

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 19.11.2019

CORAM

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A.No.3352 of 2019 and
C.M.P.No.19539 of 2019

Calderys India Refractories Ltd.,
(Formerly Ace Calderys Ltd.,)
'Fidvi Tower' 6th floor,
Opposite Saraf Chambers,
Mount Road, Sadar,
Nagpur - 440 001

... Appellant/Petitioner

Vs.

M/s Saint Gobain Glass India Ltd.,
Plot No.A-1, Sipcot Industrial Park,
Sriperumbudur,
Kancheepuram - 602 105

.. Respondent /Respondent

Civil Miscellaneous Appeal is filed under Section 37(2) of the Arbitration and Conciliation Act of 1996 to set aside the Order dated 12.08.2019 passed by the Arbitration Tribunal in the matter of Purchase Order No.32001497 dated 25.05.2011 and direct the arbitrators to mark the documents and allow the Appellant to recall CW2 and RW2.

For Appellant : Mr.G.Veerapathiran

For Respondent : Mr.Ravi for
Mrs. Gupta Ravi

J U D G M E N T

The appellant herein has challenged the order dated 12.08.2019 passed by the Arbitral Tribunal with regard to the purchase order no.32001497 dated 25.05.2011 and to set aside the same and further to direct the arbitrators to mark the documents and to allow the appellant to recall CW2 and RW2 to the said arbitral proceedings.

2. The appellant herein has filed three applications along with the petition before the Tribunal, (i) to reopen the side of the appellant and recall CW2 for further cross examination, (ii) to reopen the side of the respondent and (iii) to recall RW2 to mark other documents. The said prayers in the applications were partly allowed by the Arbitral Tribunal.

3. Challenging the same, the appellant herein has raised various grounds, one such ground is that, having accepted the case of the appellant and allowed to mark additional documents, rejecting the marking of documents, which were downloaded from the Internet, is a mere error apparent on the face of record and rejecting the recalling of the witness is also an error committed. The reason given by the learned arbitrator that recall of witnesses CW2 and RW2 will further delay the petition pending, but, the delay was due to the non-availability of the Presiding Arbitrator, is not considered by the arbitrators.

4. The learned counsel for the appellant submitted that the Presiding Arbitrator, who was originally appointed was not well and after that, another Presiding Arbitrator was appointed, who after conducting the hearing for some time, had suddenly expired. Hence, new Arbitrator has been appointed and therefore, the delay was not due to the appellant or the respondent, but only on the above stated facts. Therefore, prayed to allow the present Civil Miscellaneous Appeal.

5. Per contra, a counter affidavit was filed by the respondent stating that the present appeal filed by the appellant is an abuse of process of law and this appeal for setting aside the order dated 12.08.2019 passed by the Arbitrator and granting permission to mark the documents at the stage of proceedings, will definitely prolong the case. Further, the learned counsel reiterates Paragraph no.3 of the Counter affidavit and the same runs as follows:

'At the outset, I submit that the application filed by the petitioner is an abuse of process of law and ought to be dismissed in limine. This petition in CMP No.19539 of 2019 for interim stay of all further proceedings in Purchase Order No.32001497 dated 25.05.2011 pending before the Arbitrators has arisen from Civil Miscellaneous Appeal in CMA No.3352 of 2019 filed by the petitioner under Section 37(2) of the Arbitration and Conciliation act, 1996 challenging the order dated 12.08.2019 passed by the Arbitration Tribunal in the matter of purchase Order No.32001497 dated 25.05.2011 pending before the Arbitrators, Where the learned Tribunal had passed an order partially rejecting certain applications dated 10.08.2019 filed

by the petitioner to mark certain documents, reopening the evidence and recalling the witnesses.'

6. The learned counsel for the respondent submitted that Section 37(2) of Arbitration and Conciliation Act, 1996 has very limited scope and is available only to the extent of challenging any orders passed by the Tribunal under Section 16 (2) or under Section 16(3) of the Arbitration and Conciliation Act, 1996 or any orders passed by the Tribunal under Section 17 of Arbitration and Conciliation Act, 1996, therefore, the present appeal, which does not fall within the scope of Section 16(3) or Section 16(2) or Section 17, is not maintainable and it has to be dismissed. The High court or any other Court does not have jurisdiction to interfere in a pending arbitration proceedings and any grievance with regard to the procedure adopted by the Arbitral Tribunal can be dealt with only at the stage of challenging the award of the Tribunal under Section 34 of the Arbitration and Conciliation Act.

7. The learned counsel for the respondent has also submitted that the Tribunal is empowered to conduct the proceedings in the manner it considers appropriate and the power of the Tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence, as the Tribunal is not bound by Code of Civil Procedure or Indian Evidence Act. For useful reference, the Paragraph Nos.6 and 7 of the counter affidavit are extracted hereunder :

'6. I submit that the Arbitration Proceedings commenced way back on 25/04/2014. I submit that the respondent filed its proof affidavit of CW1 along with document on 14/03/2015. The cross examination of CW1 commenced on 24/03/2015 and was concluded on 26/03/2015. Thereafter, the respondent filed the proof affidavit of CW2 on 17/04/2015. The cross examination of CW2 commenced on 01/08/2016 and was concluded on 01/02/2017. As many as 306 questions were put to CW2 by the Counsel for the Petitioner.

7. I submit that the petitioner filed the proof affidavit of RW1 dated 26/02/2017. His cross examination which commenced on the same day was concluded only on 19/09/2017. Thereafter, after a long delay of nearly four months the Petitioner examined RW2 on 23/01/2019 and he was cross examined on the same dated. The Counsel for the Respondent commenced his arguments on 14/09/2018 which was concluded on 23/03/2019. The Counsel for the Petitioner commenced his argument on 13/07/2019 and when it was posted for the continuation of arguments on 10/08/2019, the petitioner came up with an application to re-open and recall CW2 for further cross examination and to re-open and recall

RW2 to mark additional documents. This is nothing but an abuse of process of law considering the fact that the arbitration proceedings which commenced way back on 25/04/2014 has reached the stage of conclusion. At this stage after more than 5 years the petitioner filed three application to recall witnesses and also to file additional documents.'

8. The respondent in the counter affidavit at Paragraph No.9 had denied the allegation that they are manufacturing refractory bulk concrete and if at all the respondent had manufactured any such product, there would be no necessity for them to buy the same from the appellant herein. The respondent had also stated that the none of the documents are relevant to the issue in the case on hand and if at all the respondent was aware about the refractory products and its applications, they would not have requested the services of the engineers of the appellant for resolving the problems faced by the respondent / claimant while utilising the products supplied by the appellant. Also, the respondent had denied that CW2 is competent and expert to give any suggestion in the construction of castables. Hence recalling him was a futile exercise. The same was agreed by the Arbitral Tribunal and have stated that the matter was pending for a long time and the respondent had commenced the arguments on 14.09.2018 and the respondent counsel has commenced their arguments on 13.07.2019 and at this point of time, the petition filed by the appellant herein to recall CW2 and RW2 and accept the documents downloaded from the Widipedia, are only to drag on the proceedings and hence the Tribunal had stated that as they have already permitted the parties to refer the documents, the recalling of witnesses would further delay the same and they have disposed of the applications on the above said terms.

9. The learned counsel for the respondent relied on the following decisions :

(I) (2005) 8 Supreme Court Cases 618 [SBP& CO. V. Patel Engineering Ltd., and Another]

(ii) ILR(2008) I Delhi 1084 [Satinder Narayan Singh V. Indian Labour Cooperative Society Ltd., & Ors), wherein at Paragraph Nos.3 to 5 it is held as under:-

'3. Section 27 of the Act permits the court assistance in taking evidence if the arbitral tribunal or a party with the approval of the arbitral tribunal applies to the court for assistance in taking evidence. In the present case, the petitioner has not obtained the approval of the arbitral tribunal before moving the court seeking is assistance for taking evidence by invocation of section 27 of the Act. Therefore, the application as filed is not sustainable.

4. The Act is absolute silent about the procedure or the remedy which may be available to a party if the arbitral tribunal refuses to examine the witnesses of a party holding that they are not relevant for the proper disposal of the dispute inter se the parties pending adjudication before him. Therefore, the only remedy available to the petitioner is to file objections under section 34 of the Act, if on pronouncement of an award, he is of the view that the arbitrator has not adjudicated upon the disputes under reference in accordance with law and procedure.'

(iii) 2008 (102) DRJ 443 [I.T.I.Limited V. Himachal Futuristic Communications), wherein at Paragraph Nos.6 and 7 it is laid down as under:-

6. In my view, the provisions of Section 17 do not come into play at all unless and until the arbitral tribunal has jurisdiction in the matter. Insofar as the argument qua jurisdiction is concerned, the arbitral tribunal, rightly or wrongly, has rejected the contention of the appellant and has refused to agree with the appellant that it had no jurisdiction to continue with the arbitration proceedings unless and until an express consent was obtained from the BIFR. In such a situation, the only remedy available to the appellant would be that which is provided by Section 16 (6) of the said Act and that is to await the making of the arbitral award and thereafter to make an application for setting aside the said award on this ground in accordance with the provisions of Section 34 of the said Act. It is also clear that an appeal can lie from an order passed under Section 16(2) only if the plea that the arbitral tribunal does not have jurisdiction is accepted. This is apparent from the provisions of Section 37(2)(a) of the said Act. Since the plea of jurisdiction raised by the appellant has been rejected, the provisions of Section 37(2)(a) of the said Act would not be available to the appellant.

7. The learned counsel for the appellant contended, as pointed out earlier, that the application was a hybrid application under Section 16 and Section 17 and, surely, any order passed under Section 17 by the arbitral tribunal could form the subject matter of an appeal particularly in view of the provisions of Section 37(2)(b) which permitted the filing of an appeal against an order of the arbitral tribunal granting or refusing to grant an interim measure under that Section (i.e., Section 17). Although this argument is attractive, I am of the view that Section 17 would only apply where the arbitral tribunal has jurisdiction and, secondly, the interim measures that

are referred to in Section 17 are passed during the pendency of the arbitration proceedings and not when they are stultified. Moreover, the interim measures that are sought are with the object of seeking protection of the subject matter of the dispute and the interim measures that are granted are by way of the tribunal ordering a party to take such measure or protection.'

10. From the order of the Tribunal, it is seen that the Arbitral Tribunal has allowed the Emails exchanged between the parties and the same was marked as Exs.R17 to R21, which are public documents, but, rejected certain documents, which were downloaded from the Internet and also rejected the claim to recall CW2 and RW2, on the ground that it would delay the proceedings further. Further, after considering the documents it was found that certain documents are forming part of one visit report of Saurabh Singh to the respondent / claimant dated 13.10.2012, as the same was already on record, the Tribunal had allowed to refer to the report of Saurabh Singh as Document no.1 of Vol.2 during the course of argument. Regarding the document at S.No.12 in Volume I, namely, the method of testing the refractory castables by Bureau of Indian Standard [IS No.10570-2011-Pages 82-90) and the document in S.No.2 in Volume 2, namely, the concrete admixtures - specifications (1st Revision by Bureau of Indian Standard) (IS No.9103/1999) are concerned, both the documents are public documents and Tribunal had also permitted the parties to refer the same.

11. Further, the Tribunal with regard to the document in Sl.No.11 in Vol. I, which was downloaded from the Wikipedia from the site of the respondent from pages 42-81 is concerned, it is a document relating to Saint Gobain SEFPRO and which was promptly denied by the respondent stating that they are manufacturing refractory bulk concrete and they belong to relevant industry and also denied that the respondent was aware of the basics of refractory / concrete product and its applications.

12. In view of the stand taken by the respondent / claimant before the Tribunal, who has got nothing to do with the Saint Gobain SEFPRO and in the absence of any evidence that both belong to the same company, the Tribunal had accepted the case of the claimant / respondent that the downloaded pages are not relevant for the purpose of present case on hand. In the absence of any evidence to link the documents with the claimant and in the absence of any nexus between the two, they held that the documents taken from the wikipedia, relating to the Saint Gobian SEFPRO cannot be relied on for the purpose of this case.

13. At this stage, the counsel for the appellant submitted that the matter has to be decided based on the materials produced before it. The Saint-Gobain SEFPRO (Sintered and Electrofused Products), founded in the year 1929, produces refractories for the Glass industry and the Group belongs to the 'Innovative Materials' division of the Saint-Gobain Group, hence he contended that the said company, who is also in the glass industries are producing similar materials, as that of the appellant herein and he wanted to show that setting type of certain products without retarding agent and with retarding agent and hence he wanted to utilise the same for defending this case before the said Arbitral Tribunal as the act which high performing retarding admixture was used by Saint Gobain. But the authorities did not consider his petition for asserting the said material, which would show that the Saint Gobain SEFPRO, one of the companies belonging to Saint Gobain Group.

14. Heard the learned counsel on either side and perused the documents placed on record.

15. On perusal of the said downloaded documents, it is seen that the company belongs to the Saint Gobain Group and whether the materials downloaded would be of any help to the appellant herein, has to be decided only by the arbitrator and this Court cannot interfere in their conduct of proceedings.

16. As pointed out by the respondent / claimant that if at all they have knowledge or if at all they are producing the same, they would not have purchased the same from the appellant, also sounds good, hence in the absence of any material to show that Saint Gobian SEFPRO has anything to do with the Saint Gobian Glass India limited and since the matter has been pending from the year 2014, as rightly pointed out that the arguments have been commenced, recalling the witness again will only delay the proceedings, as observed said Arbitral Tribunal. It is also found that the Arbitral Tribunal has allowed the parties to mark certain documents, which are relevant to the said proceedings. The appellant herein should have been more vigilant and should have made more research, when the matter was taken up by Arbitral Tribunal and ought to have filed the relevant / concerned documents at the time, when they had filed a petition or when the respondent had filed their counter. The scope of interference in the order passed by the learned Arbitrator is limited. Hence the appellant can raise all these issues before the said forum, when the claim is decided.

17. From year 2014, the appellant had waited till the year 2019, after commencement of the arguments, has come out with the present petition to reopen and recall the CW2 and RW2 and

the same will definitely prolong the proceedings. As the Bureau of Indian Standards' documents have been allowed to be marked and referred, the appellant and the respondent can let in evidence as per the directions of the Arbitral Tribunal. As the Tribunal has rightly stated that it would further delay the same by recalling the witnesses, this Court is not inclined to interfere with said orders passed by the Tribunal.

With the above said observations and directions, the present Civil Miscellaneous Appeal is dismissed. No costs.

Sd/-

Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

ssd

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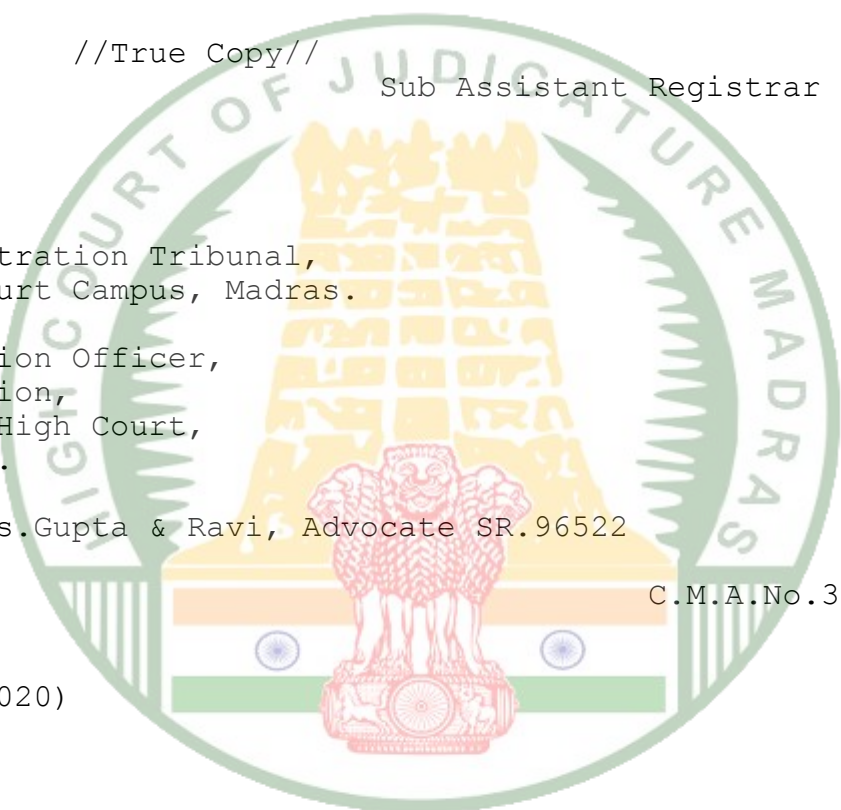
1.The Arbitration Tribunal,
High Court Campus, Madras.

2.The Section Officer,
VR Section,
Madras High Court,
Chennai.

+1cc to M/s.Gupta & Ravi, Advocate SR.96522

C.M.A.No.3352 of 2019

CP(CO)
CB(24/02/2020)

The seal of the Madras High Court is a circular emblem. It features a central illustration of the Lion Capital of Ashoka, which is a four-lion capital standing on a base. The capital is flanked by two smaller lions. The entire emblem is set against a background of a green and white striped field. The words "HIGH COURT OF JUDICATURE MADRAS" are inscribed in a circular border around the central emblem. Below the emblem, the Sanskrit motto "सत्यमेव जयते" (Satyameva Jayate) is written in Devanagari script.

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