



Original Side Appeal (CAD) No.169 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 19.01.2024	Delivered on 13.02.2024
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CORAM:

**THE HONOURABLE MR JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR JUSTICE R.SAKTHIVEL**

**Original Side Appeal (CAD) No.169 of 2022
and CMP No.22721 of 2022**

Chennai Metropolitan Water Supply
and Sewerage Board,
No.1, Pumping Station Road,
Chintadripet, Chennai 600 002.
Rep. herein by its Managing Director

... Appellant/Petitioner

Versus

M/s. Chennai Water Desalination Ltd.,
No.30 A, 6th Cross Road,
Thiru vi ka Industrial Estate,
Rep its Manager

.... Respondent/Respondent

PRAYER: Original Side Appeal (CAD) filed under Order XXXVI Rule 1
of the Original Side Rules read with Section 37(1)(b) of the Arbitration and



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Conciliation Act, 1996 read with Clause 15 of the Letters Patent and Section 13(1A) of Commercial Courts Act 2015, to set aside the Judgment and decretal order dated 26.07.2022 bearing OP No.298 of 2022 passed by this Hon'ble Court in its entirety.

For Appellant : Mr.P.S.Raman, Advocate General
for M/s.Gautam S. Raman

For Respondent : Ms.Hema Srinivasan

J U D G M E N T

(Judgment of the Court was delivered by R.SUBRAMANIAN, J.)

The instant Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 is against the order of the learned Single Judge made in a proceeding under Section 34 of the Arbitration and Conciliation Act, 1996.

2. The background facts are as follows:



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2.1. The Appellant entered into a Bulk Water Purchase Agreement [BWPA] with the respondent which was essentially an agreement for erection of a desalination plant with the capacity 100 MLD (Million litres per day). The scope of the contract included erection and operation of the plant. As a successful tenderer, the respondent was awarded the contract. An agreement came to be entered between the parties on 13.09.2005, it was a DBOOT contract that is a contract to design, build, own, operate and transfer. The said agreement was entered into on 13.09.2005, it was for a period of 25 years. As it has become a practice, there was delay on both sides in completion of the contract, and the appellant sought to levy liquidated damages of Rupees 5 Crores and attempted to encash the Bank Guarantee that was offered by the respondent. This led to the respondent moving this court under Section 9 of the Arbitration and Conciliation Act.

2.2. This Court by an order dated 27.07.2010 restrained the appellant from invoking the Bank Guarantee and directed the respondent to keep the bank guarantee alive till such time the arbitration proceedings are



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completed. Thereafter on 27.04.2011, the respondent nominated one Mr.R.Nadimuthu, a retired Chief Engineer of the Public Works Department as the Arbitrator and called upon the appellant to name its Arbitrator. The appellant, however, responded after nearly three years on 24.07.2014 calling upon the respondent to initiate Arbitration. Even before the said Communications, the matter was referred to the Dispute Resolution Panel as per the agreement and the said Panel held in favour of the respondent.

2.3. By its letter dated 25.11.2014, the Appellant nominated a retired Judge of this Court as an Arbitrator on its side. The two Arbitrators nominated by the parties namely Hon'ble Mr. Justice K.Chandru and Mr.R.Nadimuthu, nominated Hon'ble Mrs.Justice Prabha Sridevan, a retired Judge of this Court, as the umpire, thus a three Member Arbitration Panel came to be constituted. The Arbitrators entered upon the reference and passed an award on 09.10.2017. The Arbitral Tribunal concluded that the claim of the appellant is barred by limitation. A counter claim was made by the respondent seeking return of the bank guarantee that was provided by it,



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the Arbitral Tribunal rejected the counter claim also on the ground that it is barred by limitation. Having held so, the Arbitral Tribunal directed the parties to bear their costs.

2.4. Thus, on the conclusion of the Arbitration, both the claim and the counter claim were rejected. The appellant did not challenge the award of the Arbitral Tribunal. The respondent filed an application under Section 34 challenging the award of the Arbitral Tribunal, insofar as it rejected the counter claim. The section 34 Court concluded that the rejection of the counter claim on the ground it is barred by limitation by the Arbitral Tribunal is not correct. The Section 34 Court on facts concluded that the letter dated 27.04.2011 addressed by the respondent herein to the appellant nominating Mr.R.Nadimuthu, as an Arbitrator, would constitute a request for reference of the dispute for Arbitration within the meaning of Section 21 of the Arbitration and Consultation Act, 1996. On the said conclusion, the Section 34 Court held that the rejection of the counter claim by the Arbitral Tribunal is flawed. The Section 34 Court also found that the conclusion of



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the Arbitral Tribunal that the counter claim is barred by limitation is against public policy as provided in Section 34(2)(b)(ii) read with Clause (ii) of Explanation (1) thereto and Section 34(2)(a) of the Arbitration and Conciliation Act.

2.5. To buttress his conclusion, the learned Single Judge sought support from the judgement of the Hon'ble Supreme Court in *Associated Builders vs. Delhi Development Authority*, reported in **2015 (3) SCC 49** and *Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India*, reported in **2019 (15) SCC 131**. Reference was also made to *Oil and Natural Gas Corporation Ltd v. Saw Pipes Ltd.*, reported in **2003 (5) SCC 705**. Having concluded that the counter claim is not barred by limitation and the rejection of the counter claim as barred by limitation, would be in conflict with public policy which is a stated ground for interference with an award under section 34(2)(b)(ii) of the Arbitration and Conciliation Act, the Section 34 Court invoked doctrine of severability has laid down in *J.G. Engineering Pvt. Ltd., v.*



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Union of India and another, reported in ***2011 (5) SCC 758***, and concluded

that the portion of the award rejecting the counter claim is clearly severable and therefore, that portion of the award will have to be set aside. As a sequitur, the Section 34 Court directed return of the bank guarantee. The appellant is on Appeal only aggrieved by the direction to return the bank guarantee.

3. We have heard Mr.P.S.Raman, learned Advocate General appearing for Mr.Gautham S. Raman for the appellant and Ms. Hema Srinivasan learned counsel appearing for the sole respondent.

4. The learned Advocate General would vehemently contend that the letter dated 27.04.2011 cannot be treated as a request for referring the matter to Arbitration as it is devoid of any detail, and therefore, according to him, the learned Single Judge was not right in concluding that the counter claim is not barred by limitation. He would further submit that, even if the original claim is barred by limitation, there cannot be a direction to the



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appellant to return the bank guarantee, inasmuch as it can encash the bank guarantee towards liquidated damages for non-performance since law of limitation only takes away the remedy and the right is not lost. In support of his submission, the learned Advocate General would rely upon ***Punjab National Bank and others vs. Surendra Prasad Sinha***, reported in ***1993 Supp (1) SCC 499***. Therefore, according to the learned Advocate General, the Section 34 Court ought not to have directed return of the Bank Guarantee.

5. Contending Contra, Ms. Hema Srinivasan, learned counsel appearing for the respondent would submit that the bank guarantee had expired, as it was not extended after the award and there was no order directing extension of the bank guarantee pending proceedings under Section 34 of the Arbitration and Conciliation Act. She would also point out that the order passed under Section 9 of the Arbitration and Conciliation Act, on 27.07.2010 in OA No.684 of 2009, imposes an obligation on the respondent to keep the bank guarantee alive only till the conclusion of the



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arbitration proceedings. Drawing our attention to the fact that there was no order pending the Section 34 proceeding, directing the respondent to keep alive the bank guarantee and the same having lapsed, the learned counsel would contend, even assuming the appellant has a right, the said right cannot be exercised as of today, as the Bank Guarantee had already lapsed.

6. On merits the learned counsel would submit that the judgement in ***Punjab National Bank and others vs. Surendra Prasad Sinha***, would not apply as a claim for damages cannot be treated as a liability unless it is crystallised. In support of her submission, the learned counsel would rely upon the oft-quoted judgement of the Hon'ble Supreme Court in ***Union of India vs. Raman Iron Foundry***, reported in ***1974 (2) SCC 231***, wherein it was held that a claim for damages liquidated or unliquidated does not give rise to a debt unless the liability is adjudicated upon by a Competent Court or a Tribunal.



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7. The learned counsel would also draw our attention to the judgement of the Hon'ble Supreme Court in ***H.M.Kamaluddin Ansari and Co. Vs. Union of India and others***, reported in ***1983 (4) SCC 417***, where the portion of the judgement in ***Raman Iron Foundry***, explaining the scope of the claim for damages was confirmed. She would also rely upon the judgement of the Hon'ble Supreme Court in ***State of Karnataka vs. Shree Rameshwara Rice Mills***, reported in ***1987 (2) SCC 160*** and the judgement of the Hon'ble Supreme Court in ***J.G. Engineering Pvt. Ltd., v. Union of India and another***, reported in ***2011 (5) SCC 758***, in support of her submissions.

8. We have considered the rival submissions.

9. On the submission of the learned Advocate General that the letter dated 27.04.2011 would not constitute a request for arbitration within the meaning of Section 21 of the Arbitration and Conciliation Act, 1996, we find ourselves unable to agree with his contentions. The said letter reads as follows.

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WD CHENNAI WATER DESALINATION LTD.

CMDL/CMWSSB/2011-2012/2161
27th April, 2011

The Chief Engineer (O&M)
CMWSSB
Chennai -2.

To of the Superintending Engineer
Date 18/5/11
87

512
Date 18/5/11

Sir,

Sub: Nomination of Arbitrator -reg.
Ref: 1. Our Ltr.No. CMDL/CMWSSB/2010-11/2073 dated 12.08.2010

In continuation of the above letter, as indicated therein, we are naming our nominee Mr. S.Nadimuthu, Retired Chief Engineer- PWD, now residing at Chennai now.

We call upon your good selves to name your nominee so that the two nominated arbitrators could elect a Presiding Arbitrator and constitute the Tribunal to resolve the dispute between ourselves early.

Thanking you,

Yours truly,
For Chennai Water Desalination Ltd

(Signature)
(N.Ganesan)
Chief Operating Officer

Cc to: Mr.S.Nadimuthu.

(Circular)
Reply sent to him
Sent on 18/5/11
2-6573

(Signature)
18/5/11

No.20A, South Phase, 6th Cross Road Thiru V. K. Industrial Estate, Guindy, Chennai - 600032
Phone: 044-22266610-18, 17-20 Fax: 044-22267348
E-Mail: info@chennaiwssltd.in, ncdowd@vsnl.com



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10. All that Section 21 of the Arbitration and Conciliation Act, requires is a request for the dispute to be referred to Arbitration. We are in agreement with the conclusion of the Section 34 Court, on the effect of this letter dated 27.04.2011. There is a clear request for reference of the dispute to the Arbitration when the appellant is called upon to nominate its Arbitrator, so that the two Arbitrators would nominate a presiding Arbitrator to resolve the dispute between the parties.

11. The appellant had kept quiet for almost 3 years after the request for reference was made on 27.04.2011. It, however, called upon the respondent to initiate arbitration process vide its letter dated 24.07.2014. Further correspondence resulted in constitution of the Arbitral Tribunal. We are therefore, unable to fault the learned Single Judge for having held that

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the letter dated 27.04.2011 would qualify as a request for referring the dispute for Arbitration in terms of Section 21 of the Arbitration and Conciliation Act, 1996. Once we conclude that the letter dated 27.04.2011 would satisfy the requirements of Section 21, as a request for Arbitration the limitation, as far as the respondent is concerned, would stop running on 27.04.2011. The inescapable conclusion is that the counter claim of the respondent is not barred by limitation. We are therefore, unable to persuade ourselves to agree with the submissions of the learned Advocate General that the counter claim would also be barred by limitation.

12. Adverting to the second limb of the argument of the learned Advocate General that the learned Single Judge ought not to have directed return of the Bank Guarantee, since it is open to the appellant to set off the amount secured by the Bank Guarantee towards liquidated damages, on the premise that a right to set off cannot be barred by limitation. No doubt in ***Punjab National Bank and others vs. Surendra Prasad Sinha***, the Hon'ble Supreme Court had held that a creditor can adjust any amount that is lying



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to the credit of the debtor, which is due to it and there cannot be any limitation for such set off, but as rightly contended by the learned counsel for the respondent, a claim for damages stands on a slightly different footing. Immediate reference can be made to the judgment of the Hon'ble Supreme Court in ***Union of India v. Raman Iron Foundry***, reported in ***(1974) 2 SCC 231***, wherein the Hon'ble Supreme Court at para 11 has held as follows:

11.The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty, and according to this principle, even if there is a stipulation by way of liquidated damages, a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by him, the



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stipulated amount being merely the outside limit. It, therefore makes no difference in the present case that the claim of the appellant is for liquidated damages. It stands on the same footing as a claim for unliquidated damages. Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eo instanti incur any pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. That is not an actionable claim and this position is made amply clear by the amendment in Section 6(e) of the



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Transfer of Property Act, which provides that a mere right to sue for damages cannot be transferred. This has always been the law in England and as far back as 1858 we find it stated by Wightman, J., in Jones v. Thompson [(1858) 27 LJ QB 234 : 120 ER 430] “Exparte Charles and several other cases decide that the amount of a verdict in an action for unliquidated damages is not a debt till judgment has been signed”. It was held in this case that a claim for damages does not become a debt even after the jury has returned a verdict in favour of the plaintiff till the judgment is actually delivered. So also in O'Driscoll v. Manchester Insurance Committee [(1915) 3 KB 499 : 113 LT 683] Swinfen Eady, L.J., said in reference to cases where the claim was for unliquidated damages: “...in such cases there is no debt at all until the verdict of the jury is pronounced assessing the damages and judgment is given”.



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13. Though the judgment in *Union of India v. Raman Iron Foundry*, was partially overruled in *H.M.Kamaluddin Ansari and Co. Vs. Union of India and others*, reported in 1983 (4) SCC 417, the Hon'ble Supreme Court in *H.M.Kamaluddin Ansari and Co. Vs. Union of India and others*, had upheld the portion of the judgment that a claim for damages does not automatically translate into a debt or liability. In *Gangotri Enterprises Ltd. Vs. Union of India*, reported in (2016) 11 SCC 720, the Hon'ble Supreme Court followed the judgment in *Raman Iron Foundry's* case and concluded that a claim for damages will not crystallise into a debt unless it is adjudicated upon. The same view has been held by a learned Single Judge of this Court in *K.N.Keerthi Rao vs. General Manager, Southern Railways*, reported in *Manu/TN/0319/2001*.

14. We are therefore, of the view that the contention of the learned Advocate General that a right to set off cannot be barred by limitation and therefore, it will be open to the appellant to invoke the Bank Guarantee even



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today cannot be accepted in a claim for damages. A right to set off itself will arise only if there is ascertained debt or a liability that has crystallised into a debt. As we have adverted to above, the Hon'ble Supreme Court has held that until it is adjudicated upon a claim for damages remains only as a claim and does not crystallise as a debt.

15. The further contention of the learned counsel for the respondent that the appellant cannot be an Arbitrator of its own cause and invoke the Bank Guarantee. Admittedly, the Arbitrators have rejected the claim of the appellant and barred by limitation. No doubt law of limitation only takes away the remedy but the right is not lost.

16. The next question that would emanate is what is the right of the appellant:

16.1. The right of the appellant is to recover damages on proof of breach. The DRP viz. Dispute Resolution Panel which is an Inter Departmental Mechanism, has concluded that the respondent was not at



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fault. The Arbitral Tribunal has not gone into the merits but it has only rejected the claim on the ground that it is barred by limitation. Therefore, the fact that there was a breach on the part of the respondent is yet to be established. Unless the breach is established, the right to claim damages cannot be said to have crystallised. If the appellant is allowed to set off the amount secured by the Bank Guarantee towards damages, it would definitely amount to allowing the appellant itself to decide as to who is in breach. The same cannot be done particularly when the claim has been rejected by the Arbitral Tribunal.

17. In *State of Karnataka vs. Shree Rameshwara Rice Mills*, the Hon'ble Supreme Court had pointed out that a claim for damages should always be decided by an independent person or body and not by the other party to the contract. This judgment of the Hon'ble Supreme Court was reaffirmed in *J.G.EngineeringPvt. Ltd., v. Union of India and another*, reported in **2011 (5) SCC 758**, where the Hon'ble Supreme Court observed as follows:



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“In fact the question whether the other party committed a breach is to be decided by the party alleging the breach. A contract cannot provide one party will be the arbiter to decide whether he committed a breach or the other party committed the breach. That question can be decided only by an adjudicatory forum that is, a court, or an Arbitral Tribunal.”

18. We therefore, conclude that the Appellant does not have a right to invoke the Bank Guarantee as of today, even otherwise the Bank Guarantee has expired even in the year 2018, after the passing of the award, no attempt has been made by the appellant to compel the respondent to keep the Bank Guarantee alive for almost five years now. Though the document is held by the appellant today, it is not worth the paper on which it is written since it has expired long back. A faint attempt is made by the learned Advocate General to contend that the proceedings under Section 34 of the Arbitration



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and Conciliation Act, are the continuation of the Arbitration proceedings.

We are unable to agree with the said submission. A proceeding under Section 34 of the Arbitration and Conciliation Act, as has been held by the Hon'ble Supreme Court is neither an Appeal nor a Review. It is a very limited re-examination within the four corners of Section 34 of the Arbitration and Conciliation Act, therefore, by any stretch of imagination, it cannot be held that Section 34 proceedings are a continuation of the proceedings in Arbitration.

19. We therefore, conclude that the appellant is not entitled to any relief in this Appeal. The Appeal is **dismissed** upholding the Order of the Section 34 Court. However, we direct the parties to bear their own costs in the facts and circumstances of the case. Consequently the connected miscellaneous petition is closed.

(R.SUBRAMANIAN, J.) (R.SAKTHIVEL, J.)

jv

13.02.2024

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Internet : Yes

Neutral Citation : Yes

Speaking Order

To

The Section Officer,
Original Side,
High Court of Madras.



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