

**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

RESERVED ON	28.06.2019
DELIVERED ON	04.07.2019

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CORAM:

THE HON'BLE MR.JUSTICE K.RAVICHANDRABAABU**and****THE HONOURABLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY****W.A. (MD) No.655 of 2019****and****C.M.P (MD) No.5568 of 2019**

M/s.The Indian Hume Pipe Company Ltd.,
Represented by its Deputy General Manager
S. Arunachalam
No.8, First Street
Gopalapuram,
Chennai

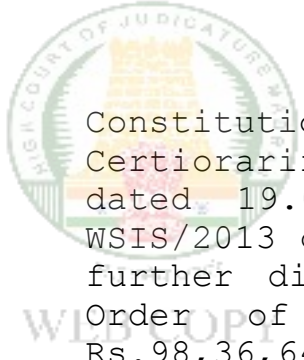
... Appellant/Petitioner

Vs.

- 1) The Executive Engineer,
TWAD Board, Urban Division
No.1, Meigna Street
Near Rose Mary School
Palayamkottai
Tirunelveli-627 002
- 2) The Chief Engineer,
TWAD Board, Southern Region,
Ganesh nagar,
Melur Road,
Madurai 625 007
- 3) The Superintending Engineer,
TWAD Board,
Tirunelveli,
Kanyakumari Circle,
Tirunelveli 627 002

... Respondents/
Respondents

PRAYER: Writ Appeal is filed under Clause 15 of Letters Patent Act against the order passed by this Court in W.P.(MD) No.828 of 2014, dated 13.11.2018.



Constitution of India, praying this Court To issue a Writ of Certiorarified Mandamus, calling for the records in Communication dated 19.03.2013 in Proceedings No. 1833/DG/F. thatchanallur WSIS/2013 on the file fo the 3rd respondent and quash the same and further direct the Respondents to make the payment as per the Order of Adjudication dated 19.05.2010 of an amount of Rs.98,36,640/- (along with interest upto 30th April 2013) along with interest till the date of payment.

For Appellant : Mr.B.Saravanan

J U D G M E N T

(The Judgment of the Court was made by **SENTHILKUMAR RAMAMOORTHY, J**)

This Writ Appeal is filed by the Petitioner in the Writ Petition. The said Appellant/Petitioner is aggrieved by the order dated 13.11.2018, whereby the Writ Petition filed by the Appellant herein praying that the communication dated 19.03.2013 be quashed and that the Respondents herein be directed to pay the sum of Rs.98,36,640 as per the order of adjudication dated 19.05.2010 was dismissed.

2. The facts that are relevant for the purposes of this appeal are that the Respondents herein floated a tender for the provision of water supply to the Thatchanallur area. The Appellant herein was the successful bidder and a contract of a total value of Rs.4,41,98,277/-was awarded to the Appellant. Upon completion of work, the Appellant made a claim for an amount of Rs.92,25,296.77. In view of the non-payment thereof, the Appellant referred the dispute for adjudication as per the contract. The dispute resolution clause in the contract provides for the reference of the decision of the Engineer to an Adjudicator within 14 days of the notification of the Engineer's decision. In turn, the Adjudicator is required to give a decision in writing within 28 days of receipt of a notification of dispute. Either party is entitled to refer a decision of the Adjudicator to an arbitrator within 28 days of the Adjudicator's written decision and if neither party refers the dispute to arbitration within the said 28 days, the Adjudicator's decision will be final and binding.

3. In this case, the reference to the Adjudicator was made by letter dated 18.12.2009 and on consideration of the said reference, the Adjudicator by decision dated 19.5.2010 directed the Respondents herein to pay the amount specified in the order under various heads. After the Adjudicator's decision, a communication dated 26.5.2010 was issued by the Executive Engineer, Chennai to the first Respondent herein to the Chief Engineer, second Respondent herein, stating that the dispute should be



referred for arbitration. Thereafter, by communication dated 29.6.2010, the said Executive Engineer informed the Appellant herein that, as already informed on 26. 5. 2010, the request of the Appellant for payment is denied on account of the decision to refer the dispute to arbitration.

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4. This was followed by various communications between the parties including the lawyer's notice dated 10.9.2011 from the Appellant to the Respondents demanding payment of Rs.92.25.296.78. In these communications, the Respondents also put the Appellant on notice that the Adjudicator gave the decision beyond the stipulated time of 28 days. Eventually, the Appellant herein filed the writ petition that culminated in the impugned order.

5. At the admission stage hearing, the learned counsel for the Appellant pointed out that the dispute resolution clause specifies that the decision of the Adjudicator becomes final and binding on the Respondents unless the matter is referred to arbitration within 28 days of the decision of the Adjudicator. According to the learned counsel, in this case, the decision of the Adjudicator was not referred to arbitration within the said 28 days and had, therefore, attained finality. Consequently, he submitted that the Respondents were obligated to make payment as per the decision of the Adjudicator. He further submitted that the Writ Court erroneously rejected the Writ Petition on the basis that it is not maintainable. In order to substantiate this contention, the learned counsel relied upon the decision of the Hon'ble Supreme Court in **ABL International Ltd. versus Export Credit Guarantee Corporation of India Ltd. (2004) 3 SCC 553**, wherein the Supreme Court held as follows:

"27. From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition:

(a) in an appropriate case, a writ petition as against a state or an instrumentality of a state arising out of a contractual obligation is maintainable.

(b) merely because some disputed questions of facts arise for consideration same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) a writ petition involving a consequential relief of monetary claim is also maintainable."

...

37. In our opinion, this limited area of dispute can be settled by looking into the terms of the contract of insurance as well as the export contract, and the same require consideration of any oral evidence or any other documentary evidence other than what is



already on record. The claim of the contesting parties will stand or fall on the terms of the contract, interpretation of which, as stated above, does not require any external aid."

6. The learned counsel for the Appellant also relied upon the decision of the Supreme Court in zonal manager, **Central Bank of India versus Devi Ispat (2010) 11 SCC 186**, where the Supreme Court took into consideration the law laid down in the aforesaid ABL International case and held as follows:

"28. From the case law it is clear that

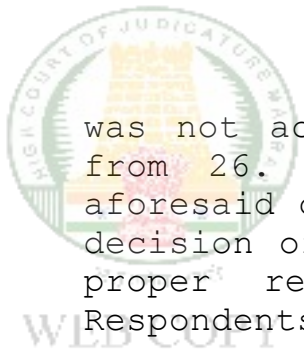
(a) in the contract if there is a clause for arbitration, normally a writ court should not invoke its jurisdiction; (b) the existence of effective alternative remedy provided in the contract itself is a good ground to decline to exercise its extraordinary jurisdiction under article 226; and

(c) if the instrumentality of the state acts contrary to the public good, public interest unfairly, unjustly unreasonably, discriminatory and violative of Article 14 of the Constitution in its contractual or statutory obligation, writ petition would be maintainable. However a legal right must exist and corresponding legal duty on the part of the State and if any action on the part of the State is wholly unfair or arbitrary, writ courts can exercise their power. In the light of the legal position, writ petition is maintainable even in contractual matters, in the circumstances mentioned in various judgments of the Supreme Court."

7. On the basis of the above mentioned judgements of the Supreme Court, the learned counsel for the Appellant contended that the Writ Court had erred in rejecting the Writ Petition as not maintainable. Therefore, he contended that the Writ Appeal is liable to be allowed and the prayer in the Writ Petition should be granted.

8. The pleadings, documents and oral submissions of the learned counsel for the Appellant were considered carefully.

9. It is the admitted position in this case that a contract was awarded to the Appellant by the Respondents and that the said contract contains a dispute resolution clause. It is also the admitted position that the said dispute resolution clause was invoked and the matter was referred to an Adjudicator. From the documents on record, it is clear that the Adjudicator entered upon reference on 18.12.2009 but submitted the decision on 19. 5. 2010. Accordingly, it is clear that the decision of the Adjudicator was given after the lapse of the contractual period of 28 days. The documents further disclose that the decision of the Adjudicator



was not accepted by the Respondents and that attempts were made from 26. 5. 2010 to refer the dispute for arbitration. The aforesaid communication dated 26. 5. 2010 is within 28 days of the decision of the Adjudicator. Although this did not culminate in a proper reference to arbitration, it is evident that the Respondents initiated action for that purpose.

10. The main objection of the writ petitioner against the reference to arbitral proceedings is that such reference was made after a period of 28 days, prescribed under the terms of the agreement, from the date of the adjudicator's decision. In other words, relying on clause 25(2) of the agreement, it is contended that if neither party refers a dispute to arbitration within 28 days of the adjudicator's decision, such decision will be final and binding. First of all, we would like to point out that such time limit is not only prescribed for referring a dispute to the arbitration and also for the adjudicator to give a decision in writing from the date of receipt of the notification of the dispute, as could be seen under Clause 25(1). Admittedly, in this case, the adjudicator has not given the decision within 28 days. Therefore, the question as to whether the decision made by the adjudicator is valid, if it was given beyond the period prescribed and whether the reference made for arbitration after the expiry of 28 days from the date of adjudicator's decision is a matter for consideration by Arbitral Tribunal. It is apparent that one party, namely, the writ petitioner seeks to take advantage of the decision made by the adjudicator, even though the same was rendered beyond the time limit and the other party, namely, the respondent seeks to refer the dispute to arbitration allegedly preferred after the period of 28 days. Therefore, the above questions need to be considered and decided in the arbitration, especially, when it is a settled position that the arbitral tribunal itself can consider and decide with regard to the applicability of arbitration clause as held in **(2003)6 SCC 503 [Hindustan Petroleum Corporation Limited vs. Pinkcity Midway Petroleums]**, wherein it is observed at paragraphs 15 and 16 as follows:-

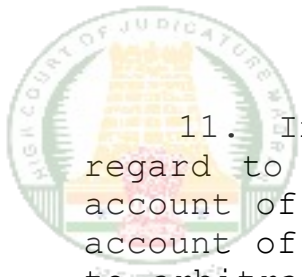
"15. The question then would arise: what would be the role of the Civil Court when an argument is raised that such an arbitration clause does not apply to the facts of the case in hand? Learned counsel for the appellant contends that it is a matter which should be raised before the arbitrator who is competent to adjudicate upon the same and the Civil Court should not embark upon an inquiry in regard to the applicability of the arbitration clause to the facts of the case. While learned counsel appearing for the respondent contends that since the applicability of the arbitration clause to the facts of the case goes to the very root of the jurisdiction of the reference to arbitration, this question will have to be



decided by the Civil Court before referring the matter to arbitration even in cases where there is admittedly an arbitration clause. The answer to this argument, in our opinion, is found in Section 16 of the Act itself. It has empowered the Arbitral Tribunal to rule on its own jurisdiction including rule on any objection with respect to the existence or validity of the arbitration agreement. That apart, a Constitution Bench of this Court in Konkan Railway (supra) with reference to the power of the arbitrator under Section 16 has laid down thus :

"21. It might also be that in a given case the Chief Justice or his designate may have nominated an arbitrator although the period of thirty days had not expired. If so, the Arbitral Tribunal would have been improperly constituted and be without jurisdiction. It would then be open to the aggrieved party to require the Arbitral Tribunal to rule on its jurisdiction. Section 16 provides for this. It states that the Arbitral Tribunal may rule on its own jurisdiction. That the Arbitral Tribunal may rule "on any objections with respect to the existence or validity of the arbitration agreement" shows that the Arbitral Tribunal's authority under Section 16 is not confined to the width of its jurisdiction, as was submitted by learned counsel for the appellants, but goes to the very root of its jurisdiction. There would, therefore, be no impediment in contending before the Arbitral Tribunal that it had been wrongly constituted by reason of the fact that the Chief Justice or his designate had nominated an arbitrator although the period of thirty days had not expired and that, therefore, it had no jurisdiction." (emphasis supplied).

16. It is clear from the language of the Section, as interpreted by the Constitution Bench judgment in Konkan Railway (supra) that if there is any objection as to the applicability of the arbitration clause to the facts of the case, the same will have to be raised before the concerned Arbitral Tribunal. Therefore, in our opinion, in this case the courts below ought not to have proceeded to examine the applicability of the arbitration clause to the facts of the case in hand but ought to have left that issue to be determined by the Arbitral Tribunal as contemplated in Clause 40 of the Dealership Agreement and as required under Sections 8 and 16 of the Act."



11. In effect, there are disputed questions of fact with regard to whether the Adjudicator's decision is binding both on account of the lapse of the 28 day limit under the contract and on account of the steps taken by the Respondents to refer the dispute to arbitration. Therefore, the issue raised in this writ petition is certainly an issue which has to be considered and decided by the arbitral tribunal itself.

12. In these facts and circumstances, applying the principles laid down by the Supreme Court, including in the cases cited by the learned counsel for the Appellant, it is clear that this is not an appropriate case for the exercise of discretion by the Writ Court for the following reasons. There is admittedly a dispute resolution mechanism in the contract between the Appellant and the Respondents. This dispute resolution mechanism also contains an arbitration clause and the Respondents took steps to initiate arbitration. As stated in the preceding paragraph, there are also disputed questions of fact and the dispute does not involve the performance of public functions. Instead, the dispute arises out of a commercial contract between the Appellant and the Respondents.

Accordingly, we are of the view that the Writ Court correctly refused to entertain the Writ Petition. Therefore, this Writ Appeal fails and the order of the Writ Court is affirmed and the Writ Appeal is dismissed. However, there will be no order as to costs. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CRL.SIDE)

// True Copy //

Sub Assistant Registrar(CS)

To

1) The Executive Engineer,
TWAD Board, Urban Division
No.1, Meigna Street
Near Rose Mary School
Palayamkottai, Tirunelveli-627 002

2) The Chief Engineer,
TWAD Board, Southern Region,
Ganesh Nagar,
Moulali Road, Madurai 625 007



3) The Superintending Engineer,
TWAD Board,
Tirunelveli,
Kanyakumari Circle,
Tirunelveli 627 002

+1 CC to M/s.B.SARAVANAN, Advocate (SR-73847[F] dated
08/07/2019)

STS

Judgment made in
W.A. (MD) No.655 of 2019
04.07.2019

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