



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.11.2023

CORAM:

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

C.M.A.Nos.2861 and 2862 of 2006

The Cotton Corporation of India Ltd.,
By its Branch Manager,
Having its Regd. Office at Nariman Point,
Mumbai and a Branch office functioning
at 1057, Trichy Road,
Ramanathapuram, Coimbatore-45.

.. Appellants in both the appeals
Vs.

1. M/s.Viswabharathi Textiles Pvt. Ltd.,
VBT House, 4/144, Bharathi Nagar,
Veerapandi, Tiruppur-605.

...1st respondent in both the appeals

2. Mr.B.Kali
District Judge (Retd)
Sole Arbitrator,
18, Eswara Nagar,
E.Vadamadurai,
Coimbatore-17.

.. 2nd Respondent in CMA.No.2861 of
2006

2. Dharani Wind Energy Private Ltd.,
By its Managing Director,
Registered office at No.36, Harvey Road,
Tiruppur.

...2nd respondent in CMA No.2862 of 2006



Common prayer: Civil Miscellaneous Appeals filed under Section 39 of the Arbitration and Conciliation Act, 1996, against the fair and decreetal order dated 18.01.2006 made in Ar.OP.No.118 of 2004 and 326 of 2005 on the file of the Principal District Court, Coimbatore.

For Appellant : Mr.Anirudh Krishnan
M/s.Sarvabhauman Associates
for both the cases

For Respondents : Mrs.Chitra Sambath, Senior Counsel
for M/s.Walldiffs Law firm R1
for both the cases
R2 – No appearance in both the appeals

COMMON JUDGMENT

Through the present appeal, the appellant challenges the fair and decreetal order passed by the Principal District Court, Coimbatore in Ar. O.P. No.118/2004 dated 18.01.2006 in and by which the court below had set aside the arbitral award, which was passed in favour of the appellant herein.

2. For the sake of convenience, the parties will be referred to as appellant and respondent as arrayed herein.

3. The brief facts necessary for the disposal of this appeal are :-

The 1st respondent company has business transaction with the



appellant for the purchase of cotton bales for which they had entered in 5 different contracts during the year 2000. After entering into the contract, the 1st respondent was not able to comply with the terms and conditions of the contract and, therefore, the appellant claimed a sum of Rs.3,33,38,997.21 towards loss on account of resale of 750 unlifted bales under the above contract. As the contract provided for arbitration, the appellant appointed the 2nd respondent herein as the sole arbitrator, who in A.O.P. No.48/02 dated 20.08.2003, passed an award along with future interest at 12% p.a., against the petitioner aggrieved by which the 1st respondent preferred the original petition before the court below.

4. The main ground canvassed in the arbitration petition was that the 2nd respondent was in the panel of arbitrators of the appellant and had been receiving fees from time to time from the appellant and that the said fact was not disclosed u/s 12 of the Arbitration and Conciliation Act (for short 'the Act') and, therefore, the arbitral award is unsustainable. It was further contended that the respondent had been declared a sick industry u/s 22 of the Sick Industrial Companies Act and the said provision acts as a bar for the maintainability of the present petition. It was further contended that for the very same reason, in O.P. No.427/2000, this court had set aside the



award passed by the said arbitrator.

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5. Contrarily it was contended that the above contentions were raised by the 1st respondent through additional grounds, well beyond the period of 120 days from the date of passing of the arbitral award and, therefore, the same is hit by Section 34 (3) of the Act. It was further contended that the plea of bias of the arbitrator was never raised by the 1st respondent, which ought to have been raised at the earliest point of time and, therefore, the said plea cannot be entertained.

6. On the above contentions and counter contentions, the court below held that as mandated u/s 12 of the Act, the factum of the 2nd respondent, being on the panel of the company, has not been disclosed by the arbitrator or the appellant and, therefore, the same is hit by Section 12 (3) (a) of the Act and the decision of this Court in O.P. No.427/2000. It was further held that the 1st respondent being a sick company, in view of Section 22 (i) of the Sick Industrial companies Act, there is a bar as to the maintainability of the application and no legal proceedings can be maintained and on the aforementioned findings, the court below, set aside the arbitral award, which is put to test before this Court in the present appeal.



7. Learned counsel appearing for the appellant, while reiterating the submissions as has been advanced before the court below, submitted that bias of the arbitrator having not been raised at the earliest point of time, Section 4 of the Act comes into play and the inaction on the part of the 1st respondent has to be construed as the 1st respondent has waived off any objections as to the same and, therefore, the non-intimation of the 2nd respondent being in the panel of the arbitrators under the appellant would not attract the rigors of Section 12 (3) of the Act.

8. It is the further submission of the learned counsel that even otherwise, the question of bias has been raised for the first time as additional grounds before the court below, that too after a lapse of 120 days from the date of the arbitral award and, therefore, the same is hit by limitation as provided for u/s 34 (3) of the Act. It is the further submission of the learned counsel that the 1st respondent having not raised the issue of bias at the earliest point of time and also not raised the additional grounds within the period of 120 days from the date of the arbitral award, the court below ought not have entertained the same as none of the ingredients as provided for u/s 34 for setting aside an arbitral award stood attracted and, therefore, the order passed by the court below suffers on all fronts and,



therefore, the same requires to be set aside.

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9. Per contra, learned senior counsel appearing for the 1st respondent submitted that the plea of bias can be raised by the 1st respondent at any point of time and merely because the 1st respondent has not raised it would not preclude the 1st respondent from raising it as the appellant and the 2nd respondent are bound to intimate the same to the 1st respondent so as to elicit the views of the 1st respondent for appointment. The said provision having not been followed, there is gross violation of principles of natural justice insofar as the 1st respondent is concerned, which has been properly appreciated by the court below, while setting aside the arbitral award. Learned senior counsel further submitted that Section 34 (3) of the Act cannot be taken in aid by the appellant when Section 12 (3) has not been followed.

10. It is the further submission of the learned senior counsel that for appreciating the aforesaid contention, the order of this Court in O.P. No.427/2000 was taken in aid, wherein this Court, in a similar scenario, in respect of the very same arbitrator had set aside the arbitral award on the ground of bias.



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11. It is the further submission of the learned senior counsel that the finding with regard to the maintainability of a petition challenging the arbitral award in a case where the company is adjudged as a sick industrial unit, is squarely covered u/s 22 (i) of the Sick Industrial Companies Act and rightly interpreting the said fact, the court below has held that no claim is maintainable against the sick industry and, therefore, the arbitration proceedings cannot be maintained. Rightly appreciating the above, the arbitral award was set aside, which does not require any interference.

12. In support of the aforesaid submissions, learned senior counsel for the 1st respondent placed reliance on the decision of a learned single Judge of this Court in ***Prime Store – Vs – Sugam Vanijya Holdings Pvt. Ltd. (2023 (2) MWN (Civil) 165***).

13. This Court gave its careful consideration to the submissions advanced by the learned counsel appearing on either side and perused the materials available on record as also the decision relied on by the learned senior counsel for the 1st respondent.

14. Two pivotal provisions, which are pressed into service on behalf



of the rival claims are Section 12 (3), on behalf of the 1st respondent and Section 34 (3) on behalf of the appellant.

15. Section 12 (3) of the Act relates to grounds under which the appointment of arbitrator can be challenged. For better appreciation, the same is extracted hereunder :-

“12. Grounds for challenge. –

.....

(3) An arbitrator may be challenged only if –

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.”

In the case on hand, resort is taken to clause (a) of sub-section (3) of Section 12, as it is claimed that the 2nd respondent is in the panel of arbitrators and, therefore, there is likelihood of bias and partiality towards the appellant. The qualifications of the 2nd respondent is not put in issue.

16. However, the bias, which is put in issue, by invoking Section 12

(3) (a) of the Act would lean on Section 4 of the Act, which relates to



“waiver of right to object”, which provides the following :-

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“4. Waiver of right to object –

A party who knows that –

Any provision of this Part from which the parties may derogate, or

Any requirement under the arbitration agreement,

has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.

Section 4 clearly stipulates that without delay, the party to the arbitration agreement ought to register his objection with regard to any requirement in the arbitration agreement, if no time limit is provided, and failure to do so, would be deemed that the party has waived his right to so object.

17. In the present case, the arbitrator was appointed by the appellant and the arbitration proceeded as usual and at no point of time, the 1st



respondent herein raised the plea of bias or impartiality nor did he raise the issue that there is infraction of Section 12 (3)(a) of the Act, as he was not put to knowledge about the dependency of the arbitrator with the appellant. As aforesaid, the qualification of the arbitrator is not questioned, but it is only the closeness of the arbitrator with the appellant, which is put in issue stating that the independence or impartiality of the arbitrator is questionable and gives rise to a justifiable doubt.

18. Though on behalf of the 1st respondent, the decision of the learned single Judge in *Prime Store case (supra)* is relied upon to submit that failure on the part of the petitioner to challenge the appointment of arbitrator u/s 13 would not disqualify them to challenge the same u/s 34, as no consent was provided by the petitioners and, therefore, in the absence of consent in writing from petitioners, appointment of arbitrator itself is non-est in law. Section 12 (5) of the Act had primarily prevailed upon the learned single Judge to come to the decision that absence of consent would be a ground for challenging the appointment of arbitrator even if the same was not objected to u/s 4.

19. However, in the present case, none of the prescriptions provided



for under the Seventh Schedule, which is referred to in Section 12 (5) is attracted to the present appointment of arbitrator. More specifically clause (1) of Seventh Schedule specifies that if the arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party, such arbitrator shall not be appointed.

20. In the case on hand, the prescriptions under clause (1) of Seventh Schedule are not attracted, as the 2nd respondent is not an employee, consultant or advisor. The ground on which bias is alleged, that too much posterior in point of time to the arbitral award is that the 2nd respondent is in the panel of arbitrators, who have been earmarked for the purpose of carrying out arbitration proceedings, if any, so arises. True it is that as one of the panel of arbitrators, the 2nd respondent would have had dealings with the appellant, but any other past or present business relationship, as provided for in the Seventh Schedule should be taken to mean business relationship, as appointment of arbitrator could not be brought within business relationship.

21. In this regard, useful reference can be had to the decision of this Court in the case of *Novel Granites – Vs – Lakshmi General Finance*



Ltd. (2003 (2) MLJ 831), wherein this Court has held that “*there is no prohibition for a company to have a panel of persons for appointing as arbitrators to the disputes between that company with other individuals, there cannot be any objection for appointing a person from such panel as an arbitrator in any number of disputes.* The aforesaid decision is squarely on the point in issue before this Court.

22. Further, the Delhi High Court in **G.Vijayaraghavan – Vs – M.D.Central Warehousing Corporation & Ors. (2000 (3) ARBLR 35 (Delhi)** has held that *merely being appointed from a panel of arbitrators and also being an arbitrator in other occasions does not ipso facto render the arbitrator ineligible*”. The abovesaid proposition is directly on clause (1) of Seventh Schedule that merely because a person had previous business relationship in the form of arbitrator in other instances, would not disqualify him from being an arbitrator so long as the impartiality or independence of the arbitrator is not put in issue at the earliest point of time, as only for that purpose, to safeguard the parties to the arbitration proceedings, Section 4 had been incorporated in the Act.

23. When the 1st respondent had not raised his finger with regard to



appointment of arbitrator at the earliest point of time, till an arbitral award came to be passed and, thereto, after a lapse of three months, had raised bias on the part of the arbitrator, the waiver of the right of the 1st respondent is deemed and in the absence of the 1st respondent making a claim that his explicit consent should have been obtained, as it is a part of the contract of agreement, the decision in *Prima Store case* would have no application to the facts in issue and cannot be a ground to give a seal of approval to the stand of the 1st respondent that the 2nd respondent is exhibiting partiality and is biased. Therefore, the contention with regard to bias and consent fails and the said contention deserves to be rejected.

24. The arbitration proceedings were initiated in the year 2002 which culminated in the arbitral award on 20.08.2003. During the course of the arbitral proceedings, the issue of bias has not been raised by the 1st respondent. However, after the arbitral award was passed, only when the original petition challenging the said arbitral award was questioned before the court below, the issue of bias was raised.

25. Section 34 of the Act covers the situation in which an arbitral award could be set aside. There is no quarrel with regard to invocation of



Section 34 to challenge an arbitral award, but the contention is only with regard to raising filing of the original petition challenging the arbitral award, as according to the appellant, the original petition is directly hit by Section 34 of the Act as it is filed beyond the period of 120 days. For better appreciation, the said Section 34 (3), is quoted hereunder :-

“34. Application for setting aside arbitral award.-

.....

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the Arbitral Tribunal.

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.”

26. There is a clear prescription under sub-section (3) to Section 34

that the arbitral award has to be challenged within three months from the



date of receipt of the arbitral award. Admittedly in the case on hand, the arbitral award has been challenged well beyond the period of 120 days.

Further, even to attract the proviso to Section 34 (3) with regard to further period of 30 days, no application is filed showing sufficient cause. Therefore, it is clear that the arbitral proceedings, which has been challenged beyond the period of limitation, cannot be maintained and the court below could not have gone ahead with hearing the petition.

27. It is the specific case of the appellant that the respondent was aware of the appointment of the 2nd respondent as arbitrator, but the 1st respondent has not objected to his appointment till filing of additional grounds in the petition filed u/s 34 of the Act. Since no challenge has been made to the appointment of the 2nd respondent till raising the additional grounds, it is deemed that the 1st respondent has waived his right to object. In the aforesaid backdrop, after waiving his right, once the arbitral award is passed, the 1st respondent ought to have challenged the same within the four corners of Section 34 (2) of the Act within the period of three months from the date of receipt of the arbitral award. However, the 1st respondent having not challenged the same within the prescribed period and also not showing sufficient cause even to claim the extended period, the court below



could not have gone into the arbitration petition to give a finding in favour of the 1st respondent, which findings, on the materials available before this Court, are arbitrary, perverse and illegal and the same are liable to be set aside.

28. Once this Court comes to the conclusion that the petition is hit by the prescription of limitation, the ancillary contention with regard to maintainability of the petition *sans* the 1st respondent being held to be a sick company u/s 22 cannot be allowed to stand as on the date when the arbitral proceedings were taken up, the 1st respondent was not claimed to be a sick company and, therefore, Section 22 cannot be pressed into service and, therefore, this Court is not entering into the said issue.

29. For the reasons aforesaid, the order passed by the court below is wholly perverse, illegal and arbitrary and, accordingly, the same is set aside and the arbitral award dated 20.08.2003 is restored and this civil miscellaneous appeal is allowed. There shall be no order as to costs in this appeal.

01.11.2023

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Index : Yes

Speaking Order : Yes

To

The Judge, Principal District Court, Coimbatore.



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18

M.DHANDAPANI,J.

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C.M.A.Nos.2861 and 2862 of 2006

01.11.2023