

(2007) 03 MAD CK 0029

In the Madras High Court

Case No : Application No. 169 of 2007 in Application No. 49 of 2007 in O.P.D. No. 34482 of 2006 and Application No. 353 of 2007 in O.P. No. 535 of 2006

Chennai Container Terminal Pvt. Ltd.

APPELLANT

Vs

Union of India (UOI) and Others
Union of India (UOI)
and Others Vs Board of Trustees and Others

RESPONDENT

Date of Decision : 09-03-2007

Acts Referred:

Arbitration Act, 1940 — Section 14
Arbitration and Conciliation Act, 1996 — Section 2(1), 34, 9
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10

Citation : (2007) 3 ARBLR 218 : (2007) 3 MLJ 1

Hon'ble Judges : M. Jeyapaul, J

Bench : Single Bench

Advocate : R. Krishnamurthy, for S. Raghunathan, for the Appellant; V.T. Gopalan, Solicitor General assisted by P. Wilson, Addl, Solicitor General, for the Respondent

Judgement

M. Jeyapaul, J.—Application No. 169 of 2007 is filed by Chennai Container Terminal Private Limited, the second respondent in the main O.P.D. No. 34482 of 2006 seeking to recall and set aside the order passed on 9.1.2007 in Application No. 49 of 2007 in the aforesaid Original Petition.

2. Application No. 353 of 2007 in O.P. No. 535 of 2006 is filed by Union of India, a third party to the arbitral proceedings seeking permission to implead itself as second petitioner in O.P. No. 535 of 2006.

3. A dispute between Chennai Container Terminal Private Limited, Royapuram, Chennai and the Board of Trustees represented by its Chairman, Chennai Port Trust, Rajaji Salai, Chennai was referred to the arbitrators and the arbitrators passed an award on 8.3.2006. Aggrieved by the said award, the Board of Trustees represented by its Chairman, Chennai Port Trust, Rajaji Salai, Chennai filed O.P. No. 535 of 2006 as against Chennai Containers Terminal Private

Limited, Royapuram and the three arbitrators who passed the award. Contending that Union of India, under which the Chennai Port Trust is functioning, is a necessary party to O.P. No. 535 of 2006, Union of India preferred Application No. 353 of 2007 in O.P. No. 535 of 2006 seeking to permit Union of India to implead itself as second petitioner in the said Original Petition. Alleging that the guidelines issued by Union of India were the subject matter of discussion in the arbitration and the award passed has impacted directly on Union of India under which the Board of Trustees represented by its Chairman is functioning, Union of India filed a separate Original Petition in O.P.P. No. 34482 of 2006 and this court, having been convinced with the grievance expressed by Union of India, granted leave to Union of India to prefer the Original Petition. Chennai Container Terminal Private Limited challenges not only the leave granted to Union of India to prefer a separate Original Petition as against the award passed by the Arbitrators but also the petition filed in the other Original Petition viz., O.P. No. 535 of 2006 seeking permission to Union of India to implead itself as second petitioner therein.

4. The common contention of Chennai Container Terminal Private Limited in the aforesaid Applications is as follows:

Chennai Container Terminal Private Limited was not served with any notice in the Application filed by Union of India seeking leave to prefer petition as against the award passed by the arbitrators. On account of certain disputes which had arisen between Chennai Container Terminal Private Limited and Chennai Port Trust under a concession agreement which contains an arbitration clause to refer any dispute arising between the parties, it was referred to the arbitrators. Union of India was not a party to the aforesaid concession agreement not was Union of India concerned with the dispute that had arisen between Chennai Container Terminal Private Limited and Chennai Port Trust. As per the scheme of the Arbitration and Conciliation Act, 1996, it is only a party to arbitration agreement who can either refer or defend the dispute referred to the Arbitral Tribunal. Chennai Port Trust had already filed O.P. No. 535 of 2006 u/s 34 of the Arbitration and Conciliation Act, 1996 and therefore, Union of India can very well advance all available challenges through the Chennai Port Trust as Union of India is a non party to the arbitration agreement, Union of India cannot be permitted to challenge the award as per Section 34 of the Arbitration and Conciliation Act as it would amount to an abuse of process. Therefore, Chennai Container Terminal Private Limited would contend that the order passed by this court permitting Union of India to prefer the Original Petition as against the award passed by the arbitrators is not sustainable and the petition filed in O.P. No. 535 of 2006 seeking to permit Union of India to implead itself as second petitioner merits no consideration.

5. The common contention of Union of India sustaining its plea to implead itself as a party and its right to file separate Original Petition challenging the award is as follows:

There is no practice in this court to give any prior notice to the respondents in the application filed seeking leave to prefer Original Petition. The various provisions of the Concession Agreement dated 9.8.2001 would show that the Government of India is very much a party to the agreement. The policy of privatisation of Chennai Container Terminal was propounded by the Government of India. The contract was awarded to Chennai Container Terminal based on a resolution passed by the Government of India even before awarding the contract. Some non negotiable conditions were stipulated by the Government of India and those conditions have been incorporated in the Concession Agreement. In fact, the draft Concession Agreement was approved by the Government of India. Several provisions and terms of the Concession Agreement would show that Government of India is a party to the agreement and without whose approval, even an amendment to the agreement is not possible. Any Governmental Action which frustrates the agreement will determine the Concession Agreement. The procedure applicable to Section 34 of the Arbitration and Conciliation Act is totally different from the procedures followed in the arbitral proceedings. The provisions of CPC cannot be said to be excluded from the purview of section 34 of the Arbitration and Conciliation Act, 1996. Union of India became aware of the impugned award only when it was communicated to them by the Chennai Port Trust. The Chennai Port Trust is functioning under the Ministry of Shipping and cannot act on their own. Wrong interpretation of Government of India's orders and the Concession Agreement has been made in the award. Therefore, Union of India would contend that the court has rightly entertained the application filed by it seeking to leave to prefer Original Petition. The impleadment petition in the other Original Petition preferred by Chennai Port Trust will have to be allowed as Union of India is not only a party to the agreement but also an affected party in the aftermath of the award passed by the arbitrators.

6. Learned Senior Counsel for Chennai Container Terminal Private Limited would contend that Union of India, who was not a party as defined u/s 2(1)(h) of the Arbitration and Conciliation Act, 1996, is not entitled to file a separate Original Petition Challenging the award u/s 34 of the said Act. The interest of Union of India is taken care of by the Chennai Port Trust who is a party to the agreement. The principles governing Section 9 would apply to Section 34 of the Arbitration and Conciliation Act. A non party," who has no privity of contract, cannot intervene either in the arbitral proceedings or in the further proceedings that culminated from the arbitral award. Referring to various authorities arising u/s 9 of the Arbitration and Conciliation Act, 1996, the learned Senior Counsel would submit that Union of India has no locus standi to come on record in the Original Petition filed by the Chennai Port Trust challenging an award or to prefer a separate Original Petition impugning the award passed by the arbitrators.

7. Learned Additional Solicitor General for Union of India would submit that the phrase "unless the context otherwise requires" found in the opening part of Section 2(1) of the Arbitration and Conciliation Act, 1996 enlarges the definition of the word "party" as found in Section 2(1)(h) of the said Act. The facts and

circumstances would demonstrate that though Union of India was not a party to the Concession Agreement, it was not only the author of the said agreement, but it has also a potential say in the conclusion of the contract and in the effective implementation of the terms and conditions of the contract. Just because a party is a non signatory to the agreement, it cannot be shut out from the purview of the proceedings before the court. The action of the Government can even determine the contract between the parties. It would be totally unjust to keep away a party who is aggrieved by the award more especially when the party was not a bystander, or an interloper. The very guidelines issued by the Government of India was deliberated upon by the arbitrators and a decision thereupon was arrived at. The CPC applies to the Original Petition filed u/s 34 of the Arbitration and Conciliation Act. When there is scope for preferring an appeal by a party aggrieved by the judgment pronounced under the scheme of Code of Civil Procedure, similar yardstick will have to be adopted for proceedings u/s 34 of the Arbitration and Conciliation Act. The scope of the proceedings u/s 34 is totally different from that of the Application filed u/s 9 of the Arbitration and Conciliation Act. Therefore, the procedure adopted for proceedings u/s 9 cannot be followed for the proceedings u/s 34 of the Arbitration and Conciliation Act, 1996.

8. Let us first see the definition adumbrated u/s 2(1) (h) of the Arbitration and Conciliation Act, 1996 which reads as follows:

In this Part, unless the context otherwise requires,

... ..

(h) "party" means a party to an arbitration agreement.

The Original Petition challenging the arbitral award has been preferred invoking Section 34 of the said Act by Union of India who is not a signatory to the Concession Agreement. Though Section 34 contemplates challenge of the award made by the "party" to the arbitration agreement, a careful analysis of the provision u/s 2(1)(h), would suggest that if the context so warrants, the import of the word "party" can be judiciously expanded. If the legislature has simply defined the term "party" to mean only a party to an arbitration agreement, we can presume that it is an "extrastive definition of the word "party". But, here, the definition has been qualified by the prelude which is found u/s 2(1) as "unless the context otherwise requires". Therefore, we will have to now see whether the context requires an interpretation of the word "party" to mean a party non-signatory to the concession agreement between the Chennai Port Trust and Chennai Container Terminal Private Limited.

9. There is no dispute to the fact that Chennai Port Trust is functioning under the Ministry of Shipping. Government of India has control over the entire properties entrusted to the Port Trust. The various provisions found in the Major Port Trusts Act, 1963 would disclose that the Government of India has all pervasive control over the functioning of various Ports including Chennai Port Trust. The entire supervision rests with the Government of India and it has every right to even

take back the property entrusted to the Port Trust. The policy of privatisation of Chennai Container Terminal was taken to this court by Union of employees and it was only the Government of India which alone waged the battle and paved a smooth way for privatisation of Chennai Container Terminal. Therefore, the whole privatisation of Chennai Container Terminal was propounded by the Government of India. The concession agreement entered into between Chennai Port Trust and Chennai Container Terminal contains a clause that any amendment, addition or variation to the agreement shall be followed and binding only if the same are mutually agreed upon by the parties and approved by the Government of India and executed in writing and signed by the licensor and the licensee. The aforesaid clause would reflect that the concession agreement entered into between the parties was completely controlled by the Government of India. That apart, yet another clause found in the concession agreement would read that if due to any Governmental action, the concession agreement gets frustrated or rendered illegal or impossible of being performed, the agreement itself will be determined on and from the date of the Governmental action so enforced or given effect to. Therefore, the Government of India has got an omnipotent power even to frustrate the very agreement entered into between the parties.

10. On a bare reading of the arbitral award, it is found that the very guidelines issued by the Government of India was very critically deliberated upon by the learned arbitrators and decision was arrived at.

11. The facts and circumstances set out above would show that though the Government of India was not a signatory to the concession agreement between Chennai Container Terminal and Chennai Port Trust, it was virtually a party non signatory. Further, the action of the Government of India was the subject matter before the arbitration. The arbitral award not only affects the interest of Chennai Port Trust, a signatory to the concession agreement, but also the interest of the Government of India. In other words, the Government of India has also become an aggrieved party as far as the award under challenge is concerned.

12. Therefore, in the considered opinion of this court, the aforesaid context mandates expansion of the definition of the word "party" to include not only a signatory to the arbitration agreement, but also a party non signatory to the agreement.

13. As far as Section 9 of the Arbitration and Conciliation Act 1996 is concerned, the court has been empowered to grant interim relief either before or during arbitral proceedings or even after the making of the arbitral award, but, before it is enforced. A party, who can refer the matter before arbitration as per the arbitration clause alone, can approach u/s 9 of the said Act seeking interim relief before the arbitral award was realised. But, a separate petition is filed challenging the very award passed by the learned arbitrators. When the award is challenged before the court u/s 34 of the Arbitration and Conciliation Act, 1996, the court has no other go except resorting to the procedure contemplated under the Code of Civil Procedure. Now, it is a settled position of law that any aggrieved

party to a judgment can carry the impugned judgment in appeal before the appellate forum irrespective of the fact that such an aggrieved party was not one of the parties to the proceedings which culminated in pronouncement of such a judgment. Even otherwise, justice demands that the party aggrieved by a judgment will have to be heard before giving shape to the judgment to reach its finality. Otherwise, it will amount to travesty of justice. The only condition is that the party affected by the order or judgment of the Trial Court has to obtain leave from the court of appeal.

14. The learned Senior Counsel for Chennai Container Terminal submitted an authority reported in *Subramanian and Others Vs. M.P. Vasudevan Chettiar and Others*, wherein it has been held as follows:

(4) Order 1, Rule 10, CPC enables the Court to add parties if their presence is necessary for the determination of the real matter in dispute. Certainly the sons of a party to a reference who are not *eo nomine* parties to the reference itself are not required in a petition for filing an award for a decree to be passed in terms of the award. What the Court has to consider is whether it has to modify the award or to remit it and such modification could be only without affecting[^] the decision of the arbitrators. The presence of third parties who are not parties to the reference and who had nothing to do with the proceedings of the arbitrators is really not necessary since the proper persons whose presence would be necessary for consideration by the Court of all the matters that required to be considered before passing a decree are the parties to the reference. Whatever interest the sons may have in the subject matter of the arbitration that cannot be a ground for making them parties.

That was a case where, under the old Arbitration Act, 1940, an award was filed seeking a decree to be passed on such award by the court. The sons of the party to the reference filed an application under Order 1 Rule 10 CPC to add them as parties in the aforesaid proceedings. The court, having found that the scope of reference u/s 14 of the Arbitration Act, 1940 was very limited, refused to entertain the petition filed under Order 1 Rule 10 CPC filed by them. In fact, it has been observed in the aforesaid judgment that it could not be laid down as a formal proposition of law that Order 1 Rule 10 CPC. could not be absolutely inapplicable to a proceedings before the court under the Arbitration Act. Therefore, the observation made in the aforesaid authority that the sons of the party to the reference were totally unnecessary parties to the proceedings cannot be applied to the facts and circumstances of this case. In yet another authority in *Keval Krishna Balakram Hitkari and another Vs. Anil Keval Hitkari and others*, it has been held as follows:

So far as the objection raised by Mr. Sanjay Sawhney is concerned, in my opinion Mr. Sanjay Sawhney is not at all entitled to raise any objection to the award. A person can raise the objection to the award only if it is his case that by the award some rights of his, have been curtailed or denied to him. Mr. Sanjay Sawhney is claiming through his mother Anju Sawhney. As rightly submitted by the learned

Counsel for the petitioners, Anju Sawhney has no interest whatsoever in the property that was subject matter of arbitration proceedings. Whatever directions in her favour are found in the award have been made by the arbitrator for her benefit though she "does not have any interest in the property and therefore, in my opinion, Mr. Sanjay Sawhney is not entitled to raise any objection of the award.

That was also a case where the award was filed for passing of a decree in terms of the award. The court, having found that the party seeking to be impleaded in the aforesaid proceedings had no interest whatsoever in the property that was the subject matter of the arbitration proceedings, rejected his plea for impleadment. The court has further observed that a person, whose right has been affected by such an award, can raise his objection to the award. Therefore, the aforesaid authority does not come to the rescue of Chennai Container Terminal. Yet another authority reported in *Ashok Traders v. Gurumukh Das Saluja* 2004 (1) R.A.J. 270(SC) was referred to by the learned Senior Counsel for Chennai Container Terminal. The Honourable Supreme Court, referring to Sections 9 and 2 (1) (h) of the Arbitration and Conciliation Act, 1996, observed as follows:

13. A&C Act, 1996 is a long leap in the direction of alternate dispute resolution systems. It is based on UNCITRAL Model. The decided cases under the preceding Act of 1940 have to be applied with caution for determining the issues arising for decision under the new Act. An application u/s 9 under the scheme of A&C Act is not a suit. Undoubtedly, such application results in initiation of civil proceedings but can it be said that a party filing an application u/s 9 of the Act is enforcing a right arising from a contract? "Party" is defined in Clause (h) of Sub-section (1) of Section 2 of A&C Act to mean "a party to an arbitration agreement". So, the right conferred by Section 9 is on a party to an arbitration agreement.

Though in the aforesaid decision, it has been held by the Honourable Supreme Court that a party defined u/s 2(1) (h) of the said Act alone can invoke the jurisdiction of the court seeking interim relief u/s 9 of the said Act, It is found that the specific phrase "unless the context otherwise requires" found in Section 2(1) was not the subject matter of discussion in the aforesaid judgment. The scope of Section 9 is totally different from that of Section 34 of the Arbitration and Conciliation Act, 1996. Only a party, who is competent to refer the matter for arbitration alone can go before the court invoking the provisions of Section 9 of the Act seeking interim relief either before or during or after the arbitral award was passed, but before the same was executed. But, u/s 34 of the Arbitration and Conciliation Act, 1996, the arbitral award passed by the learned arbitrator is put to test. There is a lot of scope u/s 34 of the Act for the court to decide whether the party who prefers to challenge the award is really an aggrieved party by the award. As far as the ambit of Section 9 is concerned, such a situation does not arise. The scheme of the CPC is made applicable to proceedings before the court u/s 34 of the Act. Then in that case, the court will

have to, see whether it can accommodate an aggrieved party for the purpose of challenging the award. Therefore, the ratio laid down by the Honourable Supreme Court that a party to the arbitration agreement alone can approach the court seeking interim relief u/s 9 of the Arbitration and Conciliation Act, 1996 cannot be applied to the present context where the aggrieved party knocks at the doors of the court seeking audience u/s 34 of the Arbitration and Conciliation Act, 1996. I find that the aforesaid ratio would apply only in a case where a non party to the arbitration agreement seeks remedy u/s 9 of the Arbitration and Conciliation Act, 1996. Further in this case, the Government of India, though not a signatory to the agreement, is still a party non-signatory. In that context also, the aforesaid authority does not apply to the facts and circumstances of this case. As already pointed out, it will be totally unjust, unfair and irrational to close the doors of the temple of justice to an aggrieved party to an award.

15. As far as the grant of leave by this court to prefer the Original Petition challenging the award, I find that it is purely a matter between the court and the party who seeks leave. Only when the leave is granted, the Original Petition is taken on file and thereafter, notice is issued to the other side. There is no practice of putting the other side on notice even at the stage where leave is sought for by the party knocking at the doors of this court. But, the party, who is affected by such a leave granted by this court, can always seek for revoking such an order.

16. Coming to the question of limitation, I find that the Government of India has clearly averred in the petition that they came to know of the award passed only through Chennai Port Trust. Therefore, the Government of India has every right to file the petition challenging the award having been aggrieved of the said award within three months from the date of knowledge. After all, the Government of India was not a party to the arbitral proceedings. Therefore, the plea of the Government of India that they came to know of the award passed by the arbitrators and immediately thereupon, they approached the court with the petition challenging the award is accepted.

17. To sum up the findings, though Government of India was not a signatory to the arbitration agreement, it was a party non-signatory. Therefore, not only a party to the arbitration agreement but a party non-signatory also can challenge the impugned award passed by the learned arbitrator. Further, the scheme of the CPC applies to the proceedings u/s 34 of the Arbitration and Conciliation Act, 1996. Therefore, the proposition of law that an aggrieved party can challenge the judgment will have to be applied to the facts and circumstances of this case. The contextual facts and circumstances warrant expansion of the definition found u/s 2(1)(h) of the Arbitration and Conciliation Act, 1996 to include the Government of India who is a party non-signatory for the purpose of challenging the award u/s 34 of the said Act.

18. In view of the above, sustaining the order passed by this court granting leave to Union of India to prefer the Original Petition challenging the award passed by

the learned arbitrators, Application No. 169 of 2007 filed by Chennai Container Terminal Private Limited seeking to recall and set aside the order dated 9.1.2007 stands dismissed.

19. As Union of India has been granted leave to prefer the Original Petition challenging the award passed by the learned arbitrators, impleading Union of India in O.P. No. 535 of 2006 as second petitioner to challenge the very same award is found to be quite redundant. Hence, Application No. 353 of 2007 also stands dismissed. But, the registry is directed to post both the Original Petitions together for common disposal in the interest of justice.