

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
23~07~2019	30~07~2019

CORAM:

THE HONOURABLE MR.JUSTICE **N. SATHISH KUMAR****O.P.No.456 of 2019**

M/s. KG Foundations (P) Limited,
Rep.by its Director Mr.Haresh Kishor
No.5, Bishop Wallers Avenue (East)
Mylapore, Chennai 600004. ..

Petitioner/Respondent

.Vs.

M/s. Consolidated Construction Consortium Ltd.,
Rep.by its Managing Director
Mr.S.Sivaramakrishnan
No.5, 2nd Link Road, C.I.T. Colony
Mylapore, Chennai 600004.

Respondent/claimant

* * *

Prayer: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the Interim Award dated 22.02.2019 passed by the learned Arbitrator in I.A.No.1/2019 in

Arbitration Claim Petition No.2 of 2018 insofar as it relates to the rejection of the petitioner's prayer seeking dismissal of the respondent's claim that does not form part of the agreement dated 31.01.2011

For Petitioner : Mr. Sankaranarayanan
Senior Counsel
for M/s.S.V. Pravin Rathinam

For Respondent : Mr. A.R.L.Sundaresan
Senior Counsel
for M/s.S. Karthik Balan

ORDER

This Petition has been filed challenging the order of the sole Arbitrator dated 22.2.2019 partly rejecting and partly allowing the Application filed by the Petitioner. This Petition is filed under Section 34(2)(a) of the Arbitration and Conciliation Act, 1996, challenging the above order on the ground that the order of the learned Arbitrator passed under Section 11(6) of the Act is interim Award. The parties are arrayed as per their own rankings as per the Arbitral proceedings.

2. The brief facts leading to file this Petition is as follows:

The claimant and Respondent entered into 4 independent contracts on various dates in the Respondent's project site known as "K.G. Signature City" and another independent contract at a different project site known as "K.G. Chandra Vista". The agreement is dated 31.1.2011 pertains to "B" Block. Pursuant to Clause 46 provided for Arbitration, by order dated 11.12.2017 this Court appointed Sole Arbitrator to decide the dispute in respect of the agreement dated 31.01.2011. Whereas before the Tribunal the claim has been preferred in respect of other agreements also. Hence, the application has been filed before the learned Arbitrator that the Tribunal has no jurisdiction to entertain the claim in respect of other agreements. It is mainly contended by the applicant that the terms of reference is only with respect to agreement dated 31.1.2011 and not in respect of other agreements. Whereas the claimant made a claim not only in respect of Agreement dated 31.1.2011 but also clubbed the claims in respect of other agreements. Hence, the application has filed.

3. The respondent resisted the above petition on the ground that in the first meeting no objection was raised by the claimant. Similarly, no objection was raised before the High Court Madras wherein the subject matter of dispute involving the entire works and in tune with the consolidated final certified bill was raised. It is the contention of the claimant that the dispute has been raised in respect of the consolidated bill given by the respondent and the general conditions of all the contracts are one and the same. The respondent has not produced any single document to show that each contract are different.

4. The Sole Arbitrator considering the entire aspect has held that as the Respondent did not raise any objection in respect of the composite claim under section 11(6) of the Act, now they cannot make any such objection. However, learned Arbitrator has found that the claimant cannot club a contract with regard to "K.G.Chandra Vista" a different project. Aggrieved over the order of the learned Arbitrator

this Petition has been filed under section 34 of the Arbitration and Conciliation Act on the ground that the order is interim award and the same is liable to be interfered.

5. Learned Senior Counsel appearing for the Petitioner mainly submitted that the reference was made only on the basis of the one contract viz., Agreement dated 31.1.2011. This Court appointed learned Arbitrator only on the basis of the reference sought on the agreement dated 31.1.2011. It is his contention that there are three contracts in respect of the "K.G. Signature City" on various dates viz., 31.1.2011 pertaining to Block-B and 31.3.2011 Block-A and 21.3.2012 UG Sump/STP at Block A & B and each contract has an arbitration clause. It is his contention that the appointment of Arbitrator was sought in terms of Clause-46 of the contract dated 31.1.2011. The reference itself made on the basis of the particular contract, now the claimant cannot seek an adjudication and make a claim in respect of other contracts namely the contract dated 31.3.2011, 21.3.2012 and 21.3.2012. They cannot club all the claims together, since all the

contracts are independent with each other and related to different works. The learned Arbitrator having found that the claim with respect to contract dated 21.3.2012 cannot be clubbed together, however, rejected the contention of the petitioner which is not correct. Therefore, it is his contention that the Arbitrator has passed an order which is in the nature of interim award. Further it is his contention that the finding of the Arbitrator goes to the root of the case. When the reference itself is not according to law the Arbitrator ruling the jurisdiction goes to the root of the case. Therefore such award is certainly in the nature of interim arbitral award, the same can be capable of challenge under section 34 of the Act.

6. In support of his contention the learned counsel for the Petitioner relied upon the following judgments:

1. Duro Felguera S.A. vs. Gangavaram Port Limited
[(2017) 9 SCC 729]

2. Cinevistas Ltd. vs. Prasari Bharti

[MANU/DE/0592/2019]

3. Indian Farmers Fertilizer Co-Operative Limited
vs.Bhadra Products **[(2018)2 SCC 534]**

7. Whereas the learned Senior Counsel appearing the Respondent submitted that the Petition is not maintainable. The order has been passed under 11(6) of the Act and the learned Arbitrator ruled his own jurisdiction. It is his further contention that though there are different contract, the dispute arose in respect of the final bills raised in respect of the Blocks A & B, UG Sump/STP at Block A & B. Final Bill was raised in respect of entire work though covered under the different contract in the same premises namely "K.G. Signature City". Hence, it is his contention that under Section 11 Application has been filed for appointment of Arbitrator to adjudicate the dispute mainly raised under final bill. Therefore, the learned Arbitrator has decided his own jurisdiction under Section 16 of the Act and the same cannot be challenged. In fact any rejection made by the Arbitrator under section 16 of the Act, the same cannot be challenged under section 34 of the

Act. Therefore, above order can be subject matter of challenge only when the final award challenged under section 34 of the Act. Hence, it is his contention that the judgments relied upon by the learned Senior Counsel cannot be applied. The Award passed by learned Arbitrator cannot be termed as Interim Award. Hence submitted that the Petition itself is not maintainable.

8. The Order impugned is passed by the learned Arbitrator who was appointed by this Court vide Order dated 11.12.2017 in O.P.No.738 of 2017. The affidavit filed in the above O.P. makes it very clear that an appointment of Arbitrator sought on the basis of the dispute arose between the parties in respect of the final bill related to the Block A & B and UG Sump/STP at Block A & B. Though it is stated by both the parties that there are three contracts in respect to "KG Signature City" dated 31.01.2011, 31.03.2011 and 21.03.2012 final bill dated 21.05.2016 makes it clear that it was raised in respect of all the three contracts viz., KG Signature City – UG Sump/STP at A and B Block. Affidavit filed before this Court for appointment of Arbitrator

also indicates that the dispute has arisen in view of the final bill relating to all three contracts.

9. Though, it is pleaded in para 4 of the affidavit to the effect that there is a contract dated 31.01.2011. The petitioner sought for appointment for Arbitrator to resolve the dispute. By consent, the Sole Arbitrator was appointed by this Court vide order dated 11.12.2017. The operative portion of the order indicates that Mr. Justice K. Venkatraman, Retired Judge of this Court, appointed as sole Arbitrator to enter upon reference and adjudicate the disputes inter se the parties. The reference was sought on the basis of the final Bill which include all the three contracts. Therefore, now it cannot be said that the appointment was made only in respect of the particular contract. In the counter filed before this Court, the only defence made by the respondent is that before referring the matter to the PMC as per clause 46 of the contract appointment of Arbitrator is not correct. In the counter nothing has been whispered. There was neither denial nor any objection with regard to the final bill in respect of all three contracts.

In fact affidavit and counter filed before this Court clearly indicate that the parties are aware of the disputes in relate to all the contracts viz., final bill in respect of "K.G.Signature City". Such being the position, now it is too late for the Respondent to contend that the reference not valid in respect of other contracts. The reference itself in fact in respect of all contracts particularly in respect of final bill. The learned Arbitrator has in fact taken note of the above fact and ruled his own jurisdiction and rightly held that the contract in respect of some other project cannot be the subject matter of reference, however, has held that the reference can be made in respect of the KG Signature City in respect of final bills.

10. The Order has been passed under Section 16 of the Act. It is to be noted that the learned Arbitrator has ruled his jurisdiction. Such finding has not decided any issue and reached finality. On a careful perusal of Section 16(5) of the Act makes it clear that when the Tribunal takes a decision rejecting the plea of jurisdiction it shall continue with the arbitral proceedings and make an arbitral award.

When the tribunal accepted the plea, such decision will be appealable under Section 37(2). As far as rejection of the plea by the Tribunal no appeal is provided. The legislature consciously did not provide any appeal remedy for any rejection rejecting the plea with regard to the tribunal jurisdiction. Further when the Tribunal has ruled on his jurisdiction, the arbitral proceedings necessarily to be continued and challenge to such decision would be postponed till all other issues have been decided and such decision can be challenged under Section 34 when the entire award was put into challenge. Further the learned Senior Counsel has placed much reliance on the judgment of the Honourable Supreme Court in **Indian Farmers Fertilizer Co-Operative Limited case** (supra) contended that the interim award can be challenged under section 34 of the Act. The Honourable Supreme Court in Paras 9 and 10 of the above judgment has held as follows:

"9. The language of [Section 31\(6\)](#) is advisedly wide in nature. A reading of the said sub-section makes it clear that the jurisdiction to make an interim arbitral award is left to the good sense of the arbitral tribunal, and that it extends

to “any matter” with respect to which it may make a final arbitral award. The expression “matter” is wide in nature, and subsumes issues at which the parties are in dispute. It is clear, therefore, that any point of dispute between the parties which has to be answered by the arbitral tribunal can be the subject matter of an interim arbitral award. However, it is important to add a note of caution. In an appropriate case, the issue of more than one award may be necessitated on the facts of that case. However, by dealing with the matter in a piecemeal fashion, what must be borne in mind is that the resolution of the dispute as a whole will be delayed and parties will be put to additional expense. The arbitral tribunal should, therefore, consider whether there is any real advantage in delivering interim awards or in proceeding with the matter as a whole and delivering one final award, bearing in mind the avoidance of delay and additional expense. Ultimately, a fair means for resolution of all disputes should be uppermost in the mind of the arbitral tribunal.

10. To complete the scheme of the Act, [Section 32\(1\)](#) is also material. This section goes on to state that the arbitral proceedings would be terminated only by the final arbitral award, as opposed to an interim award, thus making it clear that there can be one or more interim

awards, prior to a final award, which conclusively determine some of the issues between the parties, culminating in a final arbitral award which ultimately decides all remaining issues between the parties."

11. Finally the Apex Court considering the fact that the issue involved in the above matter the Tribunal has decided the limitation aspect and held that such finding can be considered as interim award and the same can be challenged separately and independently u/s 34 of the Act. By holding so, the Apex Court has also held that the parliament may consider amending section 34 of the Act so as to consolidate all interim awards together with the final arbitral award, so that one challenge under Section 34 can be made after delivery of the final arbitral award. Piecemeal challenges like piecemeal award lead to unnecessary delay and additional expense.

12. In the above judgment, the Honourable Apex Court taken note of the kompetenz principal, held that jurisdiction mentioned in Section 16 has reference to three things: 1. as to whether there is

existence of a valid arbitration agreement; 2. Whether the arbitral award is properly constituted and 3. matters submitted to arbitration should be in accordance with the arbitration agreement. No doubt from the above principle the question as to the existence of valid agreement whether the tribunal has properly constituted; the arbitration will be in accordance with the arbitration agreement can be questioned under Section 16 of the Act. But the fact remains in this case, the appointment of arbitrator itself by way of consent. The application filed under Section 11(6) of the Act based on the final bill in respect of three contracts. Therefore, merely, only one clause in one of the contracts was referred in the petition, it cannot be said that only dispute qua the contract dated 31.1.2011 alone referred to the sole arbitrator.

13. In the judgment reported in ***Duro Felguera S.A. case*** (supra) the Apex Court has held that when there are distinct contracts pertain to the different work and the parties took the conscious decision to split the works which lead to separate contract. There

should be a reference for every contract. There should be an arbitral tribunal for the dispute pertaining to each agreement. In the above case the Apex Court taking note of the fact that each contract have entered into different packages as a special condition of contract as well as the general condition of the contract held that separate tribunal to be constituted for each issue. But in this case the dispute itself is raised for composite transaction which has not denied in the counter by the respondent at the time of appointment of Arbitrator. Further, what are the nature of the separate dispute, nothing has been shown by the Respondent. Hence, the above judgment will not help the petitioner. Similarly the judgment of the Delhi High Court in ***Cinevistaas Ltd., case*** (Supra), it is held that the order of the arbitral Tribunal conclusively determines the rights of the parties prior to the final award the same constitute to an interim award. Therefore, the appeal is maintainable. Absolutely there is no dispute in respect of the the above judgment. The facts remains in this case is that the rights of the parties have not been finally decided in this order. The learned arbitrator has simply ruled his own jurisdiction on the basis of the

admitted facts and rejected the plea of the petitioner in respect of its jurisdiction. Such being the position, the challenge to such decision has not been wiped out, but postponed till the final award passed by the Arbitrator. When the plea raised has been rejected under Section 16 of the Act also can be challenged under section 34 of the Act, while challenging the main award. Such being the position the present petition is not maintainable. Accordingly the original petition is dismissed as not maintainable.

20. In the result Original Petition is dismissed No costs.

30.07.2019

Index : Yes / No
Internet: Yes
Speaking/Non-speaking order
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N. SATHISH KUMAR, J.

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To
M/s. Consolidated Construction Consortium Ltd.,
Rep.by its Managing Director
Mr.S.Sivaramakrishnan
No.5, 2nd Link Road, C.I.T. Colony
Mylapore, Chennai 600004.

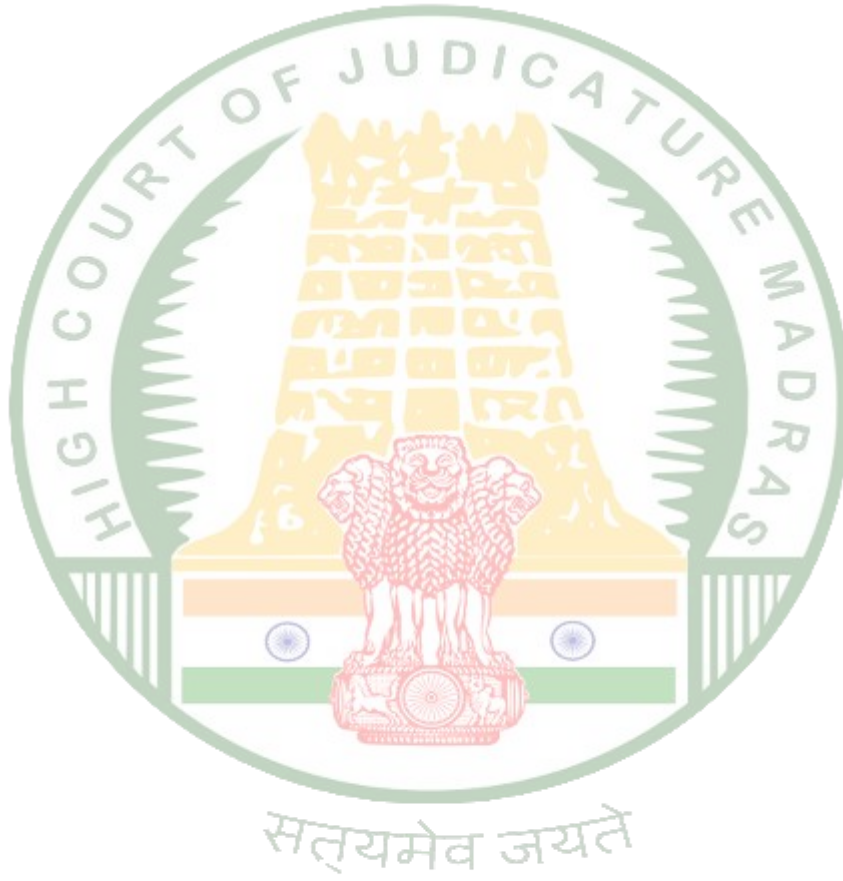


order in:

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