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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.10.2021

CORAM :

THE HON'BLE MR.SANJIB BANERJEE, CHIEF JUSTICE
AND
THE HON'BLE MR.JUSTICE P.D.AUDIKEVALU

OSA No.97 of 2020
and CMP No.4341 of 2020

The Water Base Limited,
PB No.4902, No.22, Sadasivam Street,
Gopalapuram, Chennai 600 086,
Present address at Thappar House,
No.37, Montieth Road, Egmore,
Chennai 600 008.

Rep. by its company secretary and
Authorized person Mr.R.Achuthan

... Appellant

-vs-

M/s.KAP (India) Project and Construction
Private Limited, Nishat Kuraichira,
Thrissur 680 006, Rep. by its
Managing Director, K.V.Mohamed Zakir.

... Respondent

Prayer: Appeal filed under Order XXXVI Rule 1 of the O.S. Rules read with Clause 15 of the Letters Patent against the judgment and decree dated 05.12.2019 passed in Application No.2342 of 2019 on the file of original side of this court.

Prayer in A.No.2342/2019: Application Praying that this Hon'ble Court be pleased to pass a Judgment against the Respondent in terms of the Award dated 16/05/2018 passed by the Sole Arbitrator, Hon'ble Mr.Justice K.P.Sivasubramaniam (Retd.) and a Decree the Claimant is entitled to interest at the rate of 12 percent per annum on Rs.69,76,000/- from 08/01/1996 till date of award viz., 16.05.2048, the Claimant is entitled to interest at the rate of 12% per annum on Rs.69,76,000/- from 16.05.2018, till date of decree to be passed by this Honble court (in terms of section 29 of the Arbitration Act 1940), and the claimant is entitled to sum of Rs.9,90,000/- towards costs in the arbitration along with future interest at 12 percent per annum thereon from date of Decree till realization.



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For the Appellant : Mr.Saundararaja Appa Rajan

For the Respondent: Mr.Vijay Narayan
Senior Counsel
for Mr.T.M.Pappiah

J U D G M E N T

(Delivered by the Hon'ble Chief Justice)

There is a lesson in every matter and the present case brings out the tardiness in court proceedings, primarily because of the mistakes committed by or on behalf of the parties. Here is a dispute which arose in the year 1996 and is no where near its conclusion more than a quarter of a century later.

2. A request was made by the respondent herein to the appellant prior to the Arbitration and Conciliation Act, 1996 or the ordinance preceding it coming into effect for an arbitral reference. After several failed attempts to get an arbitrator appointed or a reference started, a Division Bench of this court passed an order on December 22, 2014, appointing a retired Judge of this court to take up the reference.

3. There is no dispute that by a notice dated February 11, 2015, the arbitrator called upon the parties to address him on the preliminary issues on February 19, 2015. Thus, it can be taken that the arbitrator entered upon reference on February 19, 2015.

4. In terms of Section 3 of the Arbitration Act, 1940 read with the First Schedule thereto, unless a contrary intention appeared from the arbitration agreement between the parties, the clauses set out in the First Schedule to the Act were deemed to be incorporated as a part of the arbitration agreement. The third clause of the First Schedule to the Act required an arbitral reference to be heard and the award pronounced thereon within a period of four months from the date of the arbitrator entering on reference.

5. Accordingly, in terms of such provision, the arbitral reference ought to have been concluded with an award pronounced by or about June 19, 2015. However, though the hearing before the arbitrator concluded by the first week of April, 2017, the award came to be pronounced on May 16, 2018, some 39 months after the arbitrator entered upon the reference. Neither side objected to the continuation of the proceedings beyond June 19, 2015, nor did it dawn on either side to apply to the court under Section 28 of the 1940 Act.



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6. The award is said to have been filed with the Registrar shortly after it was made, but even the exact date of the filing of the award is not available at the moment. No steps were taken for the issuance of any notice under Section 14(2) of the Act of 1940. It must also be remembered that the award was required to be filed within 30 days of the making and publishing thereof.

7. Though the time for a party seeking to challenge the arbitral award under the 1940 Act started only upon receipt of a notice under Section 14(2) of the Act, the appellant herein applied under Sections 30 and 33 of the Act to question the propriety of the Act under divers grounds even before receiving any notice under Section 14(2) of the Act. But, it appears that there were certain defects in the petition and the same remained unnumbered since the defects had not been removed.

8. Thereafter, only upon the respondent herein applying under Section 17 of the Act for the court to pass a decree in terms of the award and the appellant herein being served a copy of the relevant petition, did the appellant attempt to contest the award. However, since the appellant's relevant petition remained defective and had not been numbered, the Arbitration Court disregarded the objection and proceeded with the petition for pronouncing judgment on the basis of the award. Indeed, the Arbitration Court was of the opinion that the decree ought to be passed first before it could be challenged by the appellant herein.

9. Just like Section 34 of the Arbitration and Conciliation Act, 1996 read with Section 36 thereof contemplates enforcement of an arbitral award after the time to set aside had expired or upon no interim order being granted in the petition for setting aside an award, Section 17 of the Act of 1940 permitted the court to proceed to pronounce judgment according to the award "after the time for making an application to set aside the award has expired, or such application having been made, after refusing it". It was obligatory on the part of the court to deal with the challenge to the award before proceeding to make a decree on the basis thereof.

10. The appellant has referred to several judgments, including those reported at (1985) 2 SCC 629 (State of Punjab vs. Hardy), AIR 1962 SC 78 (Hari Shanker Lal vs. Shambhu Nath) and (1987) 4 SCC 93 (Hindustan Steel Works Construction Ltd vs. Rajasekhar Rao), for the proposition that it is only a court which can enlarge the time to make and publish an award unless the arbitration agreement between the parties confers any right on the parties to consent thereto. It must also be noticed that courts have been lenient in enlarging the time to make and publish the award, particularly since Section 28(1) of the Act of 1940 permitted the enlargement of the time even before or after the award had been made and published.



11. The exercise to extend the time to make and publish an award must be on established and judicious considerations. In the present case, the disputes between the parties that commenced in 1996 have not attained a closure. It took almost 18 years for the claimant to discover the forum before which the claim could be pursued. The parties proceeded in the reference and continued at least ten months after the original time had expired before the hearing in the arbitral reference was concluded and the matter was reserved for judgment. The judgment came to be pronounced a year later and the circumstances in which the award came to be filed in court or the steps taken by the parties thereafter betray that the procedure in the 1940 Act had completely gone out of the minds of all concerned, including the department of this court.

12. In such circumstances, it would be unreasonable to not extend the time to make and publish the award and require the parties to start the process all over again. Accordingly, in exercise of the authority available under Section 28(1) of the Act of 1940, the time to make and publish the award is extended such that the award is now deemed to have been passed within time.

13. Two other issues remain. The first pertains to when the award come to be filed in this court. By way of abundant caution and since Mr.V.Srikanth has appeared before us and affirmed that he had personally made over the original award to a Registrar of this court, the delay, if any, in filing the award in this court is condoned. The appellant herein is also permitted four weeks from today to re-present the petition filed under Sections 30 and 33 of the Act of 1940 upon removing the defects originally detected. It is made clear that if the defects are not removed or the re-representation made within the time permitted, the appellant will forfeit the right to challenge the award.

14. The judgment and decree impugned herein cannot be sustained since the court proceeded to make the award a decree of court despite noticing that a previous challenge to the award – may be it was defective – was pending without affording the challenger a reasonable time to remove the defects. The judgment and decree impugned dated December 5, 2019 stand set aside. The respondent's petition under Section 17 of the 1940 Act, Application No.2342 of 2019, is restored to the board of Arbitration Court. It will be open to the respondent herein to prosecute such application if, within four weeks from date, the appellant's petition for setting aside the award is not re-presented after removing the defects therefrom. It will be open to the appellant to re-construct the petition for setting aside the award if the original papers are not available.



OSA No.97 of 2020 is allowed as above without any order as to costs. CMP No.4341 of 2020 is closed.

Sra

04/10/2021

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CIVIL MISCELLANEOUS PETITION NO.17701 OF 2021
IN
OSA NO.97/2020

Prayer:Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to recall the final order dated 04/10/2021 made in O.S.No.97/2020 and in the said order of the fact relating to the disposal of the Petition filed under Section 33 in the Lower Court that being O.P.No.499 of 2020 may be mentioned and appropriate order that may be necessary.

ORDER:This Petition having been posted on Thursday, the Twenty Eighth day of October Two Thousand and Twenty one affidavit filed in support thereof and subsequent to order of this Court dated 04/10/2021 made in OSA No.97/2020 and in the presence of Mr.S.A.Rajan, Advocate for the Petitioner herein and Mr.R.Vijay Narayan, Senior Counsel for Mr.T.M.Pappiah, Advocate for the Respondent this Court made the following order;

The application has been filed in an appeal which has been disposed of by an order dated October 4, 2021. The appeal arose from a decree passed on the basis of an arbitral award.

2. The grievance of the appellant was that no notice under Section 14(2) of the Arbitration Act, 1940 had been issued to the appellant. However, it turned out that the appellant had applied under Sections 30 and 33 of the Act of 1940 for setting aside the award and at the time of disposal of the appeal from the decree passed on the basis of the award, the appellant represented to this court that the appellant's application for setting aside the award was kept in defective form by the department and not re-numbered.

3. In view of such submission, the appellant was given leave to pursue the appellant's defective application. It now turns out that a completely erroneous picture was presented to this court and the appellant's application for setting aside the order had been considered and dismissed on merits in the presence of counsel who later appeared for the appellant in the appeal.



4. In view of such discovery, there is little latitude that the appellant is entitled to. Since the premise on which the appeal was received and decided was that the appellant's application for challenging the arbitral award would be revived thereby and since it is now evident that the relevant application challenging the award had been dismissed in the presence of advocate for the appellant, no question arises of the appellant being allowed to apply afresh for challenging the arbitral award since such arbitral award has now attained finality. Accordingly, the order dated October 4, 2021 is recalled to the extent that it set aside the judgment and decree impugned. Since the underlying premise for passing the order was flawed and the appellant's challenge to the arbitral award had already been repelled, the decree passed in terms of the award is affirmed. OSA No.97 of 2020 is dismissed by modifying the order dated October 4, 2021 accordingly. C.M.P.No.4341 of 2020 is closed. There will be no order as to costs.

5. Since, as a court of record it inheres in this court to correct its mistake, the mistake is corrected as above. C.M.P.No.17701 of 2021 is disposed of. There will be no order as to costs.

Sd/-
Assistant Registrar(CS IV)
Dated:18/10/2021

Sd/-
Assistant Registrar(CS-III)
Dated:10/11/2021

//True Copy//

Sub Assistant Registrar

sra
To:

The Sub Assistant Registrar,
Original Side,
High Court, Madras.

+lcc to Mr.T.M.Pappiah, Advocate, S.R.No.55939

CMP Nos.17701 of 2021 and 4341 of 2020
in OSA No.97 of 2020

SSV(CO)
SB(22/10/2021)
rsi(co)
srg 18/11/2021