
(2013) 11 MAD CK 0065
In the Madras High Court
Case No : C.M.A. No. 2829 of 2012

Anugraha Engineers and Contractors	Vs	APPELLANT
Union of India		RESPONDENT

Date of Decision : 18-11-2013

Acts Referred:

Citation : (2014) 3 CTC 116 : (2014) 1 LW 132 : (2014) 2 MLJ 458

Hon'ble Judges : P.R. Shivakumar, J

Bench : Single Bench

Advocate : A.R.L. Sundaresan for Mr. Sai Satyajith for Ms. S. Hemalatha, for the Appellant; J. Kumaran, Govt. Pleader (Puducherry), for the Respondent

Judgement

P.R. Shivakumar, J.—Anugraha Engineers and Contractors, represented by its Managing Director (hereinafter referred to as "contractor"),

is the appellant in both the Civil Miscellaneous Appeals. The Union of India, represented by the Chief Secretary to the Government of Puducherry

(hereinafter referred to as "Government") and the Executive Engineer, Buildings and Road Division are respondents 1 and 2 in both the civil

miscellaneous appeals. Both the appeals have been preferred against the common order of the learned Additional District Judge, Puducherry at

Karaikal dated 31.08.2010 made in Arbitration O.P. No. 1/2008 and Arbitration O.P. No. 1/2009 respectively. Arbitration O.P. No. 1/2008

came to be preferred by the respondents herein, whereas Arbitration O.P. No. 1/2009 came to be preferred by the appellant herein. The learned

Additional District Judge, after hearing, by a common order dismissed the Arbitration OP preferred by the appellant herein, namely Arbitration

O.P. No. 1/2009 and allowed the Arbitration OP preferred by the respondents herein, namely Arbitration O.P. No. 1/2009. The Common Order

is challenged in C.M.A. No. 2829/2012 so far as it relates to Arbitration O.P. No. 1 of 2008 and C.M.A. No. 2830/2012 has been filed against

the common order relating to Arbitration O.P. No. 1/2009. The facts leading to the filing of these appeals, can be narrated in brief, which are as

follows:-

i) The appellant (contractor) was awarded a contract for the construction of a bridge across the Arasar River on the downstream side of the

existing old bridge at Karaikal. The agreement incorporates provision for several extra items, substituted items and deviated items of work

regarding which, adjustments are to be made in passing the bills and making payments. An arbitration clause has also been incorporated in the

agreement to the effect that in case of difference of opinion regarding the extra cost to be paid by the Government or the amount to be deducted

from the contract amount depending upon the quantity of work and the quality of materials used with the permission of the Government, the same

shall be referred for arbitration.

ii) The agreement contained a stipulation that the contractor should use "HYSD bars" for the construction of the bridge and that the said bars

should be purchased only from SAIL or VIZAG or TISCON. Out of the three companies, SAIL and VIZAG are public sector companies. The

contract came to be finalised on the assumption that "HYSD bars" would be available from all or any one of these companies. But, unfortunately, it

transpired that all the three companies stopped manufacturing "HYSD bars" eight years prior to the date on which the contract between the

Government and the contractor came to be entered into. When the said companies were addressed for supply of "HYSD bar", the contractor

received a reply informing that the manufacture of HYSD bars had been stopped 8 years back and only "TMT bars" were available. Besides

offering "TMT bar", it was made clear that it was of higher quality than "HYSD bar" and hence the same was available at a higher rate than the

rate quoted in the agreement for HYSD bars. When the same was brought to the notice of the Government by the contractor and their permission

was sought to use "TMT bars" instead of "HYSD bars" for the construction of the bridge, permission was granted. While seeking permission, it

was made clear by the contractor that the "TMT bars" were of superior quality

and the cost of the same was higher than "HYSD bars". Still the Government permitted the contractor to proceed with the construction. Accordingly, the contractor took up the construction work and completed the same.

iii) When bills were prepared for the payment for the contract work, the contractor made a claim for the difference between the price of "TMT

bar" and the price quoted in the agreement for "HYSD bar" as additional expenditure, which they were entitled to be paid. The same was not

accepted by the Government. In addition, there was also a dispute regarding the amount to be paid for the MS Liners used by the contractor. The

Government disputed the quantity and also contended that the dismantled MS liners were re-usable, for which, deductions should be made. Due to

the above said difference of opinion, a reference was made to the Arbitrator and the Arbitrator, after hearing, passed an award holding the

contractor entitled to Rs. 79,79,517/- as against the claim of Rs. 2,07,88,670/-. The Arbitrator also directed payment of interest on the amount to

which the contractor was held entitled, at the rate of 12% per annum.

iv) As against the award, both the contractor and the Government, preferred separate applications u/s 34 of the Arbitration and Conciliation Act,

1996. They were taken on file by the learned Additional District Judge, Puducherry at Karaikal as Arbitration O.P. No. 1/2009 and Arbitration

O.P. No. 1/2008 respectively. The learned Additional District Judge, after hearing, on a dissection of the award in respect of various heads of

claim, held that the challenge made by the contractor in respect of certain heads could not be sustained and on the other hand, the challenge made

by the government in respect of certain heads could be sustained. Accordingly, the learned Additional District Judge, allowed the Arbitration O.P.

No. 1/2008 preferred by the Government in respect of three items of claims, namely Claim No. 1 relating to TMT bars, Claim No. 2 relating to

MS Liners and Claim No. 6 relating to development of pile length and pile breaking and accordingly set aside the Arbitral Award dated

30.06.2008 in part. So far as the challenge made by the contractor in Arbitration O.P. No. 1/2009 is concerned, the same was dismissed

confirming the award in respect of Claim Nos. 2A, 2B, 3, 5, 8, 10, 12, 13, 14 and 15. Nothing has been stated about the other claims, though

totally 19 items of claim were referred to the Arbitrator and the Arbitrator dealt with all those claims.

2. As against the order passed in Arbitration O.P. No. 1/2008 setting aside the arbitral award in part relating to claim Nos. 1, 2 and 6, C.M.A.

No. 2829/2012 has been filed. As against the dismissal of Arbitration O.P. No. 1/2009 relating to claim Nos. 2A, 2B, 3, 5, 8, 10, 12, 13, 14 and

15, C.M.A. No. 2830/2012 has been filed. Both the appeals came to be filed u/s 37 of the Arbitration and Conciliation Act, 1996.

3. The points that arise for consideration in this appeals are:

1. Whether the court below has committed an error in setting aside the award in part in respect of Claim Nos. 1, 2 and 6 alone?

2. Whether the court below committed an error in dismissing the Arbitration O.P. No. 1/2009 upholding the award in respect of claim Nos. 2A,

2B, 3, 5, 8, 10, 12, 13, 14 and 15?

4. The arguments advanced by Mr. A.R.L. Sundaresan, learned senior counsel appearing on behalf of the appellant in both the appeals and by Mr.

J. Kumaran, learned Government Pleader (Puducherry) appearing for the respondents in both the appeals are heard. The materials available on record are also perused.

5. Mr. A.R.L. Sundaresan, the learned senior counsel for the appellant advancing arguments on behalf of the appellant in both the appeals, submits

that the order of the learned Additional District Judge is not in conformity with the provision found in Section 34 of the Arbitration and Conciliation

Act, 1996 and that the power given to the court under the said provision is to set aside the award in entirety and not to set aside the award in part

and confirm the award in part. It is the further contention of the learned senior counsel that the very discussions made by the learned Additional

District Judge will show that the court below erroneously assumed the powers of an appellate forum in dealing with an application u/s 34 of the

Arbitration and Conciliation Act, 1996 and that the same has resulted in the impugned order, which according to the him, is unsustainable and is

liable to be set aside by this court. It is the further contention of the learned senior counsel that, to get an award set aside, the applicant must bring

his case within the ambit of section 34 and that in this case, the Government has failed to prove any one of the grounds mentioned in Section 34 of

the Arbitration and Conciliation Act, 1996 to set aside the award of the Arbitral Tribunal. In line with his contention that the court below could not

have set aside part of the award and uphold part of the award, learned senior counsel has also submitted that the appeal preferred in C.M.A. No.

2830/2012 shall not be pressed by the appellant (contractor).

6. Per contra, Mr. J. Kumaran, learned Government Pleader (Puducherry) would contend that there is no bar for the court dealing with an

application u/s 34 to uphold part of the award and set aside part of the award of the Arbitral Tribunal. In addition, as an answer to the contention

raised on behalf of the appellants that none of the grounds found in Section 34 has been made out by the Government, learned Government

Pleader would contend that, if the award of the Arbitral Tribunal is against the clauses of the agreement between the parties, the same can be

successfully projected as a decision against public policy and that hence the award of the order of the court below upholding the award passed by

the Arbitrator in respect of Claim Nos. 2A, 2B, 3, 5, 8, 10, 12, 13, 14 and 15 and setting aside the award of the Arbitrator in respect of Claim

Nos. 1, 2 and 6 can be justified.

7. In support of the above said contention, the learned Government Pleader has relied on a judgment of the Hon''ble Supreme Court in Hindustan

Zinc Ltd. Vs. Friends Coal Carbonisation, . Of course, it is true that the Hon''ble Supreme Court made the following observation:

The High Court did not have the benefit of the principles laid down in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., and had

proceeded on the assumption that award cannot be interfered with even if it was contrary to the terms of the contract. It went to the extent of

holding that contract terms cannot even be looked into for examining the correctness of the award. This Court in Saw Pipes has made it clear that

it is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is

patently illegal and opposed to the public policy of India.

Though the said observation has been made in so many words, it is nothing but the enunciation of the principle that an award, which is contrary to

the clauses of the agreement which was the subject matter of arbitration, should be held to be perverse, enabling the court dealing with an

application u/s 34 of the Arbitration and Conciliation Act, 1996 to interfere with and set aside the award. This court wants to add a rider to the above said observation as an explanatory note. The award being contrary to a clause in the agreement can be set aside only when such a clause in the agreement or the agreement is a legally enforceable. If the agreement itself is illegal and unenforceable, then there shall be no question of the award being against the public policy of India, because there is no public policy that an agreement, though invalid is to be honoured and given effect to.

8. In this case, even on facts also, the award of the Tribunal regarding "TMT bars" cannot be said to be against the public policy. The controversy between the parties arose due to the mutual mistake of the parties, as they believed that "HYSD bars" were available with the three companies mentioned in the agreement. But, it transpired that all the three companies stopped manufacturing "HYSD bars" eight years prior to the date of agreement. The said ignorance regarding stoppage of manufacture of "HYSD bars" being mutual, it shall not be proper to accuse the contractor alone for the same by stating that the contractor ought to have verified the availability of "HYSD bars" before submitting its tender. Suppose the contractor has submitted such a tender in ignorance of the non-availability of the said bars, the Government, who are equipped with infrastructure to know whether the three companies named by them were manufacturing "HYSD bars" or had stopped long before, could have very well either rejected the tender or asked the contractor to submit a fresh tender quoting the price for the use of "TMT bars". The parties proceeded on the assumption that "HYSD bars" would be available. But, unfortunately they were informed by the said companies that the manufacture of the same had been stopped and "TMT bars", which were of superior quality with a higher price tag were available. When the same was intimated to the government and permission was sought for, the Government agreed for the use of "TMT bars" as a substituted item. In fact, the contractor have not claimed the entire cost of "TMT bars" as a new item of work. On the other hand, treating the same as a substituted item, they did claim only the difference in price between the "HYSD bars" and "TMT bars". The same came to be upheld by the Arbitrator. Similar is the case of MS Liner

and the other items.

9. The contract itself contains provision for payment of difference in cost of substituted items and payment of extra amount for new items of work

and deduction for execution of less quantity of work. The said contractual clauses have been sought to be given effect to by the Arbitrator. The

learned Additional District Judge seems to have been carried away by the fact that one of the parties to the application is the Government and the

other is the contractor. The above said observations have been made to provide an answer to the contention of the learned Government Pleader

that the award can be termed as one opposed to public policy in respect of certain items, as according to him, it was contrary to the clauses in the

agreement, whereas, in fact there is no such contradiction with the clauses in the agreement.

10. The orders of the court below are sought to be challenged by the appellant on a more vital ground, than on the merits of the case. According to

the learned senior counsel, the court below exceeded its mandate u/s 34 of the Arbitration and Conciliation Act, 1996 in assuming the power of an

appellate forum, as it has chosen to consider each and every claim on merit with the result that the award was upheld in respect of certain items

and set aside in respect of other items. In this regard, the learned senior counsel drew the attention of the court to the judgment of this court in M/s.

S.P. Periyasamy and Co. Vs. The Superintending Engineer PWD WRO and The Executive Engineer PWD WRO, and argued that unless the

award can be split up into two or more distinct awards, the dissection of the award into several parts and upholding some of them, while setting

aside the award in respect of some of the items, is not the scope of the power contemplated u/s 34 of the Arbitration and Conciliation Act, 1996.

In the above said judgment, this court, relying on a judgment of a Division Bench of this court in Mekala Traders Vs. Tamil Nadu Civil Supplies

Corporation Ltd. and Hon"ble Mr. Justice P. Thangavel, Judge (Retd.), High Court , which was pronounced, in turn, relying on several decisions

of the Apex court, held that the court dealing with an application u/s 34 of the Arbitration and Conciliation Act, 1996 shall not set aside the Arbitral

Award in part. In this regard, this court also referred to various sub clauses in section 34 in support of its view that the court dealing with an

application u/s 34 cannot set aside the award in part. Instead of making a bald reference to the said observation, this court deems it appropriate to

refer to the provisions found in Section 34 of the Arbitration and Conciliation Act, 1996 in this case also. Section 34 of the Arbitration and

Conciliation Act, 1996 reads as follows:

34. Application for setting aside arbitral award - (1) Recourse to a Court against an arbitral award may be made only by an application for setting

aside such award in accordance with sub-section (2) and sub-section (3).

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

(a) the party making the application furnishes proof that-

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the

time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise

unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains

decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award

which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement

was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part;

or

(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. Explanation. - Without prejudice to the generality of sub-clause(ii) of clause (b), it

is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was

induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(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 u/s 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.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the

proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take

such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

Apart from enumerating the grounds on which the award of the Arbitrator can be set aside by the court dealing with an application u/s 34,

provision has also been made in sub section (4) to the effect that, the court may, where it is appropriate and it is so requested by a party, on

receipt of application under sub section (1) of section 34, adjourn the proceedings for a period of time determined by it or give the Arbitral

Tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the

grounds for setting aside the Arbitral award. The said sub clause is meant for adjournment of the hearing of the application filed u/s 34 to give an

opportunity to the Arbitral tribunal to eliminate the ground which would entitle a party to seek the award set aside. The same will make it clear that

the court, while dealing with an application u/s 34, can either set aside the award in entirety or dismiss the application and that it cannot set aside

the award in part. In other words, the court dealing with an application u/s 34, cannot assume the power of an appellate forum and modify the

award. The same was exactly what this court observed in the above cited case. The said observations are very much applicable to the case on

hand.

For all the reasons stated above, this court comes to the conclusion that the order of the court below is infirm and defective and the same is liable

to be interfered with and set aside. At the same time, this court is also of the view that the matter shall be remitted back to the court below for

passing an order in line with the observation made by this court supra. The learned Additional District Judge, Puducherry at Karaikal is directed to

dispose of the Arbitration OPs within two months from the date of receipt of a copy of the order and records. However, there shall be no order as

to costs in this appeal.