

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 12.04.2019

Order Reserved on: 28.03.2019	Order delivered on: 12.04.2019
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CORAM :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
AND
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

O.S.A.No.84 of 2019
and C.M.P.No.7789 of 2019

M/s.United Plantation Limited
A Company incorporated under
The Companies Act, 1956,
Having its Administrative Office at
No.78, Cheran Towers,
Government Arts College Road,
Coimbatore - 641 018. ... Appellant

-vs-

K.Vasu,
Proprietor,
M/s.Hariharan Timber and Fire Wood Depot,
Wellington Bazar, Wellington,
Nilgris. ... Respondent

PRAYER: Original Side Appeal filed under Order XXXVI Rule 1 of O.S. Rules r/w. Section 37(1)(B) of the Arbitration and Conciliation Act, 1996 and Clause 15 of the Letters Patent to set aside the judgment and decretal order dated 13.07.2018 in O.P.No.141 of 2017 and consequently set aside the Arbitral Award dated 10.08.2016.

For Appellant : Mr.Ramakrishnan Viraraghavan
Senior Counsel
for Mr.Arjun Suresh
For Respondent : Mr.R.Bharat Kumar

JUDGMENT

(Judgment was delivered by T.S.Sivagnanam, J.)

This appeal filed under Order XXXVI Rule 1 of O.S. Rules r/w. Section 37(1)(B) of the Arbitration and Conciliation Act, 1996 ('Act' for brevity) is directed against the order in O.P.No.141 of 2017 dated 13.07.2018.

2.The appellant filed the said Petition in O.P.No.141 of 2017 under Section 34(2) of the Act to set aside the additional award dated 29.09.2016 passed by the Sole Arbitrator (hereinafter referred to as "the Tribunal"). The said petition was dismissed by the impugned order.

3.The appellant appointed the respondent as a Contractor for felling trees at Terrace Tea Estate in the Nilgiris District covering an extent of 450 acres. A Memorandum of Agreement (MOA) dated 14.02.2013 was entered into, under which the respondent was entitled to cut Blue gum and Wattle trees at a total cost of Rs.45,00,000/- excluding trees in 8 hectares from and out of the total extent of 450 acres. The respondent paid the entire consideration in terms of the MOA and the appellant agreed to cooperate with the respondent for the purpose of obtaining required statutory approvals. The MOA stated that the respondent should remove the trees on or before 13.05.2014. The Forest Department granted permission vide order dated 30.05.2013 to cut trees in 5 hectares at the first stage, to be cut within four months. The appellant was required to identify the areas and the trees to be cut within one week in advance. The respondent cut and removed the trees in 5 hectares and the forest authorities have identified and inspected the progress of work and removal of trees so as to prevent any illegal felling. The appellant approached the District Collector seeking permission for cutting and removing trees in another extent of 5 hectares vide application dated 17.07.2013. At that juncture, their appears to have arisen a dispute resulting in a complaint lodged by the appellant against the respondent to the Forest authorities vide complaint dated 16.07.2013 alleging that the respondent had illegally cut trees in unauthorized areas and in areas not permitted by the appellant. This lead to the dispute between the parties.

4.Clause 21 of the MOA provides for arbitration between the parties in the event of dispute. The respondent approached the District Court vide application under Section 9 of the Act which was ultimately allowed by order dated 07.03.2014 granting an order of injunction restraining the appellant from interfering with the respondent in cutting and removing the trees as mentioned in the MOA. The appellant filed an appeal before this Court in C.M.A.No.976 of 2014 which was allowed and the matter was remanded to the District Court for fresh consideration. The said application in AOP.No.6 of 2014 was allowed by the District Court by order dated 21.04.2014 granting injunction as sought for by the respondent. Pursuant to which, the District collector granted permission to the respondent on 06.06.2014 to cut the trees in the extent of 5 hectares being the second phase. When the respondent approached the District Forest Officer (DFO) for issuance of Form II license, the appellant

raised an objection and parallelly the appellant filed an appeal before this Court in C.M.A.No.1818 of 2014 against the order passed by the District Court in AOP.No.6 of 2014 by granting injunction in favour of the respondent. This Court by order dated 04.07.2014 appointed a Hon'ble Retired Judge as the Sole Arbitrator (Tribunal) to decide the issue. The respondent filed a claim statement before the Tribunal for the following reliefs:

"a) permitting the claimant to cut and remove the remaining wattle and blue gum trees as per the agreement dated 14.02.2013 in the respondent's estate known as Terrace Estate in Naduvattam Village in Nilgiris District and also permitting the claimant to approach the District Collector, District Forest Officer or any other authorities for the said purpose without reference to the respondent.

b) directing the respondent to cooperate with the claimant for achieving the object of cutting of the trees and removal of the felled trees as agreed under the Agreement dated 14.02.2013.

c) directing the respondent to pay a sum of Rs.75,00,000/- (or any other huge sum as decided by the Tribunal) to the claimant by way of damages."

5.The appellant filed a counter statement resisting the relief sought for. The Tribunal after considering the oral and documentary evidence passed an award dated 10.08.2016 directing the appellant to pay a sum of Rs.48,90,000/- with interest at the rate of 9% p.a. from 22.09.2014 till the date of the award and thereafter at the rate of 18% p.a. till the date of realisation. A sum of Rs.2,80,000/- was directed to paid as cost within a period of two months from the date of the award, failing which shall be paid with interest at the rate of 6% from the date of award till the date of realisation. Subsequently, the respondent/ claimant filed a petition before the Tribunal under Section 33 of the Act claiming interest at the rate of 12% p.a. This petition was heard and decided by the Tribunal and an additional award dated 29.09.2016 was passed directing that the said sum of Rs.48,90,000/- be paid with interest at the rate of 12% p.a. from 22.09.2014 till 29.09.2016 and thereafter at the rate of 18% p.a till the date of realisation. Challenging the same, the appellant had filed the petition to set aside the award which has been dismissed by the impugned order.

6.Mr.Ramakrishnan Viraraghavan, Barrister-at-law appearing for Mr.S.Arjun Suresh, learned counsel for M/s.Dua Associates submitted that in terms of MOA the maximum limit payable as compensation has been fixed as Rs.25,10,000/- in Clause 17(a) and the award of the Tribunal cannot exceed this amount fixed. In this regard, the learned counsel refer to Section 74 of the

Contract Act. Further, by relying upon the decision of the Hon'ble Supreme Court in the case of Associate Builders vs. Delhi Development Authority [(2015) 3 SCC 49], it is submitted that the Tribunal shall decide the dispute in terms of the contract and the Tribunal having failed to take into consideration Clause 17(a) of the MOA, the award is liable to be set aside as they are in contravention of Sections 18 and 19 of the Act. Further, it is submitted that the Tribunal has extensively relied upon the affidavit filed by the District Forest officer before the National Green Tribunal (NGT) in an application filed by the Director of the appellant in his individual capacity and that could not have been marked as a document by the Tribunal, that too without affording an opportunity to the appellant to cross examine the deponent of the affidavit, namely, the District Forest Officer. Further, it is submitted that the Tribunal violated the procedure which was agreed to between the parties as recorded in paragraph 20 of the award. In this regard, the learned counsel had elaborately referred to the findings recorded by the Tribunal in the award to impress upon this Court that the Tribunal had extensively relied upon the affidavit filed by the District Forest Officer before the NGT. Thus, the endeavour of the learned Senior Counsel is to bring the challenge to the impugned award within the ambit of Section 34(2)(a)(iii) of the Act.

7. Mr. R. Bharat Kumar, learned counsel for the respondent submitted that the award passed by the Tribunal is a reasoned award and the correctness of which was tested by the learned Single Bench and the scope of interference of such an order under Section 37 of the Act is very limited and prayed for confirming the order passed by the learned Single Bench. Further, it is submitted that the argument that award cannot be beyond the maximum limit fixed in terms of Clause 17(a) of MOA is incorrect as the said amount represent the advance amount paid by the respondent/claimant at the time of signing the MOA. Further, the Director of the appellant in his cross examination has admitted that a sum of Rs. 45,00,000/- was paid to him by the respondent pursuant to the MOA. Further, it is submitted that it is incorrect to contend that the Tribunal has extensively referred to and relied upon the affidavit filed by the District Forest Officer before the National Green Tribunal and in fact the learned Tribunal has specifically stated that it has not based its findings on the affidavit filed by the District Forest Officer before the NGT. Further, it is submitted that sufficient opportunity was granted to the appellant by the Tribunal and this has been recorded by the Tribunal in several paragraphs of the award and the conduct of the appellant was also noted by the Tribunal. Further, it is submitted that no documents were produced by the appellant before the Tribunal and the Tribunal after considering the entire facts has passed a

reasoned award. It is submitted that though there was a direction by the learned Single Bench to deposit a sum of Rs.,22,50,000/- in the name of the Registrar General, Madras High Court in O.P.No.141 of 2014, the learned counsel for the appellant filed a memo stating that he has only a photostat copy of the Fixed Deposit receipt and the direction to deposit the amount was never complied with by the appellant.

8.In fact this objection was raised before us when the case was heard at the stage of condonation of delay in filing this appeal. We directed that the appellant should comply with the direction before the appeal is taken up for admission. Accordingly, the appellant has complied with the direction and the original Fixed Deposit receipt in the name of the Registrar General, Madras High Court in O.S.A.Sr.No.15976 of 2019 has been submitted to the Registrar General on 25.03.2019 and acknowledgment has been produced.

9.By way of reply, Mr.Ramankrishnan would contend that what has been awarded by the Tribunal is damages and the same cannot exceed the amount fixed in Clause 17(a) of the MOA and the Tribunal committed a serious error in awarding a sum of Rs.48,90,000/- and therefore prayed for setting aside the order passed by the learned Single Bench and consequently set aside the award passed by the Tribunal.

10.We have heard the learned counsels for the parties.

11.Section 37(1) of the Act states that an appeal shall lie from the following orders to the Court authorized by law to hear appeals from the original decrees of the Court passing the order namely, (a) granting or refusing to grant any measure under Section 9 and (b) setting aside or refusing to set aside an arbitral award under Section 34. Section 34 of the Act deals with application for setting aside the arbitral award. Such an application may be made for setting aside an award in accordance with sub-Sections (2) and (3) of Section 34 of the Act. The Court while deciding the correctness of the speaking award should not substitute its own for the view taken by the Arbitrator. Where the Arbitrator acts within jurisdiction, the reasonableness of the reasons given by the Arbitrator is not open to the scrutiny by Courts. But, however if the reasons are such as no person of ordinary prudence can ever approve of them or its outrageous and shock the conscience of the Courts, then it is a different situation. It has been held that the degree of such unreasonableness must be greater than the standard in a writ proceedings for issuance of a writ of Certiorari.

12.Bearing the above legal principle in mind we proceed to examine the correctness of the decision taken by the learned Single Bench. Broadly the contentions advanced by Mr.Ramakrishnan, learned Senior Counsel are two fold. Firstly, the Tribunal ignored Clause 17(a) of the MOA which limits the

amount payable to Rs.25,10,000/- and an award exceeding the said amount could not have been passed. In this regard reference was made to Section 74 of the Contract Act as well as Sections 18 and 19 of the Arbitration and Conciliation Act, 1996. The second contention is that the affidavit filed by the DFO before the NGT was marked as a document which could not have been done and the Tribunal having extensively referred to the same ought to have given an opportunity to the appellant to cross examine the deponent to the said affidavit.

13.Clause 17(a) of the Memorandum of Agreement reads as follows:

"17.All statutory dues and liabilities applicable to this M.O.A. shall be payable by the 2nd Party.

a.In the event of the first party committing any default and this agreement is unable to be proceeded with, then the first party will be liable to return the advance amount of Rs.25,10,000/- (Rupees twenty five and ten thousand only) to the second party along with reasonable expenses as agreeable to both parties."

14.In terms of the above clause in the event of the appellant committing any default and the agreement is unable to be proceeded with, then the appellant will be liable to return the advance amount of Rs.25,10,000/- to the respondent along with reasonable expenses as agreeable to both parties. We find that this clause in no manner limits the claim for damages. The amount of Rs.25,10,000/- mentioned in the MOA represents the advance amount which was paid to the appellant by the respondent at the time of signing of the MOA. The said condition does not place any embargo or any upper ceiling limit with regard to the claim for damages upon failure to proceed with the agreement for the default committed by the appellant. In fact the Director of the appellant Company in the cross examination has admitted that they have received a sum of Rs.45,00,000/- from the respondent. This statement which was made in the proof affidavit filed by the respondent has not been denied by the appellant. Therefore, to state that the claim made by the respondent cannot exceed a sum of Rs.25,10,000/- is an argument which is to be outrightly rejected. The second contention of Mr.V.Ramakrishnan, learned Senior Counsel is that the learned Tribunal has extensively referred to the affidavit filed by the DFO before the NGT and the affidavit could not have been marked as a document by the Tribunal and if the Tribunal were to refer to the averments in the affidavit, the deponent to the affidavit should have been made available for cross examination. In paragraph 37 of the award, the Tribunal has referred to certain portions of the

affidavit filed before the NGT. In paragraph 43 of the award, the Tribunal has specifically pointed out that it has not taken into account certain observations made by the DFO in his reply affidavit before the NGT. Mr.V.Ramakrishnan, Barrister would submit that it has not taken into account "certain observation" but it has in fact taken into consideration the observations probably a few might not have been taken into consideration.

15.From a reading of the award, it is seen that the appellant has not raised any objection to the affidavit being taken on record by the Tribunal nor the appellant has denied the allegation. The appellant has taken a stand before the Tribunal that the proceedings initiated before the NGT was in his personal capacity as Director of the Company. This aspect has also been dealt with by the Tribunal noting the conduct of the appellant. The Tribunal has referred to the affidavit of the DFO only for the limited purpose to hold that there was no illegal felling of trees as alleged by the appellant/Director. Admittedly, the application filed before the NGT by the appellant was dismissed and no steps were taken by the appellant to restore the same. The conduct of the appellant came to the adverse notice of the Tribunal. Further, the Tribunal noted that the Directors of the appellant were playing a hide and seek game as the agreement was signed by one S.Subramani on 14.02.2013 and the application for second stage of cutting is forward by the said S.Subramani on 17.06.2013 but the letter to the DFO denying the filing of the second application by the Company is signed by another person as authorized signatory on 10.10.2013 and the counter statement in the arbitral proceedings is signed by yet another person on 15.12.2013. The said S.Subramani who has kept back suddenly surfaces again on 16.11.2015 (Ex.R1) to attest the Board's resolution. Thus the Tribunal held that these facts would only establish the clandestine attitude of the Directors/authorized signatories of the appellant showing different faces at different stages inclusive of filing the application before the NGT by RW1 impleading the Company as one of the respondents making it appear as though the said application was an individual venture of RW1. Further, while dealing with the counter claim, the Tribunal pointed out that the stand taken by the Forest Department before the NGT clearly disproves the allegation made by the appellant that the respondent herein has illegally felled trees without permission. Further, it has to be pointed out that no documents were filed by the appellant before the Tribunal. Therefore, it would not lie in the mouth of the appellant to now raise before this Court, that too, in an appeal under Section 37 of the Act, the contentions advanced before us which have been done in such fashion for the first time before the Division Bench. The Tribunal on appreciating the evidence held that RW1, the Director of the appellant for his own reasons

has chosen to put obstacles resulting in ultimate break down of the contract and has chosen to put forth untenable reasons. Noting that the appellant never took a stand that the agreement was either unlawful or not validly entered into, his intention was to break the contract on his own or in collusion with the other Directors and this explains how RW1 went before the NGT claiming to be in his personal capacity and by impleading the Company as one of the respondents to make it appear that the Company has no role to play in the proceedings before the NGT.

16. Thus, for the above reasons we find that the appellant has not made out any grounds to interfere with the order passed by the learned Single Bench. In the result, the Original Side Appeal is dismissed and the order passed in O.P.No.141 of 2017 dated 13.07.2018 is confirmed. No costs. Consequently, connected miscellaneous petition is closed.

17. In terms of the directions issued by us earlier, the appellant has deposited a sum of Rs.22,50,000/- in the name of the Registrar General, Madras High Court to the credit of this appeal. This direction was issued by us taking note of the fact that the appellant had filed an affidavit of undertaking before the learned Single Bench dated 14.12.2017 undertaking to deposit a sum of Rs.22,50,000/- which is 50% of the award amount. As we have dismissed the appeal filed by the appellant confirming the award, we direct the Registrar General, Madras High Court to pay to the respondent the sum of Rs.22,50,000/- together with interest if any accrued now lying in deposit in the name of the Registrar General, Madras High Court in this appeal, by drawing a Demand Draft in the name of the respondent and such payment shall be effected within a period of two weeks from the date of receipt of a copy of this judgment. The payment so received by the respondent shall be in part satisfaction of the award passed by the Tribunal and it is open to the respondent to initiate steps for recovery of the remaining amount in accordance with law.

s/d-

Assistant Registrar(CO)

True Copy

Sub-Assistant Registrar

cse

To

1. The Sub Assistant Registrar
Original Side, High Court, Madras 104.

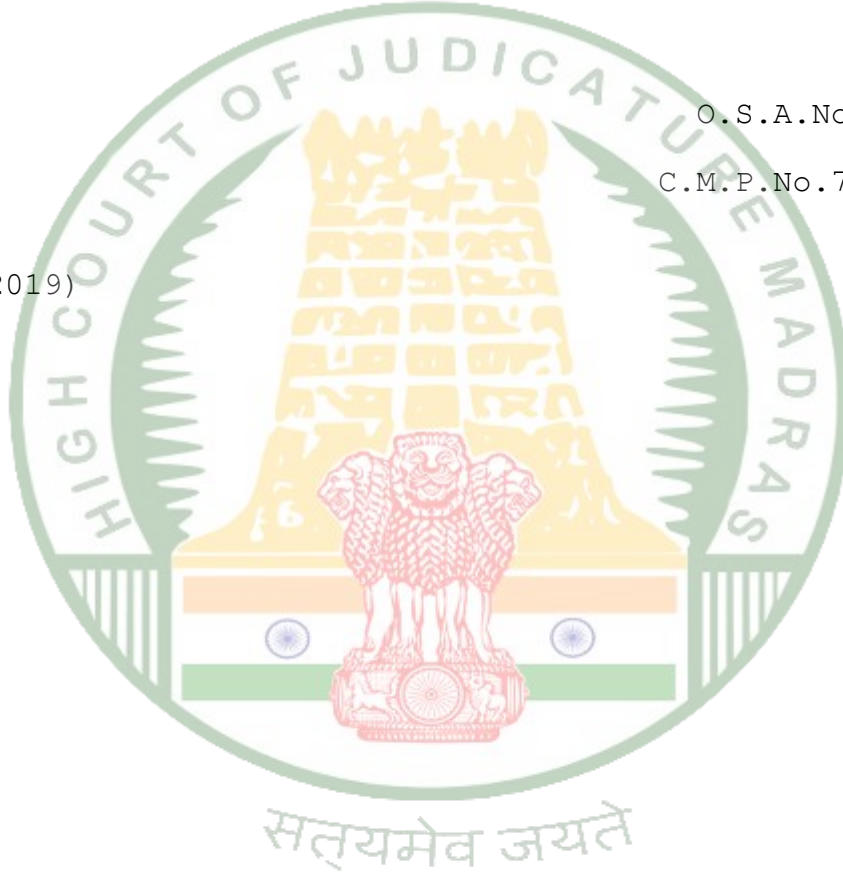
2.The Registrar General
High Court, Madras 104.

3.The Section officer
Accounts Section
High Court, Madras 104.

+1 CC to Mr.S.Arjun Suresh, Advocate sr 36058.
+1 CC to Mr.R.Bharat Kumar, Advocate sr 37029

O.S.A.No.84 of 2019
and
C.M.P.No.7789 of 2019

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