

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 11.12.2018

Delivered on : 22.01.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Civil Miscellaneous Appeal No.1371 of 2015 and
M.P.No.1 of 2015

1. National Highways Authority of India
G5 & 6, Section 10, Dwarka
New Delhi - 110 075.
2. The General Manager (T) TN
National Highways Authority of India
(Ministry of Road Transport and Highways)
G5 & 6, Section 10, Dwarka
New Delhi - 110 075.
3. The Chief General Manager (T)
Chennai Region
National Highways Authority of India
Sri Towers, 3rd Floor
DP-34, Industrial Estate
Guindy, Chennai - 600 032.
4. The Project Director
Project Implementation Unit (NS) NHAI
Door No.212-3/D3-1, Sri Nagar Colony
Narasothipatti,
Salem - 636 004. .. Appellants/Respondents 1-4

Vs.

Mukesh & Associates
rep. By its Managing Partner, D.Manojkumar
2/6, Ranganathar Avenue
Perumal Malai Main Road
Narasothipatti,
Salem - 636 004.

.. Respondent/Petitioner

Civil Miscellaneous Appeal filed under Section 37 of the
Arbitration and Conciliation Act, 1996 as against the order

dated 15.4.2015 made in A.O.P.No.262 of 2014 passed by the learned Principal District Judge, Salem.

For Appellants : Mr.Richardson Wilson
for M/s.P.Wilson Associates

For Respondent : Mr.R.Parthasarathy

JUDGMENT

Calling in question the order dated 15.4.2015 made in A.O.P.No.262 of 2014 passed by the learned Principal District Judge, Salem, the present appeal has been filed.

2. Succinctly put, the facts leading to the filing of the present appeal are as under: The appellants - National Highways Authority of India (NHAI) are involved in the development, maintenance and management of National Highways, while the respondent is a partnership firm engaged in Civil, Architectural Consultancy and other related works.

3. The respondent was awarded the contract of consultancy for 4 laning of Km 180/000 to Km 199/200 on Thumbipadi - Salem Section on NH-7 in the State of Tamil Nadu - package No.NS-26/TN by the appellants on 9.8.2001 and the appellants and the respondent entered into a Consultancy Agreement on 9.8.2001 itself. It is stated that as per the agreement, the respondent was required to render consultancy services for the above said project, which was awarded by the respondents to one contractor.

4. It is stated that the project for which the Consultancy Agreement was entered into between the parties was completed by the contractor way back in 2009 and after completion of the work, the appellants have issued a Completion Certificate on 3.6.2011. It is averred that on 18.7.2014, the appellants have issued a show cause notice to the petitioner alleging that there were lapses and poor performance qua the Consultancy Agreement. In response to the said notice, the respondent submitted it's explanation on 28.9.2014.

5. However, apprehending continuous threat of blacklisting, the respondent filed A.O.P.No.262 of 2014 seeking an order of ad interim injunction against the appellants, restraining them from taking any action against the respondent like blacklisting, etc., till the disposal of the arbitration proceedings.

6. The appellants filed their counter affidavit before the Court below, inter alia, stating that as per Section 28 of the National Highway Authority Act, 1988, no suit, prosecution or

other legal proceedings shall lie against the authority and, therefore, the petition filed by the respondent is not maintainable.

7. The learned Principal District Judge, by the order under challenge, allowed the petition filed by the respondent.

8. In this backdrop, the present appeal is filed by the NHA I and the contentions of Mr. Richard Wilson, learned counsel appearing on behalf of NHA I are as under:

- (a) The issue qua blacklisting of the respondent from participating in the future projects, which is the subject matter of the show cause notice, is not covered by the Consultancy Agreement and, therefore, the same is not an arbitrable dispute;
- (b) Courts in Delhi alone have jurisdiction to entertain any application under the Arbitration and Conciliation Act and the District Court, Salem has no jurisdiction at all and, therefore, the impugned order has been passed without jurisdiction and is a nullity in the eye of law;
- (c) The respondent filed W.P.No.27584 of 2014 assailing the show cause notice issued by the appellants and on being unsuccessful in getting interim orders has filed the petition under Section 9 of the Arbitration and Conciliation Act and obtained interim orders from the Court below and clandestinely withdrew the writ petition thereafter and, therefore, the petition under Section 9 of the Act is hit by the principle of res judicata; and
- (d) The Court below had virtually quashed the show cause notice and had given a final verdict against the appellants, ignoring the facts that the NHA I had fixed a date of hearing the respondent and the respondent had never sought for an arbitration in the petition filed under Section 9 of the Act.

9. Per contra, Mr. R. Parthasarthy, learned counsel appearing on behalf of the respondent contended as under:

- (a) The respondent had requested for an amicable settlement of the disputes by letter dated 7.7.2015 and the same was agreeable to the appellants as per their letter dated 15.7.2015 and in view of the appeal pending before this Court, negotiations could not take place; and
- (b) Inasmuch as the Consultancy Agreement dated

9.8.2001 contemplates at first an amicable settlement and thereafter provides for appointment of arbitrators in the event of failure to arrive at settlement, the order of the Court below warrants no interference.

10. Notwithstanding the above contentions, the learned counsel for the respondent has filed an affidavit duly signed by the respondent to the effect that the respondent is willing to cooperate with the appellants for amicable resolution of disputes in the interest of justice. He also stated that the respondent had also addressed a letter dated 4.7.2018 to the appellants to the above said effect.

11. I heard Mr. Richard Wilson for M/s. P. Wilson Associates, learned counsel for the appellants and Mr. R. Parthasarathy, learned counsel for the respondent and perused the documents available on record.

12. A challenge to a show cause notice has to be made on the ground of jurisdiction or ex facie arbitrariness - where the extent of the arbitrariness is obvious, an order of blacklisting cannot reasonably follow therefrom. In the case on hand, it is not the case of the respondent that the appellants lack authority to issue the show cause notice. The show cause notice was challenged on the ground of mala fides.

13. Mala fides, in the context of an order of blacklisting, would mean a biased action, to wit, an action which is not in good faith and is actuated by grudge for any oblique or ulterior purpose. The assessment on such count has to be on the twin tests of whether there is a personal bias or oblique motive and whether it is a valid exercise of authority.

14. A bare perusal of the documents available on record, more particularly, Ex.A2 (dated 22.6.2009) and Ex.A4 (dated 3.7.2011), both issued by the fourth respondent, reveals that the respondent has been carrying out work from August, 2001 and that the work has been completed. It is also seen from the records that the Contractor who had been engaged by the appellants had sought extension of time for execution of the work and the respondent, being a Consultant, had recommended for terminating the agreement of the Contractor, which was not done by the appellants. The appellants all along granted extension of time to the Contractor to enable him to complete the work and also arranged for financial assistance to him.

15. A reference to Ex.A3, a report of the Comptroller and Auditor General of India for the year ending March, 2013, categorically records that "Undue favour was extended to a

contractor due to non termination of the agreement coupled with payment of escalation charges of Rs.10.56 Crores and non recovery of liquidated damages of Rs.7.06 Crores during the years 2006 to 2009, in deviation to the terms of agreement despite substantial time and cost overrun for reasons attributable to the contractor." In the said report, it has been further stated that "The consultant to the project, Mukesh & Associates had intimated the Authority in May 2007 that the Contractor stopped the work beyond 28 days and recommended termination of the contract and execution of the balance work through any other agency in accordance with the terms of the agreement, Authority, however, allowed the Contractor to continue the work on grounds that termination of contract and invitation of fresh bids would involve cost estimates higher than existing contract rates."

16. A reading of the above report makes it clear that it is only as a consequence to the report of the Comptroller and Auditor General that the appellants have issued the show cause notice that too after a lapse of five years from the date of completion of the contract work, to shift the blame on the respondent. A reading of the above report makes it further clear even during the subsistence of the contract, during 2007, the respondent had recommended for termination of the contract, however, the appellants allowed the Contractor to continue the work paying no heed to the recommendation of the respondent.

17. When the report of the Comptroller and Auditor General specifically refers to the recommendation of the respondent seeking to terminate the contract, it is not known as to how the appellants are taking a diametrically opposite stand to fix the responsibility on the respondent that too after five years of completion of the contract.

18. A reading of the show cause notice shows that the contents, allegations and calling for explanation, etc., all relate to the subject matter of the Consultancy Agreement entered into between the parties and certainly, it is an action initiated as a result of the Agreement entered into between the parties. The appellants have issued a show cause notice and the respondent submitted its explanation and also sought for appointment of an Arbitrator. For clarity on this issue, it is apposite to refer to the relevant portion of the show cause notice dated 18.7.2014. The show cause notice shows the subject as under:

"Four laning from Km 180/000 to Km 199/200 on Thumbipadi to Salem Section on NH-7 in the State of Tamil Nadu - package No.NS-26/TN - Lapses and Poor performances in the Consultancy Agreement - Show Cause Notice for action as per Agreement - Reg."

The relevant portion of the show cause notice reads thus:

"AND WHEREAS you, the above named addressee not only failed to comply with your contractual obligations under the Contract Agreement, but failed to act as a faithful Consultant to Employer in terms of the Consultancy Agreement.

AND WHEREAS, your defaults, lack of professionalism in providing the services and breach of the terms and conditions of the Contract Agreement have led to huge financial implications for the Employer besides establishing your lack of competency in dealing with Contractual matters and providing services at the required level.

The excess payment was also released to the Contractor due to your faults. Whereas, the Contractor has not remitted the amount despite repeated requests by Employer and rather invoked the Arbitration process. This is solely on account of mismanagement of the Contract Agreement, on your part."

All this, only goes to show that the entire dispute flows from the agreement entered into between the parties and nothing else. Therefore, it is certainly an arbitrable dispute.

19. That apart, it is also seen from the records that pending the present appeal, on 7.7.2015, the respondent addressed a letter to the appellants seeking amicable settlement of the dispute and the same was also found acceptable to the appellants as could be seen from the letter dated 15.7.2015, but for the requirement of a power of attorney in favour of the authorized person to represent the respondent qua negotiations for amicable settlement. The respondent, in response to the above said communication, by letter dated 27.7.2015, enclosed a power of attorney, thereby satisfying all the requirements to settle the matter amicably. Moreover, the respondent had addressed another letter dated 4.7.2018 expressing its intention to partake in the negotiations for amicable settlement.

20. From the above, it is amply clear that the entire cause of action for issuance of show cause notice is the report of the Comptroller and Auditor General and the appellants, to save their skin, intend to fix liability on the respondent. Moreover, when the respondent is willing to amicably settle the matter and the same has also been accepted by the appellants, as could be seen from their letter dated 15.7.2015, it is not known why the present appeal is being contested taking a different stand.

21. Clause 8.2 of the agreement entered into between the parties states about arbitration. It contemplates that any dispute between the parties as to the matters arising pursuant to the agreement, which cannot be settled amicably within sixty days after receipt of one party of the other party's request for such amicable settlement, shall be referred to adjudication of a Committee of three Arbitrators.

22. In the case on hand, the trial Court observed that the dispute and the allegations contained in the show cause notice issued by the appellants relate to the matters contained in the agreement entered into between the parties. This Court, in view of the foregoing reasoning, does not propose to take a different stand. Certainly, the allegations and counter allegations can be dealt with in the arbitration proceedings, if any, to be initiated subject to the result of the negotiations for amicable settlement.

23. Qua the bar of jurisdiction of the Civil Court to entertain suit against the National Highway Authority of India, it is apposite to refer to a decision of learned Single Judge of this Court in IVRCL Infrastructures and Projects Ltd. v. National Highways Authority of India Ltd. And another, (Judgment dated 24.1.2011 passed in C.M.A.(MD) No.669 of 2009), wherein it is held as under:

"12. Section 28 of the NHAI Act is extracted as follows:

'28. Protection of action taken in good faith -

(1) No suit, prosecution or other legal proceeding shall lie against the Authority or any member or officer or employee of the Authority for anything which is in good faith done or intended to be done under this Act or the Rules or regulations made thereunder.

(2) No suit, prosecution or other legal proceeding shall lie against the Authority or any member or officer or employee of the Authority for any damage caused (3) or likely to be caused by anything which is in good faith done or intended to be done under this Act or the rules or regulations made thereunder.'

13. The said section is only to give protection of action taken in good faith. Therefore the said Section cannot be extended to bar the civil court's jurisdiction under Section 9 of the Arbitration and

Conciliation Act. The National High Ways Authorities of India Act, 1988 never overlapped with the arbitration and conciliation Act and therefore there is no question of any conflict or overriding of the other Act. When clause 67.3 of the agreement itself speaks about the resolution of dispute by way of arbitration as per the Arbitration and Conciliation Act 1996, the conclusion of the Trial Court that the civil court's jurisdiction under Section 28 of the NHAI Act is erroneous and the same is liable to be set aside. The other finding of the court that the intention of the government is to confer jurisdiction of the higher forum, since the dispute involves higher value has no basis.

14. In view of that, this court holds that:

- 1) Section 28 of the National High Ways Authorities of India Act 1988 does not bar the jurisdiction of the Civil Court to entertain Section 9 application under the Arbitration and Conciliation Act, 1996.
- 2) As per Sections 2(1) (e), 9, 34 and 36 of the Arbitration and Conciliation Act 1996, the Trial court has got jurisdiction to entertain an application under Section " 9 " of the Act.
- 3) The conclusion of the Civil Court that the High Court alone has got jurisdiction under Section 2 (1) (e) of the Act is erroneous. Therefore return of petition for presentation before appropriate forum is set aside. In view of the above reasoning, the civil court should not have returned the papers without deciding the matter on merits. In this case, the dispute has already arisen. As per clause 67.1 of the contract agreement, the parties have approached the Dispute Review Board. Irrespective of the out come of the Board proceedings, the out come would only be recommendatory in nature as seen in Clause 67.1 of the contract. Moreover the Board has got no power to grant interim orders. Therefore, the appellant rightly approached the civil court under Section " 9 " of the Act for interim relief. As per Section 9, the civil court has to entertain the application and decide the matter on merits. The Civil Court after considering prima facie case, balance of convenience granted interim order and therefore the same order is required to be continued till the disposal of Section 9 application."

(emphasis supplied)

24. In view of the above decision, this Court does not intend to take a different stand qua the entertaining of petition under Section 9 of the Arbitration and Conciliation Act by the Court below. The petition is certainly not barred by Section 28 of the NHAI Act. The trial Court, in fact, had made it crystal clear that the order of interim injunction is granted till the arbitration proceedings are concluded. It is for them to resolve the disputes by way of amicable settlement as agreed by them in the letters, referred supra, or to invoke to arbitration clause in the agreement and appoint the Arbitral Tribunal.

25. The Arbitration and Conciliation Act, 1996 is enacted to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards, as also to define the law relating to conciliation and for matters connected therewith or incidental thereto. Section 9 of the Arbitration and Conciliation Act relates to interim measures by Court and, under clause (ii) thereof, the party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a Court for an interim measure of protection in respect of (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement; (b) securing the amount in dispute in the arbitration; and (c) such other interim measure of protection as may appear to the Court to be just and convenient; and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it. Chapter IX of the Act relates to Appeals and Section 37 thereunder relates to appealable orders. Sub-section (1) (a) of Section 37 stipulates that an appeal shall lie from an order, granting or refusing to grant any measures under Section 9, to the Court authorised by law to hear appeals from original decrees of the Court passing the order.

26. Since jurisdiction to order interim measures is conferred on the Court under Section 9 of the Act in respect of any grievance of a party before or during arbitral proceedings, it is certain that the Court has the power, authority and jurisdiction to order ad-interim measures as well, and pending ordering of measures after hearing affected parties. Section 9 of the Act incorporates a power in the Court to grant ad-interim measures, pending grant of measures after hearing the concerned parties, and without the necessity of reliance on the provisions of Order XXXVIII Rule 5 of CPC. An order under Section 9 of the Act, granting ad-interim measures, can be appealed against under Section 37 of the Act. The appeal provided under Section 37 of the Act comprises within its locus an appeal against an order granting ad-interim measures, pending passing of final orders,

under Section 9 of the Act.

27. The rule regarding interference by the Appellate Court has been laid down by the Hon'ble Supreme Court as well as this Court in umpteen number of decisions. It requires the Appellate Court to exercise circumspection in making interference in the use of the discretion by the trial court, unless the appellant would be able to show that the said court while granting or withholding injunction has acted unreasonably or capriciously or has ignored relevant facts. Reliance in this regard can be placed on the judgment of the Hon'ble Supreme Court *Wander Ltd. v. Antox India P. Ltd.*, 1990 Supp SCC 727. In the instant case, there is nothing on record to suggest that discretion has been exercised by trial court capriciously or unreasonably.

28. One more allegation levelled against the respondent is that it had filed a writ petition and on being not successful in getting interim order, it had filed a petition before the Trial Court clandestinely and obtained interim order. However, a bare perusal of the affidavit filed by the respondent shows that the filing of writ petition was clearly stated and, in fact, the trial Court has noted the said aspect. Therefore, the question of res judicata does not arise, inasmuch as the writ petition was withdrawn on 7.11.2014, prior to the impugned order passed by the trial Court on 15.4.2015.

29. Anent the consequences of blacklisting, it is apposite to refer to the decision of the Hon'ble Supreme Court in *Erusian Equipment & Chemicals Ltd. v. State of W.B.*, (1975) 1 SCC 70, wherein the Hon'ble Supreme Court examined the entire aspects of blacklisting and the requirement to follow principles of natural justice. The Hon'ble Supreme Court observed as under:-

"12. Under Article 298 of the Constitution the executive power of the Union and the State shall extend to the carrying on of any trade and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public

contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting. A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation. When the State acts to the prejudice of a person it has to be supported by legality.

....

15. The blacklisting order does not pertain to any particular contract. The blacklisting order involves civil consequences. It casts a slur. It creates a barrier between the persons blacklisted and the Government in the matter of transactions. The blacklists are 'instruments of coercion'.

....

20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist."

30. In the case on hand, the show cause notice refers to the Consultancy Agreement entered into between the parties and as observed earlier, the same is a sequence to the report of the Comptroller and Auditor General. The respondent in all fairness, even as per the report of the Comptroller and Auditor General, pointed out all is not well with the manner in which the Contractor is executing the work. However, it was the appellants who did not pay heed to the same. The action of the respondent which lead to the issuance of show cause notice certainly is triable and in terms of the Consultancy Agreement, the parties should agree to meet halfway and try to amicably settle the issue, to which both sides, as referred supra, agreed as seen from the correspondence exchanged by the parties.

31. In any event, Clause 8.1. of the Consultancy Agreement provides for amicable settlement. The said clause reads as under:

"8.1. Amicable Settlement: The Parties shall use their best efforts to settle amicably all disputes arising out of or in connection with this Contract or the interpretation thereof."

32. The respondent addressed a letter dated 7.7.2015 to the

appellants for amicable settlement of the dispute and such request was also considered and responded by the appellants by letter dated 15.7.2015 stating that Power of Attorney should be filed, which was also complied with by the respondent. Even subsequently the respondent sent a letter on 4.7.2018 to the appellants assuring to extend fullest of cooperation for settlement of the dispute.

33. There is no dispute with regard to the proposition laid down in various decisions cited on either side. But, the facts in the instant case are distinguishable and peculiar. So, this Court does not intend to deliberate on each decision separately, but for what has been noted in the order as aforesaid. In view of the reasoning given above, the other contentions touching upon the merits of the matter, pale into insignificance.

34. In the result:

(a) this Civil Miscellaneous Appeal is dismissed by confirming the order passed in A.O.P.No.262 of 2014 dated 15.4.2015 on the file of the learned Principal District Judge, Salem;

(b) both the parties are directed to approach the Arbitrator for settling their disputes as early as possible. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

vs

To

1. The Principal District Judge
Salem.

2. The Section Officer,
V.R.Section, High Court, Madras. (2 Copies)

+1 cc to Mr.R.Parthasarathy, Advocate Sr.No.4463

+1 cc to M/s.P.Wilson Associates, Advocate Sr.No.4914

order made in
Civil Miscellaneous Appeal No.1371 of 2015 and
M.P.No.1 of 2015

SKV(CO)
CSL/28.01.2019