

(2006) 04 MAD CK 0304
In the Madras High Court
Case No : C.R.P. (PD) No. 424 of 2005

Brick Steel Enterprises

APPELLANT

Vs

The Superintending Engineer, Public Works Department

RESPONDENT

Date of Decision : 19-04-2006

Acts Referred:

Arbitration Act, 1940 — Section 18
Arbitration and Conciliation Act, 1996 — Section 9
Civil Procedure Code, 1908 (CPC) — Section 151

Citation : (2006) 5 CTC 519 : (2007) 1 MLJ 488

Hon'ble Judges : P.P.S. Janarthana Raja, J

Bench : Single Bench

Advocate : K. Bijai Sundar, for the Appellant; S. Senthilnathan, AGP, for the Respondent

Judgement

P.P.S. Janarthana Raja, J.—The petitioner herein, is a registered Partnership Firm having its office at No. 1, Om Sakthi Buildings, State Bank Colony-III, Salem-4 and the respondent herein, invited a tender on 18.09.1986 for the construction of office buildings in two blocks for the Collectorate, Vellore in Vellore District. The petitioner was the successful tenderer. The petitioner and respondent entered into an agreement on 09.06.1987. The value of the work was estimated at Rs. 1,57,59,319/-. As per the agreement, the work has to be completed within 17 months from the date of handing over the site. The site was handed over by the respondent to the petitioner on 11.06.1987. As per the terms of the agreement, the work entrusted to the petitioner should be completed on or before 10.11.1988. The petitioner did not complete the work within the stipulated time. The petitioner had completed the work only on 25.07.1990, after a lapse of 37 months. After completion of the work, final bill was settled to the petitioner on 30.08.1990. Later, the petitioner herein, filed A.O.P. No. 53 of 1993 on the file of the Subordinate Judge of Salem for appointment of an Arbitration and to refer the matter to decide the dispute. Later Thiru K.E. Mohan, F.I.C. A. Consulting Engineer was appointed as Arbitrator on 02.04.1997 to

decide the dispute between the parties. The Arbitrator passed the award dated 27.07.1998 and communicated to the respondent on 27.07.1999 and received by the respondent on 29.07.1999. Aggrieved by the award, the respondent filed an application for setting aside the Arbitration Award u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") in A.O.P. 107 of 1999 on the file of the Additional District Judge, Salem and contended that the award should be set aside on the ground that the award is vitiated and the error apparent on the face of the award in construing the contract and on the ground of not appreciating the vital documents and on procedural deviation and on the ground of omission of discussing the vital matters. The petitioner also filed counter affidavit and stated that the application filed u/s 34 of the Act by the respondent should be dismissed on the ground that the Trial Court is not a court of appeal to sit on judgment over the award so as to give a finding regarding the merits. The scope of setting aside the award is very limited one and hence the same should be dismissed with costs.

2. Pending the application for setting aside, the respondent filed I.A. dated 02.08.2004 requesting the Court to receive certain documents and also requested the Court to condone the delay in presenting the said documents. It was filed under Order 7, Rule 14 read with Section 151 of CPC. It was stated in the I.A. that certain documents were relevant for deciding the issue but unfortunately these documents were not produced before the Arbitrator at the time of hearing due to reasons that the said documents were so voluminous and kept in various files and hence could not be looked into and produced before the Arbitrator at the time of hearing. Now they have traced out and hence the Court below may receive the same. Further the respondent also sent a notice to the petitioner to produce Income Tax Return for the period 1987-88, 1988-89 and 1989-90, Labour payment details for the work period and details of materials purchased during the work period and also the list of test for the materials conducted with details of test results and details of payment. The petitioner filed a memo of objection in respect of the notice for production of documents and stated that it is not open to the respondent to conduct de novo trial in respect of the application filed to set aside the award u/s 34 of the Act and hence the production of documents sought for by the respondent at this juncture was unnecessary and uncalled for. Later the petitioner himself filed I.A. No. 1384 of 2004 dated 27.08.2004 requesting the Court to decide the question regarding the letting in oral evidence by the respondent as a preliminary issue before further hearing the main petition and to eschew the evidence already recorded by the lower Court. The respondent also filed counter to the said I.A. and stated that there is no merit in the petition nor valid reasons stated in the affidavit to eschew the evidence already recorded by the lower Court and also the Court has the discretionary power to record oral evidence and the same could not be decided as a preliminary issue. The Trial Court after considering the arguments, held as follows:

Once it is found that CPC is applicable to the enquiry regarding the petition filed

u/s 34 of the Act, parties to the enquiry are entitled to lead evidence as per CPC and it has to be mentioned here that this application itself has been filed u/s 151 CPC. Even if this application is considered as a Civil Miscellaneous Appeal for argument sake recourse to Order 47, Rule 27 CPC for adducing additional evidence can also be permitted. But it is the considered view of this Court, petition filed u/s 34 of the Act is an original petition and hence recording of evidence is permissible and in accordance with CPC and this point is answered accordingly and hence this petition is dismissed and the request of the petitioner to eschew the evidence already recorded in this case from the records is rejected. The decisions cited by the first respondent will be helpful to this Court only to decide the merits of the main petition and they are not relevant to decide the issue under consideration and those decisions in the view of this Court have to be ignored so far this application is concerned.

3. The learned Counsel for the petitioner contended that the Additional District Judge had totally misunderstood and misapplied the law and had erroneously dismissed the application filed to decide the question of the recording of oral evidence by the respondent as a preliminary issue before further hearing the main petition and to eschew the evidence already recorded. Further he submitted that the lower Court disregarded the scope of enquiry in the application to set aside the award u/s 34 of the Arbitration and Conciliation Act is very limited one and the award can be challenged only on certain grounds enumerated in Section 34 of the Act.

4. The learned Government Pleader for the respondent submitted that the application filed u/s 34 of the Arbitration and Conciliation Act is original petition and hence the recording of evidence is permissible in accordance with the CPC and the respondents were also permitted to file the said documentary evidence to support and hence further submitted that there is no specific exclusion of CPC in the Arbitration Act and hence the order passed by the lower Court is in accordance with law.

5. Heard the counsel on both sides. Section 34 deals with application for setting aside the Arbitration Award. The Court u/s 34 has no jurisdiction to set aside the award other than the grounds mentioned in the Section 34 of the Arbitration and Conciliation Act, which 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 furnish 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 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.

From a reading of the above, it is clear that the Court can exercise limited jurisdiction over the award passed by the Arbitrator. The court cannot go into the merits or reappraise or reexamine the evidence or look into the inefficiency of

the evidence. The Court u/s 34 cannot sit as a court of appeal over the factual finding of the Arbitrator. The court can interfere only when the conditions enumerated in Section 34 of the Act are satisfied, as mentioned above. Unless and until the conditions enumerated are not satisfied, the application for setting aside cannot be maintained before the Court. The scope for setting aside is very narrow and is not like a regular appeal proceeding. In the present case, in the main AOP, P.W.1 has been examined in part on 16.07.2004 and the matter was adjourned for further examination to 02.08.2004. At this juncture, the petitioner objected to the said procedure of the examination of witness and contended that the examination of witness does not at all arise in an application filed for setting aside the award u/s 34 of the Act. So, letting in oral evidence is not permissible. Further the respondent wanted to file certain documents which were not filed earlier before the Arbitrator and the same could not be permitted to file before the Court first time. Recently, this Court considered the application of the CPC in Arbitration proceeding in the case of Om Sakthi Renergies Limited Vs. Megatech Control Limited and A.P. Transco, , and held at Para 13 as follows:

He placed strong reliance on the decision of a Division Bench of this Court Ganesh Benzoplast Ltd., Mumbai v. Sundaram Finance Ltd., Chennai 2002 (2) CTC 238. We have carefully analysed the said judgment. The judgment merely states that when Section 9 of the Act does not specifically require any averment in any particular form as contemplated either under Order 38, Rule 5 of the C.P.C. or u/s 18 of the Arbitration Act, 1940, there is no need to make such averment in the affidavit filed in support of the application seeking a prohibitory order. It is true that the provisions like Order 38, Rule 5 or Order 39, Rules 1 and 2 of the CPC are not contained in the Arbitration and Conciliation Act, 1996 but its principles will be applicable as has been held by the Supreme Court in I.T.I. Ltd. Vs. Siemens Public Communications Network Ltd., , wherein it was held that for want of specific exclusion of C.P.C. in the Act of 1996, it cannot be inferred that the code was not applicable, but that would mean that the provisions of the Code have to be read into as it is, when the Court exercises powers as prescribed under the Act of 1996.

14. Our attention was brought to the decision of the Delhi High Court in Goel Associates v. Jivan Bima Rashtriya Avas Samiti Ltd. 2004 (3) R.A.J. 658, where a Division Bench of the Delhi High Court following the decision of the Supreme Court in I.T.I. Ltd. Vs. Siemens Public Communications Network Ltd., , held that the procedural aspect provided in the CPC about which the Act of 1996 is silent, shall be a guiding factor for exercise of power by the Court u/s 9(ii)(b) of the Act, to determine whether such order deserves to be passed for justice to the cause. We are in respectful agreement with the view taken by the Division bench of the Delhi High Court.

From the above judgment, it is clear that CPC can be used as a guiding principle while considering Section 9 application, under the Act. However, the present facts in hand is an application to set aside an award u/s 34 and the question is

whether the same yardstick must be applied to Section 34 as it is applied u/s 9. The scope of Section 34 is very limited one and whatever documents filed earlier by the parties before the Arbitrator can be filed before the court to support the respective claim. Any new document or new plea would not be entertained while filing the application for setting aside the award u/s 34 and the letting in oral evidence also could not be entertained. If such letting in of oral evidence is allowed, it amounts to enlarging the scope of restricted provision, similar to an appeal proceeding. In the present case the lower Court permitted to take de novo trial by letting in evidence and accepting new documents for the first time which totally alien to arbitration proceedings. A Single Judge of the Delhi High Court in the case of Sial Bioenergie Vs. Sbec Systems, , had considered the scope of Section 48 of the Arbitration and Conciliation Act, which deals with condition for enforcement of foreign awards. In that case, the counsel appearing for the Judgment-Debtor requested the Court to summon certain persons as witnesses of the Judgment-Debtor and also they should be permitted to be cross examined. The Delhi High Court held as follows:

5. In my view the whole purpose of the 1996 Act would be completely defeated by granting permission to the applicant / JD to lead oral evidence at the stage of objections raised against an arbitral award. The 1996 Act requires expeditious disposal of the objections and the minimal interference by the Court as is evident from the Statement of Objects and Reasons of the Act which reads as follows:

4. The main objectives of the Bill are as under:-

(ii) To make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration.

x x x x x x x

(v) to minimize the supervisory role of Courts in the arbitral process.

6. At the stage of the objections which are any way limited in scope due to the provisions of the Act to permit oral evidence would completely defeat the objects underlying the 1996 Act. The process of oral evidence would prolong the process of hearing objections and cannot be countenanced." There is no express provision under the Arbitration and Conciliation Act, excluding C.P.C. However, considering the object of the Act and taking into consideration the facts of the case, C.P.C. can only be used as a guiding principle. Once an Award is passed, the role of C.P.C. is minimised especially u/s 34. Further, this Court in the case of Ennore Port Limited v. Hindustan Construction Company reported in 2005 4 L.W.319 considered the case of Section 34 of the Act and held that it is a settled law and the scope of interference in the awards passed by the Arbitrator is limited and the Courts are not expected to reappraise the matter as if it is an appeal. The Apex Court in the case of Food Corporation of India Vs. Indian Council of Arbitration and Others etc. etc., held that the legislative intent underlying the 1996 Act is to minimise the supervisory role of the Courts in the arbitral process and nominate / appoint the arbitrator without wasting time

leaving all contentious issues to be urged and agitated before the arbitral tribunal itself. After considering the judgments cited supra, I am of the view that while filing the application for setting aside, parties are not entitled to letting in oral evidence and not allowed to file a fresh document or raise a new plea for the first time before the Court. They are only permitted to file documents which were already filed and considered by the Arbitrator alone, before the Court for the purpose of supporting their claim.

7. In the foregoing reasons, I find that the view taken by the Trial Court is against the scope of Section 34 of the Act. Hence it suffers from legal infirmity and the same is set aside. Hence, the C.R.P. is allowed. No costs. Consequently, the connected C.M.P. No. 4400 of 2005 is closed. It is also made clear that what are all stated above shall not be taken into account by the Trial Court while deciding the case on merits.