

Reserved on :07.06.2019

Pronounced on :13.06.2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Original Petition No.42 of 2018

The State Industries Promotion Corporation
of Tamil Nadu Limited,
Represented by its Managing Director,
No.19-A, Rukmani Lakshmipathy Road,
Egmore, Chennai – 600 008

... Petitioner

Vs

M/s.Terex India Private Limited,
Represented by its Executive Director (Finance),
Mr.Srikanth Ekambaram,
E-18, Phase II, Expansion II,
SIPCOT Industry Complex,
Hosur – 635 109.

... Respondent

Prayer :- This Original Petition has been filed to set aside the Award passed by the Arbitrator on 30.08.2017 based on modified award to allow all the Counter claims filed by the Petitioner.

For Petitioner

: Mr.P.H.Arvinth Pandian
Additional Advocate General
for Mr.Sudharshana Sunder

For Respondent

: Mr.R.Yashodvardhan (SC)
for Mr.Vinod Kumar

ORDER

This petition has been filed to set aside the impugned award dated 30.08.2017 passed by the Sole Arbitrator pointed by this Court.

2. Brief facts leading to filing of this Original Petition is as follows :

The claimant is wholly owned subsidiary of Terex Corporation, USA and their company has been incorporated under the provision of the Companies Act, 1956. It is engaged in manufacturing broad range of equipments and machineries for many applications including construction, infrastructure, quarrying, mining, shipping, transportation, refining, energy, utility and manufacturing industries. The respondent is an undertaking of the Government of Tamilnadu established to develop industrial growth in Tamilnadu. The respondent is involved in the formation of industrial complexes by providing infrastructure facilities for varied industries to set up their units. Originally the claimant approached the respondent with a request for allotment of land around 60 acres to carry on its operation therein Phase – II, Expansions to set up at Hosur. After due consideration of the Claimant's application by the allotment committee, by an Order dated 02.07.2007, Plot No.E-18, measuring 45 acres was allotted to the claimant. Pursuant to such allotment, a lease deed dated 17.10.2007 was entered between the claimant and the respondent. An extent of 44.83 Acres of land was leased to the claimant for a period of 99 years. The

claimant paid a sum of Rs.3,04,84,400/- towards plot deposit, a sum of Rs.12,19,37,500/- towards developmental charges and Rs.100/- towards advance for lease rent to the respondent. Under letter dated 19.11.2014, the respondent noted that an extent of 15 acres out of the plot allotted to the claimant was kept vacant and that the claimant had breached the contract and he is also liable for non compliance of the lease deed. Hence, the claimant shall surrender the unutilized land to an extent of 15 acres within 15 days. After receipt of the letter, the respondent sent a letter dated 27.12.2014 setting out in detail the utilization of the plot and pointing out that the land allotted to the claimant was not in excess of its requirement and that there was no surplus land with the claimant. By a letter dated 09.03.2015, the claimant was informed that if remedial action was not taken within 90 days, the respondent, by invoking provision of Tamilnadu Public Properties Eviction Act, would resume the 15 acres from the claimant. By communication dated 17.07.2016, the respondent sought to cancel an extent of 5 acres of land on the purported basis that it was excess land and called upon the claimant to execute a deed of surrender within 15 days from the date receipt of the same, failing which the plot shall be resumed under Tamilnadu Public Properties Encroachment Act. The claimant disputed the stand of the respondent and invoked the Arbitration clause. As the respondent did not appoint any Arbitrator, this Court, by an Order dated 12.02.2016 appointed an Arbitrator.

3. The respondent filed a counter contending that industrial plots in Industrial parks are allotted to Entrepreneurs on 99 years lease basis for setting up their proposed project subject to certain terms and conditions as stipulated in the lease deed. One such condition 14(1) entitles SIPCOT to cancel the allotment if it is found that the land allotted to the company is not put in use for the purpose for which it was allotted or the excess land as the case may be and resume the same. It is the case of the respondent that the claimant has utilised only 30 acres as against 44.83 acres and the remaining land has been lying vacant from 2010. As the entire land was not put in use, a notice was issued to the claimant in this regard on 19.11.2014 for which the claimant has requested two weeks time to submit a detailed reply. In the meantime, the claimant by a letter dated 27.12.2014 explained the activities carried out in their facility and the need for large and uneven area for field testing of the tracks and other prototype machines produced by their R & D Division. As the claimant had no concrete proposal to utilize the vacant land for the manufacturing activity and since the vacant land was not being put to use and based on the utilization sketch submitted by PO, SIC, Hosur on 22.01.2015, the respondent issued a notice to the petitioner on 09.03.2015 to take remedial action on the unutilized area of 15 acres within 90 days from the date of the notice with an indication that failing which they may be constrained to cancel the allotment and then proceed to resume the plot under TNPPE Act. Thereafter, based on the report dated 14.07.2015, the claimant has stored their products in some portion and levelling

work is in progress and the claimant has not shown substantial progress within 90 days and sent a revised sketch. Considering the above, it has been decided to cancel an extent of 5.00 acres only out of the unutilized land of 15.00 acres and to leave the balance 10.00 acres for their testing activities. Accordingly, the respondent cancelled 5.00 acres out of 15 acres unutilized land.

4. Based on the averments, the Arbitrator framed the following issues :

a) Whether as per Clause 14(1) of the lease deed SIPCOT has the right to cancel the allotment if it is found that the land allotted to the company is not put to use for the purpose for which it was allotted or the excess land as the case may be and resume the same?

b) Whether the claimant has violated the said clause?

c) Whether the respondent, SIPCOT entitled to cancel an extent of 5.00 acres only out of 15.00 acres unutilised (out of the total allotted extent of 44.83 acres) and proceed for resumption of the excess land of 5.00 acres?

d) Whether the communication dated 17.07.2015 issued by the Respondent requiring the Claimant to surrender 5 acres out of the 44.83 acres of land leased to the Claimant under the lease deed dated 17.10.2007, is valid and in accordance with the lease deed between the parties?

e) Whether the respondent is entitled to seek to resume 5 acres of land out of the 44.83 acres of land leased to the Claimant, under the lease deed dated 17.10.2007, based on its communications dated 19.11.2014, 09.03.2015 and 17.07.2015?

f) Whether, the initiation of actions by the Respondent for resumption of 5 acres of land out of the 44.83 acres leased to the Claimant's, based on its inspection report dated 29.09.2015 is in accordance with the allotment Order dated 02.07.2007 and lease deed dated 17.10.2007?

g) Whether, in the light of the Claimant's assertion that the entire land leased to it is required for its business purposes, the Respondent could have proceeded with its unilateral decision and issued the communication dated 17.07.2015, seeking to resume 5 acres out of the land leased to the Claimant?

h) Are the parties entitled to any other reliefs including costs?

5. The learned Arbitrator, considering the entire evidence adduced on both sides had factually found that the business of the claimant involves manufacturing, assembling of machines of different models of crushers, screeners which are heavy machines used in construction, mining and quarrying sites. They are used in different types of terrain. These facts were placed

before the allotment committee when the claimant made the application for allotment. It is also stated that the equipments manufactured in the Hosur unit occupied close to 6100 sq.mts. The crusher and the screener are mounted on the tracks to give mobility. The tracks manufactured are exported to their group of companies in UK. All machines and tracks are to be tested for long hours simulating actual field conditions. The components and the spares requires huge area for storage and finally held that the tracks and the spare parts is not done in a closed area. Thus, with the nature of the industrial activity carried and the products dealt with and the functionality also remain the same since the first time of the application for allotment, there is nothing on record to show the nature of inspection done, or that the claimant has changed its business of dealing in heavy machines to come to the conclusion that the requirement was in excess of the allotted area calling for resumption by the respondent and finally answered the issues against the respondent and held that the Ordering resumption of 5 acres is arbitrary and not based on the evidence and facts. Challenging the award, the present petition has been filed.

6. The learned Additional Advocate General Mr.Arvind Pandian, submitted that the Arbitrator have no jurisdiction to decide the issue since the dispute is with regard to the lease agreement. There is a specific clause namely clause 14(1) of the contract which gives right to the lessor to resume unused land. Such dispute would be resolved only by the Court and not by the Arbitral

Tribunal. The rights and liabilities of the lessor and lessee to be governed by substantial law and not capable of arbitration and resolved by arbitration. Hence, it is his contention that Arbitrator had no jurisdiction to decide the dispute between the landlord and tenants. Such dispute can be decided only by Civil Judge and cannot be referred to arbitration. It is his further contention that though objection to the jurisdiction has not been raised before the arbitrator, the same will not preclude the petitioner from raising such objections under section 34 of the Act. There is no bar to raise the plea of jurisdiction under section 34 of the Act, even no such objections was raised under section 16 of the Act. Hence, it is his contention that looking into the terms of the contract and right of obligations of the lessor and lessee, the arbitrator ought not to have passed an award nullifying the action of the petitioner taken in pursuant to the specific covenant agreed between the parties under the contract. It is his further contention that the object of the contract has to be seen and the allotment is made only for the purpose of setting up industrial park. When the land allotted has not been utilized for the purpose for which it was allotted, the State has right to resume such land as per the contract, which has not been looked into by the Arbitrator. Hence, it is his contention that the entire award is vitiated and the same is liable to be set aside, since it violates the public policy of India and the arbitrator has no jurisdiction. In support of his submissions, he also relied on the following judgments :

Booz Allen and Hamilton Inc. Vs. SBI Home Finance

Ltd. Others reported in AIR 2011 SC 2507

Ranjit Kumar Bose and others Vs. Anannya

Chwdhury and others reported in AIR 2014SC 1534

Lion Engineering Consultants Vs. State of M.P. And

others reported in AIR 2018 SC 1895

7. The learned Senior Counsel Mr.Yashod Vardhan, appearing for the respondent would contend that the plea of jurisdiction has not been raised either before the Arbitrator under section 16 of the Act nor in the petition filed under section 34 of the Arbitration and Conciliation Act. Further no objections raising the plea of jurisdiction has been filed. Only for the first time during oral submissions such a plea has been raised and the same cannot be given any importance. Any such plea is made much beyond the period of limitation, it has to be rejected. It is his further contention that the learned Arbitrator has found that the respondent is manufacturing heavy machines and machines require lot of space for testing and trial. The object of entering into a contract for such a huge area is for running business keeping in mind the nature of machines manufactured by the respondent. The utility of the land cannot be decided on the ground of mere construction. It has to be seen in the context of manufacturing machines. The Arbitrator has found out that the action of the petitioner is without any materials. Hence, submitted that merely because the contract has been entered between the lessor and lessee, the State cannot act

arbitrarily take advantage of the clause 14 of the contract. Clause 14 has to be seen in the context of the other obligations and rights of the parties. The action of the authorities to resume the land under different provision of law is also not followed. The entire aspects have been considered by the Arbitrator and submitted that the matter is arbitrable and no public policy is violated. It is his further contention that entire land of 45 acres has been transferred in favour of the respondent. Therefore, clause 14(1) cannot be read in isolation and should be read along with other conditions. The parties have agreed to refer the dispute or difference in relation in terms of the lease deed to Arbitrator and now they cannot contend that the Arbitrator has no jurisdiction to decide the issue. Hence, submitted that the petition lacks merits and liable to be dismissed. In support of his submissions, he has relied upon the following judgments :

Jamshed Hormusji Wadia Vs. Board of Trustees, Port of Mumbai and another reported in **2004 (3) Supreme Court Cases 214**

Bharat Petroleum Corporation Ltd., Vs. Maddula Ratnavalli and others reported in **2007 (6) Supreme Court Cases 81**

State of Maharashtra Vs. Hindustan Construction Company reported in **2010 (4) Supreme Court Cases 518**

Associate Builders Vs. Delhi Development Authority reported in **2015 (3) Supreme Court Cases 49**

**Madhya Pradesh Rural Road Development Authority
and another Vs. L.G.Chaudhary Engineers and Contractors**
reported in **2018 (10) Supreme Court Cases 826**

Vidya Drolla and others Vs. Durga Trading Corporation
reported in **2019 SCC Online SC 358**

8. In the judgment in **Lion Engineering Consultants Vs. State of Madhya Pradesh and others** reported in **AIR 2018 SC 1895**, the Apex Court has held that a party who has not raised any objections available to the party under section 16 of the Arbitration and Conciliation Act can raise such plea under section 34 of the Act. In the above judgment, earlier view of the Apex Court in **MSP Infrastructure Ltd. Vs. Madhya Pradesh Road Development Corporation Ltd.** reported in **2015 (13) SCC 713**, that objection has not been raised in the initial stage cannot be subsequently raised has been set aside by the Apex Court. In **Lion Engineering** case, the Apex Court has held that even the objection has not been raised under section 16 of the Act, still the plea of jurisdiction can be raised by way of objection under section 34 of the Arbitration and Conciliation Act, even no such objection has been raised under section 16 of the Act. But the fact remains that the petitioner has not raised any objection in the petition filed under section 34 of the Act.

9. In **State of Maharashtra Vs. Hindustan Construction Company** reported in **2010 (4) Supreme Court Cases 518**, it has been held that

“36. As noticed above, in the application for setting aside the award, appellant set up only five grounds viz., waiver, acquiescence, delay, laches and res judicata. The grounds sought to be added in the memorandum of arbitration appeal by way of amendment are absolutely new grounds for which there is no foundation in the application for setting aside the award. Obviously, such new grounds containing new material/facts could not have been introduced for the first time in an appeal when admittedly these grounds were not originally raised in the arbitration petition for setting aside the award. Moreover, no prayer was made by the appellant for amendment in the petition under [Section 34](#) before the concerned court or at the appellate stage.”

10. In **Madhya Pradesh Rural Road Development Authority and another Vs. L.G.Chaudhary Engineers and Contractors** reported in **2018 (1) Supreme Court Cases 826** it has been held that :

“Leave granted.

In view of order passed in C.A. No.2751 of 2018 @ SLP(C) No.16615/2012, no objection having been raised by the

respondents in terms of [Section 16\(2\)](#) of the Arbitration and [Conciliation Act](#), 1996 at appropriate stage within the time stipulated, the award could not have been annulled.”

From the above judgments, it is well settled that though objections has not been taken at a preliminary stage under section 16 of the Arbitration and Conciliation Act, plea of jurisdiction can be raised as objection under section 34 of the Act, of course, within a period of limitation. The petitioner has not raised any plea in this regard in the petition filed under section 34 of the Act. For the first time in the oral submission, the learned Advocate General has raised such a plea, which is beyond the period of limitation. Such an objection, in my view, cannot be entertained, for the first time, beyond the period of limitation, in an application filed to set aside the Award. Therefore, the contention of the learned Additional Advocate General, in this regard cannot be countenanced.

11. In **Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and others** reported in **AIR 2011 Supreme Court 2507**, the Honourable Apex Court has held that only those tenancy matters that are Governed by the Special statutes where the tenant enjoys statutory protection against eviction, only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

12. Whereas in **Civil Appeal No.16850 of 2017 in Himangni**

Enterprises Vs. Kamaljeet Singh Ahluwalia case, the Apex Court has held that the dispute between the parties in Transfer of Property Act shall not be arbitrable. Subsequently in the judgment in **Vidya Drolla and others Vs. Durga Trading Corporation** reported in **2019 SCC OnLine SC 358**, after considering the entire facts, the Honourable Apex Court took a view that reasons found in Himangni Enterprises also not hold good. However, the matter has been referred to Larger Bench.

13. In line with the above judgments, when the lease deed entered between the parties, when carefully seen, the same makes it clear that the respondent was allotted plot E-18 for the purpose of putting up their projects and for material processing and construction equipments. Clause 35 reads as follows :

“During the currency of the lease, any question of dispute or difference in relation to or in connection with the terms of the lease deed shall not be raised by the Party of the Second Part and, if at all raised, such question of dispute or difference shall be referred to an Arbitrator appointed by Govt. of Tamil Nadu.”

Though Clause 14(1) enables the party of the first part to resume the land which was not put in use for the purpose for which it was allotted, this clause cannot be

read in isolation. It should be read with the entire agreement. The purpose of allotment of land is for manufacturing machinery and construction of equipments.

14. In any event, even if the contention of the learned counsel for the petitioner that only the landlord and tenant relationship is exists, resumption of land should be only based on substantial provision of law namely the transfer of property Act and not by way of invoking Tamilnadu Public Property Eviction Act and Encroachment Act. Therefore, the contention of the learned Additional Advocate General that the matter is not arbitrable cannot be countenanced. Merely, on the basis of one of the conditions, namely, clause 14(1) of the contract, it cannot be said that they have right to resume the land. The entire award, when carefully seen, the learned Arbitrator has taken note of the fact that the evidence of the claimant has not been controverted. Heavy machines manufacture and construction of the equipment is also not in dispute. It requires large space for trial run and assembling, etc. That being the position, merely because, some land was kept vacant for the purpose of trial run and for assembling the machines, it cannot be said that land was not put in use for the purpose for which was allotted. Above aspects has been elaborately dealt by Arbitrator. The State as a landlord, every action of the State must be reasonable. The Arbitrator factually found that there is no materials placed by the petitioner before the Tribunal to show that their action is based on evidence and opinion has been formed on materials.

15. In **Original Petition Nos.456 and 457 of 2018**, this Court by its Order dated 02.04.2019 in para x, 6, has held as follows :

(x) This Court has very carefully and closely examined this argument. In the considered view of this Court, learned counsel for Caveator / respondent is correct in arguing that Explanation 2 to [section 34\(2\)\(b\)\(ii\)](#) and <http://www.judis.nic.in> proviso to [section 34\(2-A\)](#) were brought in to ensure that aforementioned crucial expressions, i.e., 'public policy', 'fundamental policy of Indian law' and 'most basic notions of morality or justice' are narrowly construed. However, this court in its considered view is unable to persuade itself to believe that judgments rendered on section 34 of A and C Act prior to 23.10.2015 with regard to aforesaid expressions cannot be relied on. Reason is, a very careful examination of Explanation 2 to [section 34\(2\)\(b\)\(ii\)](#) and proviso to [section 34\(2-A\)](#) reveals that they have neither narrowed down the explanation of 'public policy' nor taken away 'patent illegality' as a ground available for assailing arbitral awards under [section 34](#). On the contrary, without narrowing down the explanation of expressions 'public policy' as contained

in Explanation 1 and without taking away patent illegality as a ground available for assailing an arbitral award as contained in [section 34\(2-A\)](#), these provisions have narrowed down the scope and nature of tests which a Court exercising powers under [section 34](#) should apply for examining whether an arbitral award is hit by the vice being in conflict with public policy / contravention with the fundamental policy of Indian law and as to whether it is vitiated by patent illegality on the face of the award. While applying the tests with regard to conflict with public policy / contravention with fundamental policy of Indian law, the Court cannot embark upon review on the merits of the dispute. In other words, while testing whether an arbitral award is in conflict with public policy / contravention with the fundamental policy of Indian law, Court should do so without embarking upon the exercise of a review on the merits of the dispute.

(y) As far as patent illegality is concerned, while patent illegality appearing on the face of the award is still available as a ground to set aside an arbitral award, owing to the proviso, i.e., proviso to [section 34\(2-A\)](#) while testing arbitral award in search of an answer to whether it is vitiated by patent illegality appearing on the face of the award, Court should refrain from answering this question in the affirmative if it is a mere

erroneous application of law. The other limiting factor while testing an arbitral award qua patent illegality appearing on the face of the award is, the Court cannot embark upon an exercise of reappraisal of evidence.

16. Similarly, in ***Oil and Natural Gas Corporation Ltd., v. Saw Pipes Ltd.*, [2003 (5) SCC 705]**, wherein the Honourable Apex Court has held that an Award can be set aside if it is contrary to:

- a) fundamental policy of Indian law; or
- b) the interest of India; or
- c) justice or morality; or
- d) if it is patently illegal

Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

17. In the very same judgment the Apex Court it has been further held that

“21. The term ‘public policy of India’ is required to be interpreted in the context of jurisdiction of the Court where the validity of award is challenged before it becomes final and executable. The Court held that an award can be set aside if it is contrary to fundamental policy of Indian law or the interest of

India, or if there is patent illegality. In our view, the said decision will not in any way come into rescue of the appellant. As noticed above, the parties have entered into concluded contract, agreeing terms and conditions of the said contract, which was finally acted upon. In such a case, the parties to the said contract cannot back out and challenge the award on the ground that the same is against the public policy. Even assuming the ground available to the appellant, the award cannot be set aside as because it is not contrary to fundamental policy of Indian law or against the interest of India or on the ground of patent illegality.”

22. The words “public policy” or “opposed to public policy”, find reference in [Section 23](#) of the Contract Act and also [Section 34 \(2\)\(b\)\(ii\)](#) of the Arbitration and Conciliation Act, 1996. As stated above, the interpretation of the contract is matter of the Arbitrator, who is a Judge, chosen by the parties to determine and decide the dispute. The Court is precluded from re-appreciating the evidence and to arrive at different conclusion by holding that the arbitral award is against the public policy.

18. In the present case, on entire reading of the well reasoned award, this Court found that the Arbitrar has not only considered the contract in a reasonable

manner. But factually found that the action of the respondent is arbitrary, without any materials and the land in question was always used by the respondent for their manufacture of heavy machineries. Therefore, the view of the arbitrator, in my view, is a reasonable and cannot be termed as violation of public policy. Besides none of the ground mentioned under section 34 of the Arbitration and Conciliation Act to interfere the Award is also made out. Hence, this Court, keeping in mind the scope of interference under section 34 of the Arbitration and Conciliation Act, is of the view that the well reasoned Award made by the Arbitrator cannot interfered.

19. Accordingly, this Original Petition is dismissed. No costs.

13.06.2019

Index : Yes/ No

Internet : Yes

Speaking/Non-speaking Order
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To

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N.SATHISH KUMAR, J.

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Order in
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