

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 15.12.2020

Pronounced on : 21.12.2020

CORAM

THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN

A.No. 1699 of 2020
in
C.S.(Comm.Div.) No.98 of 2020

A.No. 1699 of 2020:-

M/s. Larsen & Toubro Limited
Thermal Power Plant Construction
Mount Poonamallee Road
Post Box No. 979, Manapakkam,
Chennai – 600 089
Rep. by its Authorised Signatory
Mr.S.Anil Kumar

... Applicant

Vs.

IL & FS Tamil Nadu Power Company Limited
4th Floor, KPR Tower,
Old No.21, New No.2,
1st Street, Subba Rao Avenue,
College Road,
Chennai – 600 006.

... Respondent

Prayer:- This application filed under Order XIV and Rule 8 O.S., Rule 1956 read with Section 8 of Arbitration and Conciliation Act, 1996, to refer the parties to the dispute in CS (Comm Div) No. 98 of 2020

pending before this Hon'ble Court to arbitration in terms of the agreement dated 15.03.2014 as per Section 8 read with Section 5 of the Arbitration and Conciliation Act, 1996.

For Applicant : Mr. Adarsh Subramanian

For Respondent : Mr. K. Manoj Menon

ORDER

Application filed by the defendant under Section 8 of the Arbitration and Conciliation Act 1996 to refer the parties in the above suit to arbitration in terms of the agreement dated 15.03.2014 in accordance with Section 8 read with Section 5 of the Arbitration and Conciliation Act 1996.

2. The suit had been filed by the plaintiff IL & FS Tamil Nadu Power Company Limited, a company incorporated under the Companies Act, 1956 seeking a Judgment and Decree against the defendant, M/s. Larsen & Toubro Limited, also a company incorporated under the Companies Act 1956 to pay to the plaintiff a sum of Rs.1,62,09,428/- together with interest at 18% p.a., at Rs.1.06.07.123/- from 21.02.2020 till date of realisation and for costs of the suit.

3. The plaintiff who are engaged in generation and supply of

thermal power, have a 1200 MW coal based Thermal Power Plant in Cuddalore District. The defendant is in the business of construction of Thermal Power Plants. The plaintiff had issued a Letter of Intent to the defendant on 28.02.2014 seeking performance of General Civil and Structural works relating to Track Hopper and Allied Conveyor Systems having a capacity of 4000 TPH at the Power Plant in Cuddalore. On 15.03.2014 an agreement had been entered into pursuant to the offer being accepted by the defendant. On 15.10.2015, on completion of the work, a Virtual Completion Certificate had been issued by the plaintiff to the defendant. During the execution of the work, the plaintiff had released payments to the defendant. On reconciliation of the accounts, the plaintiff found that an excess amount of Rs.1,06,07,123/- had been paid to the defendant. The plaintiff then commenced a series of correspondences with the defendant seeking refund of the excess amount paid. It was stated that the defendant had not disputed their liability. They had proposed set off against the amounts payable to the defendant from another contractor. However, the plaintiff claimed there was no privity of contract or connection between the two contracts. The defendant failed to settle the outstanding amount. The plaintiff then issued a legal notice. The defendant issued a reply once again claiming

adjustments of the dues owed by another contractor to the defendant. The plaintiff again claimed that the defendant had not disputed their liability and issued a rejoinder rejecting adjustment of the debts as proposed by the defendant. It was under these circumstances that the suit had been filed claiming that the dispute is a Commercial Dispute falling under Section 2(1)(c)(vi) of the Commercial Courts Act 2015.

4. The present application has been filed by the defendant stating that the agreement dated 15.03.2014 which is the basis for the claim of the plaintiff *inter alia* provides for settlement of disputes through arbitration. It was therefore stated that the issues raised should be referred to arbitration in accordance with Section 8 of the Arbitration and Conciliation Act 1996.

5. Heard Mr. Adarsh Subramanian, learned counsel for the applicant/defendant and Mr. K. Manoj Menon, learned counsel for the respondent/plaintiff.

6. It is to the credit of both the learned counsels that arguments

were advanced recognising the legal position which arises when parties had agreed to refer disputes arising out of an agreement entered into between them to arbitration.

7. Section 8 of the Arbitration and Conciliation Act 1996 is as follows:-

“8. Power to refer parties to arbitration where there is an arbitration agreement.— ”

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the

issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made. “

8. Section 5 of the Arbitration and Conciliation Act 1996 is as follows:-

“5. Extent of judicial intervention.—

Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part. ”

9. A copy of the agreement had been filed along with the plaint. The defendant produced the original agreement along with the application. The agreement had been engrossed in a Rs.100/- Non Judicial Stamp Paper purchased by the plaintiff herein. Clause 4.12 relates to General Terms and Conditions. Five Terms and Conditions had been set out. The fifth Term is as follows:-

“In case of any dispute arises regarding or concerning this agreement or its interpretation

thereof the same will be resolved through Arbitration in accordance with Indian Arbitration & Conciliation Act (latest version). All the legal disputes will be within the jurisdiction of Chennai.”

10. A reading of the above clause makes it crystal clear that the parties had agreed to resolve through arbitration any dispute arises concerning the agreement.

11. In the instant case, the dispute is with respect to the payments made by the plaintiff to the defendant. The plaintiff claims excess amount has been paid. The defendant claims set off with the amounts due from another contractor.

12. The payment made by the plaintiff was on the basis of the payment terms under the agreement. There could be an instance when there would be default in payment and a contractor seeks the said amount. In this case, according to the plaintiff, excess payment had been made and the plaintiff seeks refund. Both instances will fall under the same category. They are both disputes arising out of the agreement. The

works executed by the defendants was pursuant to the agreement. Payments were made pursuant to the agreement. Any dispute, either for claim for non payment or for refund of excess payment would be a dispute arising out of the agreement.

13. In this connection, the attention of the Court had been drawn to a very recent Judgment of the Hon'ble Supreme Court in ***Civil Appeal No. 2402 of 2019 [Vidya Drolia & Ors. Vs. Durga Trading Corporation]*** dated 14.12.2020 wherein the Hon'ble Supreme Court decided a reference to three Judges made vide order dated 28.02.2019 in Civil Appeal No. 2402 of 2019 (i) ***2019 SCC OnLine SC 358 [Vidya Drolia & Ors. Vs. Durga Trading Corporation]***; and (ii) ***(2017) 10 SCC 706 [Himangni Enterprises V. Kamaljeet Singh Ahluwalia]*** with specific reference to reference of disputes to arbitration.

14. In paragraph 45, the Hon'ble Supreme Court had propounded a four fold test for determining when a subject matter of a dispute in an arbitration agreement is not arbitrable. Paragraph 45 is extracted below:-

“45. In view of the above discussion, we

would like to propound a fourfold test for determining when the subject matter of a dispute in an arbitration agreement is not arbitrable:

(1) when cause of action and subject matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.

(2) when cause of action and subject matter of the dispute affects third party rights; have erga omnes effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;

(3) when cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; and

(4) when the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

These tests are not watertight

compartments; they dovetail and overlap, albeit when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject matter is non-arbitrable. Only when the answer is affirmative that the subject matter of the dispute would be non-arbitrable.

However, the aforesaid principles have to be applied with care and caution as observed in (1999) 5 SCC 651 [Olympus Superstructures Pvt. Ltd.]:

“35...Reference is made there to certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, which cannot be referred to arbitration. It has, however, been held that if in respect of facts relating to a criminal matter, say, physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration in (1846) 9 Q.B. 371 (Keir v. Leeman). Similarly, it has been held that a husband and a wife may refer to arbitration the terms on which they shall

separate, because they can make a valid agreement between themselves on that matter (Soilleux v. Herbst [(1801) 2 Bos & p. 444], Wilson v. Wilson [(1848) 1 HL Cas 538] and Cahill v. Cahill [(1883) 8 App Cas 420(HL)]).”

15. In paragraph Nos. 52, 53, 54 & 55, the Hon'ble Supreme Court had held as follows:-

“52. Who decides the question of non-arbitrability? - a jurisdictional question is a technical legal issue, and requires clarity when applied to facts to avoid bootstrapping and confusion. The doubt as to who has the jurisdiction to decide could hinder, stray, and delay a many arbitration proceedings. Unfortunately, who decides non-arbitrability remains a vexed question that does not have a straightforward universal answer as would be apparent from opinions in the at-variance Indian case laws on this subject.

To some extent, the answer depends on how much jurisdiction the enactment gives to the

arbitrator to decide their own jurisdiction as well as the court's jurisdiction at the reference stage and in the post-award proceedings. It also depends upon the jurisdiction bestowed by the enactment, viz. the facet of non-arbitrability in question, the scope of the arbitration agreement and authority conferred on the arbitrator.

53. Under the Arbitration Act, 1940, the jurisdiction to settle and decide non-arbitrability issues relating to existence, validity, scope as well as whether the subject matter was capable of arbitration, with possible exception in case of termination, novation, frustration and 'accord and satisfaction' when contested on facts, was determined and decided at the first or at the reference stage by the courts. The principle being that the court should be satisfied about the existence of a valid arbitration agreement and that the disputes have arisen with regard to the subject matter of the arbitration agreement. At this stage, the court would be, however, not concerned with the merits or sustainability of the disputes. Despite best efforts to contain obstructive tactics, adjudication and final decision of non-arbitrability issues at the reference stage would invariably stop, derail

and thwart the proceedings in the courts for years.

[Emphasis supplied]

16. It is thus seen that even the question of non arbitrability will have to be decided only by the arbitral tribunal. The Court will have to refer the dispute to arbitration if there is a valid agreement and the parties had agreed to refer the disputes to arbitration.

17. In the instant case, there is an agreement. The parties had agreed to refer disputes to arbitration. I have no hesitation in allowing the Application and in referring the issues raised in the suit to Arbitration. As and when an Arbitral Tribunal is constituted, on application made by either of the parties, the Registry may grant certified xerox copies of the relevant records. Further proceedings in the suit shall stand stayed. Plaintiff/defendant to inform the Court regarding any award passed, and at that stage, the suit may be formally disposed. This Application is allowed. No costs.

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Index : Yes / No

Internet : Yes / No

Speaking order : Yes / No

21.12.2020

C.V.KARTHIKEYAN, J.,

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Pre-delivery order made in
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