in/hcservices/> having considered all evidence, facts, submissions of both parties and based on the workings as per item wise rate

calculations, we find that the amount of Rs.1,67,000.00 (Rupees One lakh and sixty seven thousand only) is over paid to the second part

With this consideration of Rs.1,67,000.00 (Rupees one lakh and sixty seven thousand only) as an advance amount, the contractor (Second part) should undertake the balance works for completion of the project within the specified time (two months) from the date of award and for an amount of Rs.13,05,282.54 (As per the abstract estimate of balance works)

If the contractor (Second part) refuses to undertake the work or commence the work within three days from the date of award, then the contract is terminated and contractor (second part) should leave the sit inn "as is, where is" condition and the first part has all the right to engage other agencies to carry out the balance works.

3. The party of the second part of the said award / the appellant herein, aggrieved by the said award, filed an appeal in A.O.P.No.72 of 2011 on the file of the the Court of Principal District Judge, Thanjavur and apart from raising the grounds on the merits of the award, also took a stand that one of the Arbitrators viz., Thiru.V.K.Sankar involved in a legal proceedings both civil and criminal and was convicted by the Court of law and as such, he suffered a disqualification, and since he failed to disclose the said fact, the award is vitiated and prayed for interference.

4. The respondent herein, who is also arrayed as the respondent in the said appeal filed his counter affidavit. The appellate Court has formulated the following points for determination:

A. Whether the arbitrator is disqualified to conduct the arbitration?

B. Whether the arbitration was conducted fairly by giving sufficient opportunity to both the parties in accordance with law?

(c), whether any sufficient reason is proved to interfere with the award passed by the arbitrator?

5. The lower appellate Court had found that the arbitration award was passed on 27.08.2010 and Ex.R1 / judgment of the Principal Assistant Sessions Court, Kumbakonam, dated 21.10.2010 in S.C.No.245 of 2007, coupled with Exs.R2 and R3 would disclose that initially the F.I.R. was registered against one of the Arbitrators viz., one V.K.Sankar under Section 174 of Cr.P.C., and on culmination of the investigation, it was altered into Section 304(B) I.P.C. and the conviction awarded to him vide Ex.R1 dated 21.10.2010 was set aside under Ex.R3, dated 28.02.2011 in C.A.No.101 of 2010 by the Court of First Additional Sessions Judge, Thanjavur and taking note of the same, the appellate Court found that on the date of passing of the award, the one of the Arbitrators was not a convicted accused and therefore, rejected the contention put forth on this issue. As regards the other issues, the lower appellate Court found that in terms of Section 34 of the Arbitration and Conciliation Act, 1996 (in short Arbitration Act), no ground has been made out to interfere with the award and also found that the award was received by the



applicant on 07.09.2010 and however, the appeal was filed on 20.06.2011 and the same is in violation of Section 34(B) of the said Act and had held that the appeal itself is not maintainable and citing the reasons, dismissed the appeal vide impugned order dated 06.11.2013 and challenging the same, the present appeal is filed.

WEB COPY

6. Mr.A.N.Ramanathan, learned counsel for the appellant / party of the second part to the arbitral award, would submit that under Section 12 of the Arbitration Act, the Arbitrator is bound to disclose the said fact and admittedly, he did not disclose the fact of pendency of criminal case against him and as such, on the date of passing the award, he was disqualified. It is the further submission of the learned counsel for the appellant on the merits of the matter, that the respondent / the party of the first part has failed to produce any document to prove that a sum of Rs.4,37,692/- (Rupees four lakhs thirty seven thousand and six ninety two) was paid to the appellant / party of the second part and with regard to the quantity of 7,320 cement bags, the Arbitrators had wrongly calculated as if 7920 bags were supplied and the difference in value comes around Rs.1,40,000/- (Rupees one lakh and forty thousand only) and the said amount ought to have been deducted out of the award amount and hence, prayed for interference.

7. Though the respondent has been served and their name appears in the cause list, there is no representation on behalf of the respondent.

8. The following questions arise for consideration in this appeal :

(i) Whether the appeal filed by the appellant in A.O.P.No.72 of 2011 on the file of the Court of Principal District Judge, Thanjavur is barred by limitation?

(ii) Whether the award dated 27.08.2010 passed by the Arbitrators, warrants interference?

9. It is relevant to extract hereunder Chapter VII of the Arbitration and Conciliation Act, 1996, which deals with the Recourse Against Arbitral Award and Section 34 speaks about the application for setting aside arbitral award:

*"As per Sub-section (3) of Section 34 " 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."*



10. The arbitration award was passed on 27.08.2010 and the appellant / party of the second part has received the said award on 07.09.2010 and filed A.O.P.No.72 of 2011 before the appellate Court on 20.06.2011.

11. It is to be noted at this juncture that insofar as the limitation is concerned, Arbitration Act, is the self contained Code and the period of limitation provided is 90 days + 30 days.

12. Admittedly, even at the time of presentation of the appeal, the period of 90 days got elapsed and it is also pertinent to point out at this juncture that the appellant did not file any separate application for condonation of delay and even assuming that such an application was filed, still delay could not have been condoned for the reason that the appeal was beyond the period of 90 days and on account of the fact that the Act is a self contained code insofar as the limitation is concerned, this Court is not having the power to condone the delay beyond the period of 90 days.

13. Therefore, this Court is of the considered view that the appeal filed by the appellant before the appellate Court is hopelessly, barred by limitation and therefore, question No.(i) is answered against the appellant.

14. Insofar as the merits of the matter is concerned, once this Court is of the view that the appeal is not maintainable, as it is being barred by limitation, and it cannot deal with the merits of the case.

15. It is a settled position of law that the award passed by the Arbitrator can be set aside under Section 34 of the Arbitration Act, on the following grounds.

In 2013(4) CTC 435 (R.Narayanan v. India Info Line Securities Private Limited and another), paragraph - 7 reads as under:

"7. I have carefully considered the above contentions. It is needless to point out that the scope of an enquiry under Section 34 of the Act is very limited. A Court is entitled to set aside an Arbitration award, only if the Petitioner satisfies the Court (a) that he was under some incapacity; (b) that the Arbitration Agreement was not valid under the law to which the parties have subjected themselves; (c) that he was not given proper notice of the appointment of the Arbitrator or of the Arbitral proceedings, or otherwise was unable to present his case; (d) that the Arbitral award deals with a dispute not contemplated by or not falling within the terms of submission to arbitration; (e) that the composition of the Tribunal was not in accordance with the Agreement of the parties; (f) that the subject matter of the dispute is not capable of settlement by arbitration; and (g) that the Arbitral award is in conflict with the Public Policy of the country.



16. None of the contingencies enumerated above have no application to the case on hand. The primordial submission made by the learned counsel for the appellant that since on the date of accepting his position as Arbitrator, one of the Arbitrators viz., Mr.V.K.Sankar was facing the criminal prosecution and he failed to disclose the said fact.

17. Section 12 of the Arbitration Act deals with the grounds for challenge and as per explanation (1) " the grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator "and as per explanation 2 " the disclosure shall be made by such person in the form specified in the Sixth Schedule".

18. A perusal of Schedule Nos.5 and 6 would also disclose that the circumstances enumerated have no application insofar as the point alleged by the learned counsel for the appellant is concerned and admittedly, against one of the arbitrators, the conviction recorded by the trial Court under Ex.R1 dated 21.10.2010 was set aside by the lower appellate Court under Ex.R3 dated 28.02.2011 and rightly pointed out by the lower appellate Court, on the date of passing of the award, the one of the arbitrators did not suffer any disqualification.

19. In the considered opinion of the Court, in the light of the reasons assigned above, the impugned order dated 06.11.2013 passed in A.O.P.No.72 of 2011 on the file of the Court of Principal District Judge, Thanjavur, warrants no interference. In the result, the appeal is dismissed, confirming the order dated 06.11.2013 passed in A.O.P.No.72 of 2011. No costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(C.O)

/True Copy/

Sub-Assistant Registrar

To

The Principal District Judge,  
Thanjavur.

+One cc to Mr.AN.Ramanathan, Advocate, SR.No.52394

akv

RL/3C/6P/KK/SAR1/23/3/2018

C.M.A. (MD) .No.975 of 2014

01.03.2018