



C.M.A.(MD)No.942 of 2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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RESERVED ON	25.07.2024
DELIVERED ON	02.08.2024

CORAM

JUSTICE N. SESHASAYEE

and

JUSTICE P.VADAMALAI

C.M.A(MD)No.942 of 2017

and

C.M.P(MD)Nos.9966 of 2017 and 16976 of 2023

The State of Tamil Nadu,
Rep. Through Superintending Engineer,
WRO, PWD, Projects Circle,
Palayamkottai,
Tirunelveli District.

... Appellant/Petitioner

Vs

1.M/s.Bhageeratha Engineering Limited,
Vazakkala, Kakkanad Post,
Kochi, Kerala

2.Dr.Krity Dave
Presiding Arbitrator,
“Ghar” 5/B Sagarika Society,
Juhu Tar Road, Juhu,
Mumbai – 400 049



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3.K.Kishen
Co-Arbitrator,
Engineer-in-Chief (Retired)
5-9-22/19-215, Adarshnagar
Hill Fort, Hyderabad – 500 063

4.C.Sivaprakasam
Co-Arbitrator, Former Chief Engineer,
47(A2), EB Colony,
Bharathipuram, Dharmapuri,
Tamil Nadu – 636 705

... Respondents/Respondents

Prayer: Appeal filed under Section Section 37-1(c) of Arbitration and Conciliation Act, 1996, against the judgment and decree of the Principal District Judge, Tirunelveli dated 09.12.2016 in AR.O.P.No.199 of 2014 in confirming the Arbitration Award passed by the Arbitral Tribunal dated 09.05.2012 .

For Appellant : Mr.R.Baskaran,
Additional Advocate General
Mr.A.Baskaran
Additional Government Pleader

For R-1 :Mr.GeorgeThomas
for Mr.K.P.Narayana Kumar

For R2 to R4 : No appearance

JUDGMENT

(Judgment of the Court was delivered by **N.SESHASAYEE, J.**)

This appeal is directed by the State challenging an order passed by the learned District Judge dismissing the Arbitration OP No.199/2014 vide his order dated 09.12.2016.



2.1 The brief facts that lead to the institution of the present appeal may be stated as follows:

- (a) On 31.03.1999, the parties herein entered into a civil contract for the formation of *Head works, Earth dam, Uncontrolled weir, surplus course and canal sluice* for the Vadaku Pachaiyar Project. The respondent participated in the tender process, and its bid for Rs.30,47,53,000/- was accepted by the Government. The contract also stipulated 24 months for the completion of the work by the respondent (henceforth would be referred to as the contractor).
- (b) The work commenced on 14.04.1999, which meant, that in terms of the contract, it had ought to conclude by 13.04.2001. However, the contract was actually completed and handed over only on 30.09.2002, which implied that there intervened a delay of 17 ½ months;
- (c) At various points of time during the course of performance of the contract, the contractor applied for extension of time for the completion of the work undertaken, and the Government also had extended the period of contract without any conditions;
- (d) After the completion of work, the contractor raised its bill, but Government would raise objections and chose to deny the



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contractor of the sum it claimed, citing contractor's delay in performing its part of the contractual obligations. This ultimately drove the contractor to invoke the arbitration clause for resolution of a dispute which *inter alia* involved its following claims:

1. *Claim on losses due to idling and under utilization of men and Rs.351,89,332/-. Machineries :*
2. *Claim of losses pertaining to excess overhead expenses Rs.2,22,89,013/-;*
3. *Claim on loss of profit Rs.2,22,89,013/-;*
4. *Claim on losses incurred due to excess cost incurred in mobilizing earth from our own borrow pit. Rs.45,05,577;*
5. *Claim on losses incurred due to extra lead of borrow pit materials Rs.87,34,518/-;*
6. *Claim on losses incurred towards formation of the approach bund to the top of the dam: Rs. 21,15,632;*
7. *Claim on losses incurred due to the decreased depth of designated borrow pit Rs.73,92,250/-;*
8. *Claim on losses incurred for the execution of extra items Rs. 26,90,941/-*
9. *Claim towards Expenditure incurred for extending B. G:Rs.7,88,942/-;*
10. *Claim of interest from 6.5.02 to 15.7.02 : Rs. 7,37,793/-;*
11. *Interest from 15.07.02 till date of award : To be quantified claimants seeks interest of 18% PA;*



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*12. Claim for interest for the amount awarded till
payment claimants seeks interest of 18% PA.”*

Accordingly, the matter came before a three member Arbitration Tribunal of the claims, Claim No:6 and 8 were later not pressed by the contractor.

(e) On 09.05.2012, the Tribunal passed its award, wherein it held that the reason for the delay in performance could not be attributed to the contractor, and had also noted that the extension of time sought for by the Contractor had been granted by the employer without any clarifications or conditions. Accordingly it passed award for a sum of Rs.2,46,04,790/- including interest at 9% with future interest at 18%.

2.2 Be that as it may, on 12.04.2004, the Government had issued a notice to the bank indicating its intention to invoke the bank guarantee which the claimant had furnished. On getting wind of the same, the contractor approached the Principal District Court, Tirunelveli, with Arbitration OP No.65/2004 under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') for an order of interim injunction seeking to restrain the bank from performing its obligation



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under the bank guarantee that it had provided.

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2.3 While seeking the prayer for an interim injunction, the claimant would phrase its prayer in such a way that the injunction might be so granted till the conclusion of the arbitral proceedings, as if an arbitral proceedings had commenced. However, on the date when the claimant moved the Arbitration OP No. 65/2004, it was yet to invoke the arbitration clause. Subsequently, a joint memo signed by the counsel on either side was filed before the District Court, recording which the Court passed an order dated 30.04.2004 making earlier interim order of injunction absolute, and added that the order of interim injunction that it had passed would continue till the completion of the arbitral proceedings, which was to be commenced.

3. This award came to be challenged by the Government before the Principal District Court, Tirunelveli, in Arbitration OP No.199 of 2014. As outlined earlier, the District Judge dismissed the said petition confirming the finding of the Arbitral Tribunal that delay in performance in completing the contractual obligation of the contractor could not be attributed to it, and proceeded to hold that there is no procedural space



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available for the District Judge within the scheme of the Arbitration & Conciliation Act to interfere with this finding on fact as the same is not affected by Sec.34 of the Act. This Order of the learned District Judge is now under challenge.

4.1 Mr.R.Baskaran, the learned Additional Advocate General, made the following submissions:

- a) The performance of the contract was completed on 30.09.2002. Prior to that on 06.05.2002, the claimant/contractor had made his claims against the Government;
- b) For resolution of dispute between the parties, the contract provides a two tier mechanism. At stage one, in terms of Clause 24.1 of the contract, the contractor should approach the Adjudicator in terms of the General Conditions of the Contract (henceforth GCC) within 14 days of the notification of the Engineer's decision on the claims which the contractor has raised. Once a dispute is presented to the Adjudicator, then he ought to give his decision in writing within 28 days of the receipt of the notification of the dispute, and the party who is aggrieved by the decision of the Adjudicator, is contractually entitled to invoke the



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arbitration within the next 28 days under Clause 25.3 of the contract.

- c) The specific provision pertaining to the constitution of the arbitral tribunal is provided in Clause 4 of the Special Conditions of Contract (would be referred to as Sp.CC). It states that there shall be an arbitral tribunal comprising three arbitrators, that each of the parties to the contract is entitled to nominate one arbitrator, and the two arbitrators so nominated is required to co-opt the third arbitrator. It also underscored in clause 4.7 that neither party to the contract is entitled to bring a claim before the arbitration beyond 30 days after the defect liability period;
- d) Turning to the present case, the contractor/claimant had preferred his claim on 06.05.2002 and the contract was completed on 30.09.2003. In terms of the contract, the defect liability period will be for one year from the date of completion of the contract. This implies that the defect liability period would expire on 30.09.2003. Reading this along with clause 4.7 of Sp.CC referred to above, the claimant should have invoked the arbitration clause within 30 days thereafter, but only after following the procedure contemplated under clause 24 and 25 of the General Conditions of Contract;



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- e) In Arb.O.P.65 of 2004, the contractor had averred as if the arbitration proceedings had commenced and made the District Court believe it, but the joint memo later filed before it indicated that the arbitration proceedings had not commenced.
- f) Critically, the jurisdiction of the District Court under Sec.9 of the Act does not stretch beyond granting certain interim directions/orders and it has zero powers to refer the parties to arbitration, notwithstanding the joint memo filed for the said purpose, and interfere with the contractual terms and enlarge the time-line it has set under Clauses 24 or 25 of the General Conditions of Contract or Clause 4.7 of the Special Conditions of Contract. In other words, when the contractor has not followed the path that the contract has provided for initiating an arbitral proceedings, the District Court cannot provide the same to the contractor by reviving an opportunity which was lost to it in terms of the contract.

4.2 The learned Additional Advocate General would argue that when parties with open eyes enter into contract and has also agreed on the modalities for resolving their dispute that might arise while working of



the contract, then, they are bound by the terms thereof. Hence when the arbitral tribunal took cognizance of the dispute, the Government filed a petition under Section 16 of the Act raising dispute vis-a-vis the jurisdiction of the arbitrator to decide the dispute. The only dispute that might fall within the time limit prescribed is that which pertains to invoking bank guarantee by the Government. Barring that all the other claims fall way beyond the time stipulated under the contract. Placing reliance on the authority of the Hon'ble Supreme Court in ***Delhi Development Authority Vs R.S.Sharma and Company, New Delhi*** [(2008) 13 SCC 40], the learned counsel submitted that where an award passed by the arbitral tribunal goes against the terms of the contract, then the said award is liable to be set aside under Section 34 of the Act.

5.1 Per contra, Mr. George Thomas, the counsel for the respondent argued:

- a) The Appellant, in its arguments, did not challenge the award allowing the claims of the respondent on merits. The only objection raised was that procedural deviation alleged to have been committed by the Respondent while referring the disputes to arbitration.
- b) The only contention that echoed more was that the Contractor did not approach the Adjudicator for the adjudication of the disputes, and hence



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the dispute is not arbitrable as it breaches under Clause 24 and 25 of GCC. However, this contention was not raised: (i) in the application filed by the Government before the arbitrator under Sec.16 of the Act; (ii) in its petition under Sec.34 of the Act; (iii) Not even in the appeal memorandum now filed under Sec.37 of the Act. Nor was his point argued either before the arbitral tribunal or the District Court. The only objection raised in the application under Sec.16 was that the claims were not notified within the contractual period of 30 days from the date of completion of the defect liability period. Indeed except Claim No. 9, all others were made much earlier than this date. When a party to an arbitral proceedings has consciously given up a plea that was available to it, it amounts to waiver within the meaning of Sec.4 of the Act, and hence the appellant cannot re-agitate it.

- c) Even if the contention of the appellant is weighed for its sustainability, as per clause 24 of the GCC rejection of a claim by the Engineer is a pre-condition for approaching the Adjudicator. But the appellant has not demonstrated when, and under which proceedings, the Engineer had rejected a claim for a dispute to arise within the meaning of Clause.24. All that the Executive Engineer had done was to inform the respondent vide his correspondence dated 27.05.2004 that the claims of the respondent had been forwarded to the Employer (who by definition is the Superintendent Engineer). Significantly enough, no Adjudicator was



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available as the office would expire within 14 days of expiry of the defect liability period. And, with the appellant sitting on the claims of the respondent for years, it is estopped from pointing an accusing finger at the respondent now. Indeed the award of the arbitral tribunal has considered this point before rejecting it.

- d) Given the nature of the terms of GCC and Sp.CC, it is inconceivable to contend that approaching the Adjudicator could be construed as a precondition for invoking the arbitration clause. Whereas Cl.24 of the GCC requires that the claim must be rejected by the Engineer, whereas Cl.4 of the Sp.CC mandates that for invoking the arbitration clause, the claim should have been rejected by the Employer. Now, the choice will vary depending upon who rejects then claim. In other words, arbitration clause in the contract will have independent existence and it is not affected by Cl.24 of GCC. Reliance was placed on the decision of a Division Bench of this Court in ***Tirunelveli City Municipal Corporation Vs M/s. Sri Pathy Associates and Others*** [2011 SCC online Mad 1601]

5.2 Moving further, the learned counsel argued:

- a) In terms of Cl. 4.1 of Sp.CC, each of the party to the dispute should nominate an arbitrator, both of whom would appoint the third arbitrator. If any of the parties did not appoint an arbitrator, then the party who had already nominated the arbitrator is entitled to invoke Cl.4.3, and approach the President of Institution of Engineer (India) for appointing



the arbitrator. This exactly what had happened in this instance case when the respondent had invoked Cl.4.3 of the Sp.CC, and after about a year and half, the appellant had appointed its arbitrator. And, in so doing, the appellant had waived Cl.24 of the GCC at one level, and had also submitted to the jurisdiction of the arbitral tribunal at another level.

- b) This apart, it is well settled that the parties cannot alter the period of limitation prescribed under the Limitation Act, 1963, by contract.
- c) So far as the order passed under Sec.9 of the Act by the learned District Judge in Arb.O.P.65 of 2004 is concerned, it is necessary to appreciate the distinction between the authority of the Court to pass an order under Sec.9 of the Act, and the contractual right of the parties to invoke arbitration.
- d) Turning to the ratio in *D.D.A Vs R.S Sharma & Co* [(2008) 13 SCC 80], it is distinguishable on facts. There the award on a particular claim was set aside as it was contrary to the provision of the contract. However, in the present case no such circumstance exists, nor was any raised by the appellant, either during the arbitration or when it moved the Court under Sec.34 of the Act.

Discussion & Decision:

6. Arguments on either side have been lengthy, but there is very little to discuss since scope of Sec.34 of the Act leaves minimum space for a court to manoeuvre. Very obviously the ground contemplated under Sec.



34(2)(a) of the Act have zero application, and necessarily the appellant might have to fall back on Sec.34(2)(b). It reads:

(2)An arbitral award may be set aside by the Court only if -

(a).....

(b)the Court finds that -

(i)the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii)the arbitral award is in conflict with the public policy of India.

In terms of Sec.34(2)(b), for a District Court to interfere with an award passed by the arbitration tribunal either the subject matter of the dispute could not be arbitrated in law, or that the award should be in conflict with the public policy of India.

7. If the line of arguments of the learned AAG is scanned for its sustainability on the plane of Sec.34(2)(b), which is the slot in which his arguments could be accommodated? His only line of contention has been that the respondent should have moved the Adjudicator under Cl.24 of the GCC first, before invoking the arbitration clause for resolving dispute. Is approaching the Adjudicator sine quo non for arbitration clause to operate? And, by bypassing it, what palpable injury has the appellant suffered? There is not a whimper of protest to the merit of the



award passed by the tribunal on the claims of the respondent. This Court senses an increasing impression that the appellant is seemingly driven to desperation in its intent to defy the arbitration award and to deny payment to the respondent, that it seemingly clings on to Sec.16 of the Act to garner a procedural advantage on a point of jurisdiction of the arbitral tribunal.

8. The respondent's challenge to this was pointed, and the appellant never met them. Its counsel argued that for the respondent to approach the Adjudicator,

- a) first there must be an adjudicator, but his term had expired on the 14th day of completion of the defect-liability period of one year.
- b) there should have been a decision of the Engineer denying the claims of the respondent for the latter to invoke Cl. 24 of the GCC. But there has never been a denial of claims, but on the other hand the respondent had been informed by the Executive Engineer that its claims are under the consideration of the Employer.

These are issues on facts, and not of law, and the appellant has not helped its efforts when it opted silence as its response to the respondent's challenge. When there is no dispute, there arises no reason for



approaching the Adjudicator, and where there is no Adjudicator, there is no place to approach. And this situation is the creation of the appellant.

By resorting to the means that it has adopted here, it possibly can replicate the same in every case where the GCC and Sp.CC are made part of any of its other contracts, and defeat the contractor from invoking the arbitration clause.

9. Here steps in Sec.4 of the Act. Can the appellant be considered to have waived its right to object. The only statutory space available for a contracting party to raise an issue on jurisdiction on an allegation of breach of any requirement under the arbitration agreement is to make an objection under Sec.16. Here, the appellant has not raised any objection in its application before the arbitral tribunal which it had filed under Sec. 16 of the Act. If the appellants had believed that Cl.24 GCC compliance is mandatory before arbitration clause is invoked, then it should have been raised it at the first instance, and if it still participates in the arbitration proceedings without raising an objection which it could have, then it flatly falls within the rule of waiver under Sec.4 of the Act, irrespective of whether Cl.24 of GCC is a precondition for invoking the arbitration clause vis-a-vis the ratio in *Tirunelveli City Municipal*



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Corporation Vs M/s. Sri Pathy Associates and Others [2011 SCC online Mad
1601].

10. The conclusion is to state the very obvious: The appellant has not established anything that warrants an interference with the order of the learned Principal District Judge, Tirunelveli, dated 09.12.2016 in AR.O.P.No.199 of 2014 . Consequently, this appeal is dismissed with costs. The miscellaneous petitions are closed.

(N.S.S., J.) (P.V.M., J.)
02.08.2024

NCC : Yes/No
Index : Yes/No
CM/RR

To

1. The Principal District Judge, Tirunelveli
2. The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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