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O.S.A.(CAD)No.100 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.09.2024

CORAM

THE HONOURABLE MR.JUSTICE M.SUNDAR

and

THE HONOURABLE MR.JUSTICE R.SAKTHIVEL

O.S.A.(CAD)No.100 of 2024

and

C.M.P.No.19331 of 2024

in

O.S.A.(CAD)No.100 of 2024

The Superintending Engineer
Highways, Construction and Maintenance
Chennai Circle, 299, Anna Salai,
Chennai-600 006.

.. Appellant

Vs.

M/s.S.Arumairaj
Rep. by its Partner L.Subramaniam
No.15, KasturiRangan Road
Alwarpet, Chennai-600 018.

.. Respondent

Original Side Appeal filed under Order 36 Rule 1 of Original Side Rules read with Clause 15 of Letters Patent praying to set aside the daily order of the Hon'ble High Court in O.P.No.747 of 2016 dated 24.07.2024.

For Appellant

:

Mr.R.Ramanlaal
Additional Advocate General
assisted by
Mr.R.Siddharth
Government Advocate



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ORDER

(Order of the Court was made by **M.Sundar, J.**)

Captioned 'Original Side Appeal' {hereinafter 'OSA' for the sake of brevity} has been filed in this 'Commercial Appellate Division' [hereinafter 'CAD' for the sake of brevity] on 30.08.2024 assailing a 'daily order' dated 24.07.2024 made by a Section 34 Court (Hon'ble single Judge of this Court) in O.P.No.747 of 2016 (to be noted, O.P.No.747 of 2016 is a petition under Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)' [hereinafter referred to as 'A and C Act' for the sake of convenience, clarity and brevity] assailing an award dated 20.10.2015 made by an Arbitral Tribunal constituted by a sole Arbitrator who is a former Judge of this Court).

2. The aforementioned 'daily order dated 24.07.2024 made in O.P.No.747 of 2016 by Section 34 Court' shall hereinafter be referred to as 'impugned order' for the sake of brevity. The award dated 20.10.2015 made by an 'Arbitral Tribunal' {'AT' for the sake of brevity} constituted by a sole Arbitrator, who is a former Hon'ble Judge of this Court has been



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assailed in O.P.No.747 of 2016 and this '20.10.2015 award' shall hereinafter be referred to as 'impugned award' for the sake of convenience and clarity.

3. Before we proceed further, it is necessary to make it clear that impugned order has been made by Section 34 Court as a common order including one another OP and two other applications. Another OP is O.P.No.892 of 2018 (a petition under Section 11 of A and C Act filed by one Ms.Edwina Amudha against one Mr.L.Subramaniam for appointment of a presiding Arbitrator qua partnership deed dated 15.03.2001). To be noted, partnership deed is qua partnership firm which goes by name 'M/s.S.Arumairaj' ['said firm' for the sake of brevity]. The two applications are, O.A.No.846 of 2018 which is an application under Section 9 of A and C Act filed by the same Ms.Edwina Amudha seeking an injunction restraining R1 thereat (Mr.L.Subramaniam) from withdrawing monies from account of said firm which are payable to said firm as per the impugned award and another application which is a part of common order is A.No.1725 of 2017 and that also has been filed by Ms.Edwina Amudha with a prayer to implead her as R2 in Section 34 petition namely, O.P.No.747 of 2016.



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4. This CAD having set out the nature of the order i.e., common order now proceeds to set out short facts i.e., factual matrix in a nutshell containing facts that are imperative for appreciating this order.

5. Short facts are that 'Highways Department of State of Tamil Nadu' {hereinafter 'State' for the sake of convenience and clarity} issued a tender notification dated 24.02.1999 inviting bids for work of improvements to Radial Roads around the city of Chennai; that it is not necessary to set out further details regarding the work considering the nature of the matter at hand; that pursuant to this tender notification an agreement dated 09.06.1999 came to be executed between the State and contractor; that during the subsistence of contract, contractor fell ill and said firm (M/s.S.Arumairaj) was created with Ms.Edwina Amudha, wife of Mr.S.Arumairaj and Mr.L.Subramaniam as partners; that final bill was submitted; that thereafter, the State called upon the contractor to rectify certain defects in the work; that according to the State, the rectification was not done; that this according to the State is breach of contract dated 09.06.1999; that there was enormous delay in execution of the work is further case of the State; that all this led to arbitrable disputes as there



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was an arbitration clause in the agreement between State and contractor; that the arbitration was triggered by the contractor by issue of notice dated 19.09.2002; that this 19.09.2002 trigger notice was received by the State on 22.09.2002; that this 22.09.2002 is the date of commencement of arbitral proceedings within the meaning of Section 21 of A and C Act (according to learned counsel for State); that said firm filed a Section 11 petition in O.P.No.435 of 2010 arraying the State as respondent; that after hearing both sides, then Hon'ble Chief Justice of this Court appointed the sole Arbitrator; that this order is dated 01.08.2014 (Friday) and sole Arbitrator appointed vide this Section 11 order rendered impugned award dated 20.10.2015; that the impugned award went in favour of contractor; that the State assailed the impugned award by resorting to Section 34 of A and C Act vide O.P.No.747 of 2016; that in O.P.No.747 of 2016, the impugned order came to be made as a common order along with another OP and two other applications as already alluded to supra; that aggrieved by impugned order, State has filed captioned appeal on 30.08.2024 in this CAD; that learned Additional Advocate General Mr.R.Ramanlal assisted by Mr.R.Siddharth, learned Government Advocate for appellant is before us.



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6. Captioned OSA is before this CAD in the Admission Board i.e., Motion List.

7. Learned Additional Advocate General submitted that in and by impugned order, Section 34 Court has held that the aforementioned Section 11 petition filed by contractor is within time and this means that the State has been denied the opportunity to argue limitation point.

8. We carefully considered the submissions made by learned Additional Advocate General and we also perused the case file.

9. In and by impugned order which is a daily order, Section 34 Court has held that aforementioned O.P.No.435 of 2010 (Section 11 OP) has been filed within time. The relevant portion of the impugned order is as follows:

'..... this Court having observed that notice under Section 21 of the Act was issued on 19.09.2002 and received on 22.09.2002 and therefore, the respondent ought to have filed a petition within a period of three years from the date of said notice or on or before 21.09.2005 and



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though the petition for appointment of arbitrator was filed on 25.07.2005, the same was returned on 26.10.2010 and therefore, the petition was filed well within the period of limitation.'

10. Though there is no mention about O.P.No.435 of 2010, the aforementioned paragraph is obviously a reference to O.P.No.435 of 2010 as it refers to trigger notice dated 19.09.2002, receipt of trigger notice by State on 22.09.2002, it computed three years therefrom which is 21.09.2005 and has thereafter held that Section 11 petition for appointment of Arbitrator has been filed on 25.07.2005 and that the same was returned on 26.10.2010. It comes to light that a petition under Section 11 of A and C Act filed in the year 2005 has been numbered and listed before then Hon'ble Chief Justice only in the year 2010 and order appointing sole Arbitrator has been made on 01.08.2014. In this regard, before proceeding further, we notice that order in O.P.No.435 of 2010 (order dated 01.08.2014) is before 23.10.2015 and this means that Section 11 powers qua domestic award were with Hon'ble Chief Justice of respective High Courts and as regards part II, it is with Hon'ble Chief Justice of India, that it is after 23.10.2015, on an application of the party,



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the High Court in case of arbitrations other than international commercial arbitration can appoint arbitrator. Likewise, in the same breath, we also deem it appropriate to say that on 01.08.2014 Section 11 order was made; that was prior to 10.03.2021 when **BSNL** case was rendered by Hon'ble Supreme Court in Civil Appeal Nos.843-844 of 2021 {***Bharat Sanchar Nigam Limited and another Vs. Nortel Networks India Private Limited*** reported in **(2021) 5 SCC 738**} wherein it was held that in cases where claim appears to be *ex facie* time barred and it is manifest that when there is no subsisting claim, Section 11 can be rejected. In the same judgment, there is also a mention about the time limit for filing Section 11 petition and it has been made clear that Article 137 of the Schedule to the Limitation Act, 1963 will apply.

11. In the case on hand, we find that the impugned order appears to say that O.P.No.435 of 2010 has been filed within time and it is not time barred, that the question as to whether the claim of contractor is time barred, we deem it unnecessary to go into all those questions as we find that the captioned appeal itself is not maintainable. The reason is, the language in which Section 37(1) of A and C Act is couched and



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Fuerst Day Lawson principle, namely ***Fuerst Day Lawson Ltd. Vs.***

Jindal Exports Ltd., reported in (2011) 8 SCC 333. As regards Section

37 of A and C Act, which provides for appeals, which is in two parts i.e.,

Sub-Section (1) of Section 37 of A and C Act deals with appeals against

orders made under Sections 8, 9 and 34 of A and C Act and Sub-Section

(2) of Section 37 of A and C Act deals with appeals made by AT either

under Section 16 or under Section 17 of A and C Act. In the case on

hand, we are obviously concerned with Sub-Section (1) of Section 37 of

A and C Act. Section 37(1) reads as follows:

'37. Appealable orders - (1) Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decree of the Court passing the order, namely-

(a) refusing to refer the parties to arbitration under Section 8;

(b) granting or refusing to grant any measure under Section 9;

(c) setting aside or refusing to set aside an arbitral award under Section 34.'

12. In ***Fuerst Day Lawson*** case, it has been made clear that



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clause 15 appeal will not lie when it comes to appeals under A and C Act and the expression (and from no others) occurring in Section 37(1) of A and C Act has been explained by Hon'ble Supreme Court. Therefore, it will suffice to say that after disposal of Section 34 petition namely, after disposal of O.P.No.747 of 2016, if it goes against the State and if the State prefers Section 37 appeal, it is open to the State to raise all the points including the points canvassed in the captioned OSA. Though it is stating the obvious, we make it clear for the sake of convenience, clarity and specificity.

13. Be that as it may, before dropping the curtains on the captioned matter, for the sake of comprehensively capturing what transpired in the hearing, we deem it appropriate to say that learned Additional Advocate General placed reliance on the aforementioned **BSNL** case reported in **2021 5 SCC 738**. We drew the attention of learned Additional Advocate General to paragraph captioned 'conclusion'. To be noted, in **BSNL** case reported in **2021 5 SCC 738** the paragraph captioned 'conclusion' is paragraph No.53 and in the official website of Hon'ble Supreme Court i.e., order made in Civil Appeal Nos.843-844 of 2021, the paragraph captioned 'conclusion' is paragraph



No.40. In the days to come, it may be appropriate for law journals to avoid these discrepancies in paragraph numbers. However, paragraph No.40 in official website of Hon'ble Supreme Court / paragraph No.53 as reported in **2021 5 SCC 738** reads as follows:

'40.Conclusion

Accordingly, we hold that :

(i) The period of limitation for filing an application under Section 11 would be governed by Article 137 of the First Schedule of the Limitation Act, 1963. The period of limitation will begin to run from the date when there is failure to appoint the arbitrator;

It has been suggested that the Parliament may consider amending Section 11 of the 1996 Act to provide a period of limitation for filing an application under this provision, which is in consonance with the object of expeditious disposal of arbitration proceedings;

(ii) In rare and exceptional cases, where the claims are ex facie time barred, and it is manifest that there is no subsisting dispute, the Court may refuse to make the reference.'

14. On a careful perusal of aforementioned paragraph in **BSNL** case makes it clear that Hon'ble Supreme Court has made a clear distinction between Section 11 petition being time barred and claim itself



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is being *ex facie* time barred. As regards Section 11 petition, Article 137 of Limitation Act comes into play and time prescribed is three years from date on which trigger notice is received by noticee. As regards claim itself, that will depend on the nature of the claim and Hon'ble Supreme Court in *BSNL* case which was rendered after 01.08.2014 (on which day Section 11 order was made by then Hon'ble Chief Justice in O.P.No.435 of 2010) made it clear that in cases where the claim itself appears to be *ex facie* time barred and when it comes to light that it appears manifestly that there is no subsisting claim which is not time barred, Section 11 prayer can be rejected.

15. Be that as it may, it is always open to the State to raise limitation point, if Section 34 Court order goes against the State and if State comes on appeal under Section 37 against the final order of Section 34 Court. Learned Additional Advocate General also placed reliance on *Oil India Limited* case {*Oil India Limited Vs. Techno Canada Inc.*, reported in **2021 SCC OnLine Del 4352**} which is an order rendered by Hon'ble Division Bench of Delhi High Court. We are afraid that the case does not aid the State in the captioned OSA as *Oil India Limited* case has



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been rendered in the light of sub-section (3) of Section 34 of A and C Act which deals with limitation for filing of Section 34 petition namely, 3 months and 30 days i.e., 3 months limitation and 30 days tolerance. This has been repeatedly explained by Hon'ble Supreme Court starting from ***Simplex Infrastructure Ltd. Vs. Union of India [2018 SCC OnLine SC 2681]*** wherein it was held that even one day delay beyond 30 days cannot be tolerated and it is not necessary to dilate more on this. Suffice to say that ***Oil India Limited*** case deals with sub-section (3) of Section 34 of A and C Act has no relevance to the case that has been argued.

16. We find from the official website that O.P.No.747 of 2016 is pending and it is next scheduled to be listed on 03.09.2024 (tomorrow) and order as in the official website reads as follows:

'O.P.Nos.747 of 2016 & 892 of 2018

and O.A. No.846 of 2018 and A.No.1725 of 2017

K.KUMARESH BABU, J.

The learned Additional Advocate General would submit that they are proposing to file an appeal against the order of this Court, dated 24.07.2024, wherein a specific finding had been given by this Court as to the limitation of the Claim Petition filed by the respondent and would seek further time to get along with the merits of the case.



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2. *Considering the request made by the learned Additional Advocate General, list the case on 03.09.2024 for arguments.'*

17. Captioned OSA is dismissed as not maintainable albeit with the aforementioned observations which only tantamounts to stating the obvious. Consequently, connected civil miscellaneous petition is closed. There shall be no order as to costs.

(M.S.,J.) (R.S.V.,J.)
02.09.2024

Index: Yes
Neutral Citation: Yes
Speaking order

mk

To

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



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M.SUNDAR.J.,
and
R.SAKTHIVEL, J.,

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