

(2011) 11 MAD CK 0331
In the Madras High Court
Case No : O.S.A. No. 112 of 2010

Gammon India Ltd. C-27, Navyug Mansion Naushir Bharucha APPELLANT
Marg Mumbai-400007

Vs

Sankaranarayana Construction (Bangalore) Pvt. Ltd., No. 9, RESPONDENT
Rajaram Mohan Roy Road Bangalore-560025

Date of Decision : 30-11-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 19, 31(6), 34
Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6

Citation : (2011) 11 MAD CK 0331

Hon'ble Judges : R. Mala, J; R. Banumathi, J

Bench : Division Bench

Advocate : R. Senthil Kumar, for the Appellant; T.A. Srinivasan for M/S. Sree and Associates, for the Respondent

Final Decision : Dismissed

Judgement

R. Mala, J.—Challenge in this appeal is the Judgment and decretal order passed in Tr.O.P.No. 628 of 2008, dated 11.10.2009, in and by which, the learned single Judge permitted the Respondent herein to furnish Bank Guarantee in the very same execution proceedings, and withdraw the amount deposited therein by the Petitioner, who is the Appellant herein.

2. Appellant/Petitioner was awarded a contract for the construction of a Masonry Dam across the Tamiraparani river basin in Mekarai Village, Shenkottah Taluk, Tirunelveli District. Block nos. 11 to 18 were assigned by the Appellant/Petitioner to the Respondent, by way of sub-contract, under a Work Order dated 02.11.2000. Since dispute arose between the parties, compelling the Respondent herein to file an application u/s 11 of the Arbitration and Conciliation Act, 1996. By an order dated 16.04.2005 passed in O.P.No. 538 of 2003, Hon'ble Mr. Justice N.V. Bala subramanian (Retired) was appointed as Arbitrator and he entered reference and passed an interim award dated 16.12.2006, directing the

Appellant/Petitioner herein to deposit a sum of Rs. 56,63,990/-to the credit of O.P.No. 538 of 2003 within six weeks and permitting the respondent to withdraw the same after furnishing Bank Guarantee.

3. Challenging the said interim award, Appellant/Petitioner filed a petition in O.P.No. 51 of 2007, u/s 34 before the District Court, Tirunelveli, but it was returned with a direction to present before the appropriate forum, against which, the Appellant/Petitioner filed Revision Petition in CRP(PD)(MD)No. 414 of 2008 and the same was dismissed. Hence, he represented the same before the Original Side of this Court and it was taken on file.

4. It is pertinent to note that after passing of an interim award, the Respondent herein has initiated execution proceeding before the Mumbai High Court in E.P.No. 85 of 2008, where the interim award amount has been deposited before the Sheriff of Mumbai High Court. Admittedly, Appellant/Petitioner herein filed an application for rejection of main O.P. in A. No. 5264 of 2008, which was dismissed, against which, no O.S.A. has been filed.

5. Appellant/Petitioner filed Tr.O.P.No. 628 of 2008 challenging the interim award passed by the Arbitrator and stated that arbitral Tribunal has not empowered to pass an interim award on admission, as in the case of Order XII, Rule 6, C.P.C. His second submission is that in any case, a decree/award on admission cannot be passed unless the admission was clear, unambiguous and unequivocal and the statement of defence was not an admission at all. His third limb of argument is statement of defence was only an adjustment, which was different from even a set off and that therefore, no interim award that would have the effect of upsetting such adjustment could be passed.

6. The learned Single Judge after considering the argument of both sides and several decisions relied upon by both sides, negated the argument advanced by the learned counsel for Appellant/Petitioner stating that the Arbitrator has every right to pass an interim award on admission. He has further held that the Appellant/Petitioner lodged a counter claim to the extent of Rs. 75,16,276/- before the Arbitrator and the balance amount, Appellant/Petitioner claimed to have adjusted is a sum of Rs. 56,63,990/-against his own claim of Rs. 1,31,80,266/-. Hence, the learned single Judge has allowed the application in A.No. 5748/2008 permitting the Respondent herein to withdraw the amount of Rs. 56,63,990/-, against which, the present Original Side Appeal has been preferred.

7. Mr.R.Senthil Kumar, learned counsel appearing for the Appellant/Petitioner would reiterate the arguments that he advanced before the learned single Judge and again raised the same three points. He would take us to Section 19 of the Arbitration and Conciliation Act (hereinafter referred to as "Act") and submitted that as per Section 19 of the Act, arbitral Tribunal is not bound by the CPC and Indian Evidence Act. So the Arbitrator has erroneously passed an interim award on admission by invoking Order XII Rule 6 of C.P.C. It is further submitted that

the admission is not clear, unambiguous and unequivocal. He further submitted that there is a difference between an adjustment and a set off/counter claim and the learned Single Judge has not considered this aspect and hence, he prayed for setting aside the Judgment and decreetal order dated 11.10.2009 passed in Tr.O.P.No. 628 of 2008. To substantiate his argument, he would rely upon the following decisions: (i) FAO (OS) 507/2007 Delhi Numero Uno International Ltd., v. Prasar Bharti, (ii) A. Nos. 3094, 3095 and 3935 and 4026 of 2005 in C.S. No. 652 of 2005 M.M. Aquin Technologies Limited v. BDT Limited (iii) Union of India (UOI) Vs. Karam Chand Thapar and Brs. (Coal Sales) Ltd. and Others, (iv) 2011 (7) Scale 566 Himani Alloys Ltd. v. Tata Steel Ltd. and (v) Ethiopian Airlines Vs. Ganesh Narain Saboo, .

8. Resisting the same, Mr.T.A.Srinivasan, learned counsel appearing for the Respondent would submit that as per Section 31(6) of the Act, an arbitral Tribunal has every right to pass an interim award. Learned counsel would take us to the claim statement made by the Appellant/Petitioner and submits that in condition-31, it was stated that "payments of running bills shall be made within 7 days of receipt of payment from S.E., P.W.D., Tirunelveli." Furthermore, in page-80 of the Statement of defence and counter claim made by the Appellant, it was mentioned that bill amount as per Annexure is Rs. 56,63,990/-. As per condition-31, it was stated that payment of bill amount shall be paid within 7 days of receipt of payment from S.E., P.W.D. Tirunelveli. So the learned Arbitrator has rightly passed an interim award directing the Appellant/Petitioner to deposit a sum of Rs. 56,63,990/-and that has been confirmed by the learned single Judge that the admission made in the Counter-claim statement is clear and the learned Single Judge came to the correct conclusion that the Respondent is entitled to withdraw the amount deposited in the execution proceedings in E.P.No. 85 of 2008 pending before the Sheriff of Mumbai High Court. To substantiate his argument, he relied upon the decision reported in 2001 (3) CTC 539 Dr. S.K. Doraisamy v. N.Elangovan and three others and hence prayed for dismissal of the appeal.

9. Considered the rival submissions made on both sides and perused the materials available on record.

10. It is an admitted fact that the Respondent was a Sub-Contractor under the Appellant/Petitioner herein. Volume of work as per work order was about Rs. 13,18,81,960/-and the period of completion was fixed at 14 months from 04.11.2000. Since the Appellant/Petitioner was not able to hand over the site and keep pace with the claimant from the beginning, there was a delay in handing over the site as well as necessary accessories/facilities, which has been agreed by the Respondent herein, the work as contemplated in the work order could not be completed within the time specified therein, extension of time to complete the work sought for, problem arose between both of them. Hence, the Respondent approached the Court u/s 11 of the Act. After Arbitrator was appointed by this Court, the arbitrator passed an interim award as per Section

31(6) of the Act. Section 31(6) of the Act is extracted hereunder:

31(6) The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.

As per Section 31(6) of the Act, an arbitral Tribunal/Arbitrator has empowered to pass an interim award.

11. The definition of arbitral award in s 2(c) includes an "interim award".

2(c) "arbitral award" includes an interim award

Section 31(6) authorizes an arbitral tribunal to "make an interim arbitral award on any matter with respect to which it may make a final arbitral award" at any time during the arbitral proceedings. Such award deals only with some of the matters referred, so that the remaining matters will be dealt with later. As regards interim measures of protection, these are only enforceable if the arbitral tribunal makes an interim award with respect to such interim measures, and since this is time consuming, parties are generally referred to the court with an expression of opinion by the arbitral tribunal on the need for such interim measures. An arbitral award on agreed terms has the same status and effect as any other arbitral award on the substance of the dispute.

12. Now this Court has to decide whether the arbitral Tribunal is empowered to pass an interim award on admission, as in the case of Order XII Rule 6 C.P.C? At this juncture, it is appropriate to consider Section 19 of the Arbitration and Conciliation Act, which is extracted hereunder:

19. Determination of rules of procedure-

(1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

13. The learned counsel would take us to the decision stating that Order XII Rule 6 CPC is not a procedure to be adopted in the arbitral Tribunal. At this juncture, it is appropriate to consider that both the parties are agreed on the procedure to be followed by the arbitral Tribunal in conducting its proceedings. Accordingly, the tribunal may conduct the arbitral proceedings "in the manner it considers appropriate". This power, however, is subject to the provisions of Pt I. Such provisions, apart from Section 18 would be those provisions of Pt I, which set

forth special features of the discretionary powers or which limits the discretion in order to ensure fairness; In the event that parties have not agreed on the procedure to be followed in the conduct of proceedings, the arbitral tribunal is, subject to Pt I, free to conduct the proceedings in a manner which it considers appropriate. Instead of following the straitjacket procedure of procedural laws, the tribunal can design the procedure to fit the exigencies of the subject matter of the arbitration. In practice, the procedure is to be designed to fit the exact exigencies of the subject matter of arbitration rather than follow the strict rule of the CPC 1908 or the Indian evidence act 1872. For instance, it is not compulsory for the tribunal to formally frame issues or record a decision on each and every one of the issues, as required by the CPC 1908. The arbitrators generally apply the rule of *resjudicata*. The power to proceed *ex parte*, in default of a party, is vested in the tribunal by the Act itself. It is not derived from the procedural law. As already stated, the parties by agreement and the arbitral tribunal in its discretion can always adopt the principles of the CPC 1908. The parties are free to determine the rules on how their chosen method of dispute settlement will be implemented. This allows them to design the procedural rules according to their specific needs and wishes. They may choose those features familiar to them and even opt for a procedure, which is anchored in a particular legal system. For instance, they may agree to adopt the principles of the procedure prescribed in the CPC 1908 (Orders VI to XX-A). However, if they refer to a given law on civil procedure, including evidence, such law would be applicable by virtue of their choice, and not by virtue of being the national law.

14. Considering the same, there is no evidence to show that the parties agreed to fix the procedural law other than Civil Procedure Code. So the arbitral Tribunal in his discretion can always adopt the principle of Civil Procedure Code. In such circumstances, the learned Arbitrator after considering the statement of defence and taken into account of the admission made by the Appellant/Petitioner herein, passed an interim award.

15. Learned counsel for the Appellant/Petitioner would rely upon the following portion in FAO (OS) 507/2007 Delhi Numero Uno International Ltd., v. Prasar Bharti, in para-5, it is stated as follows:

5..... In fairness to Mr. Jaitley, we must record that he did not question the jurisdiction of the arbitrator to make an interim award as was, it appears, sought to be done before the learned Single Judge at some stage.

He submitted that at the time of argument, learned counsel has not questioned the jurisdiction of the Arbitrator to make an interim award. But here, the learned counsel for the Appellant would question that the passing of an interim award on the basis of the admission and hence findings of the learned Single Judge is unsustainable. Learned Single Judge has also extracted the following portion of the above decision in his judgment, which is stated as follows:

No interference with an interim award would, however, be permissible only

because the defendant has made a counter claim or because some areas of dispute independent of the area covered by the interim award remains to be resolved.

Now we have to consider that whether the interim award has been passed on admission and whether the statement given by the Appellant/Petitioner in the claim statement is clear, unambiguous and unequivocal admission? The Tribunal has right to pass an interim award on admission made by the Appellant/Petitioner by invoking Order XII Rule 6 of C.P.C., because as already stated that it is a discretion of the Arbitrator to follow the procedural law, if both the parties are not agreed. Hence we are of the opinion that the learned single Judge has rightly held that the arbitral Tribunal has a right to pass an award on the basis of the admission by invoking Order XII Rule 6 of C.P.C. So it does not warrant any interference.

16. The learned counsel for the Appellant/Petitioner would rely upon *Ethiopian Airlines Vs. Ganesh Narain Saboo*, , in para-66, it is held as follows:

66. Likewise, CPC itself does not claim to make Section 86 applicable to proceedings before the Consumer Fora. Instead, CPC includes a saving clause, providing that "in the absence of any specific provision to the contrary, nothing in [CPC] shall be deemed to limit or otherwise affect any special... law... or any special form of procedure prescribed, by or under any other law... " In addition, Section 86 only applies to a "suit in any court". This term should be understood differently than the term "court" discussed above because CPC refers exclusively to the civil courts. In particular, CPC specifically refers to the District Courts, the High Courts, and the Supreme Court and makes little if any reference to other, quasi-judicial fora like the consumer redressal bodies at issue here. This interpretation has been approved by the Supreme Court, in *Bhagwat Singh*.

In the above citation, it was defined that what is the Court? "Court" means Civil Court (i.e.) District Court, High Court and Supreme Court. So he mainly focussing upon the said decision to contend that the arbitral Tribunal will not come under the definition of "Court". As decided earlier that there is no quarrel over the proposition, but the above citation is not relevant for this appeal, which is different from the facts of this case.

17. Now this Court has to decide that whether averment in the claim statement filed by the appellant is clear, unambiguous and unequivocal admission? At this juncture, it is appropriate to consider the claim statement made by the Appellant/Petitioner. In page-48 of the Claim statement, Claim-15.1 is extracted hereunder:

15.1 Withholding of bills and adjusting the same for the amount due to the Respondent are in order. The Claimant has stated that an amount of Rs. 68.84 lakhs is outstanding and payment due. But as per the quantity arrived by initial level and final level taken jointly with the Claimant, the amount of bill due to Claimant works out to Rs. 56,63,990/-. Annexure V with working sheet is attached.

The Respondent submits that as a matter of fact an amount of Rs. 1,31,80,266/- is due to the Respondent from the Claimant vide details furnished in the counter claim. The amount of Rs. 56,63,990/-payable to Claimant has been adjusted towards the amount due to Respondent.

18. It is true, as per page-80 of the claim statement, it was specifically mentioned that Bill amount as per Annexure-V is Rs. 56,63,990/-and that has been admitted. But in claim-15.1, Appellant/Petitioner stated that the amount of Rs. 56,63,990/-payable to Claimant has been adjusted towards the amount due to Respondent. So the Appellant/Petitioner admits that he owns Rs. 56,63,990/-, which is clear and unambiguous admission. On that basis only, an interim award has been passed by the Arbitrator. The learned single Judge has considered this aspect in para-26 of his judgment and discussed as follows:

as per the quantity arrived by initial level and final level taken jointly with the claimant, the amount of bill due to the claimant works out to Rs. 56,63,990/-.

In the prayer portion, towards the end of Counter claim No. 1 in part-III of their Statement of defence, Appellant/Petitioner prayed before the Arbitrator as follows:

(A) The claims made by the Claimant are not maintainable and deserves to be rejected except partial bill amount of Rs. 56,63,990/-, which is adjusted towards the amount due to Respondent besides encashment of Bank Guarantee.

19. The learned Single Judge considering the statement of defence and prayer portion, came to the correct conclusion that admission is more clear, more positive and more unequivocal. Appellant/Petitioner has not only admitted their liability to the Respondent to the extent of Rs. 56,63,990/-, but also gone to the extent of adjusting the same towards the amount claimed by them against the Respondent. So the admission is clear, categorical about the own liability of the Appellant/Petitioner to the extent of Rs. 56,63,990/-. So the learned single Judge has rightly held that an Arbitrator was right in passing interim award on the strength of the admission made in the claim statement of the Appellant/Petitioner.

20. At this juncture, learned counsel for the Appellant/Petitioner would rely upon the following decisions of this Court and Apex Court.

(i) Unreported judgment in A. Nos. 3094, 3095 and 3935 and 4026 of 2005 in C.S. No. 652 of 2005 (M.M. Aquin Technologies Limited v. BDT Limited), in para-11, it is held as follows:

11. It is pertinent to point out in the instant case that a written statement making a counter claim and set off has been made. Under the circumstances, the Court is of the considered opinion that it is not a fit case, where interim decree can be granted, applying the provisions of CPC and hence application No. 4026 of 2005 requires an order of dismissal. Accordingly, the same is dismissed.

(ii) Reported judgment in Himani Alloys Ltd. Vs. Tata Steel Ltd., . in para-9, it is

held as follows:

9. It is true that a judgment can be given on an "admission" contained in the minutes of a meeting. But the admission should be categorical. It should be a conscious and deliberate act of the party making it, showing an intention to be bound by it. Order 12 Rule 6 being an enabling provision, it is neither mandatory nor peremptory but discretionary. The court, on examination of the facts and circumstances, has to exercise its judicial discretion, keeping in mind that a judgment on admission is a judgment without trial which permanently denies any remedy to the Defendant, by way of an appeal on merits. Therefore unless the admission is clear, unambiguous and unconditional, the discretion of the Court should not be exercised to deny the valuable right of a Defendant to contest the claim. In short the discretion should be used only when there is a clear "admission" which can be acted upon.

(iii) Likewise, learned counsel for the Respondent relied upon the decision reported in 2001 (3) CTC 539 Dr. S.K. Doraisamy v. N.Elangovan and three others, in para-11, it is held as follows:

11..... The contention of the defendants that the above part of the pleading will not constitute admission by the defendants as to the part of the plaintiff's claim cannot be countenanced since as stated above, the admission made in the written statement is clear and unambiguous to the extent of the part of the consideration of Rs. 6 lakhs. In view of the candid admission made by the defendants in the written statement, as stated above, it will not be worthwhile to allow them to put forth the defence stating that the entire suit has to be dismissed in view of the non-production of the evidence, oral and documentary.

As per the above decisions, admission made by the Appellant/Petitioner is clear, unambiguous and unequivocal.

21. Learned Single Judge in para-33 of his judgment discussed the above aspect and held that counter claim made by the Appellant/Petitioner in claim-15.1 and his prayer would clearly prove that his admission is clear, unambiguous and unequivocal. A person who claims to have adjusted an amount due from him to another against his own claim, actually makes it clear that the Court need not spend any time on adjudicating his liability to that extent, as he had already given credit to the other and adjusted the same towards what is due to him. On the basis of the admission, an interim award has been passed. Hence, we are of the considered view that the learned single Judge has rightly held that the admission is clear and unambiguous and it does not suffer any irregularity.

22. The third contention raised by the learned counsel for the Appellant/Petitioner is that an adjustment stands on a different footing than a set off or counter claim. In this connection, the learned counsel for the Appellant/Petitioner relied upon the decision reported in Union of India (UOI) Vs. Karam Chand Thapar and Brs. (Coal Sales) Ltd. and Others, . in para-15, it is held as follows:

15. "Set-off" is defined in Black's Law Dictionary (7th Edn., 1999) inter alia as a debtor's right to reduce the amount of a debtor by any sum the creditor owes the debtor; the counterbalancing sum owed by the creditor. The dictionary quotes Thomas W. Waterman from A Treatise on the Law of Set-Off, Recumbent, and Counter Claim as stating:

Set-off signifies the subtraction or taking away of one demand from another opposite or cross demand, so as to distinguish the smaller demand and reduce the greater by the amount of the less; or, if the opposite demands are equal, to extinguish both. It was also, formerly, sometimes called stoppage, because the amount to be set-off was stopped or deducted from the cross-demand.

The above paragraph would clearly prove that the distinction between an adjustment and set off and the distinction between a legal set off and an equitable set off.

23. As per para-37 of the judgment of the learned single Judge, Appellant/Petitioner herein has claimed to have adjusted a sum of Rs. 56,63,990/-against his own claim of Rs. 1,31,80,266/-. Consequently, Appellant/Petitioner has lodged a counter claim to the extent of Rs. 75,16,276/-before the Arbitrator. Final award has been passed on 22.06.2011. In the final order, arbitrator had accepted only Rs. 1,37,036/-with interest and he passed final award in favor of claimant/Respondent herein to the extent of Rs. 89,63,989.50 subject to the counter claim of Rs. 1,37,036/-with interest. Even though it was under challenge before the learned single Judge, we are of the considered view that the Appellant/Petitioner herein has admitted that he is due to the Respondent for a sum of Rs. 56,63,990/-towards payment of running bills that to be paid within 7 days from the date of receipt of amount from S.E., P.W.D., Tirunelveli and in the counter statement, Appellant/Petitioner stated that bill amount as per Annexure-V is Rs. 56,63,990/-and so Respondent is entitled to that amount. The learned single Judge considered all the aspects in a proper perspective and came to the correct conclusion. Hence, we do not find any reason warranting interference with the order passed by the learned single Judge.

24. In the result, confirming the order passed by the learned Single Judge in Tr.O.P.No. 628 of 2008, dated 11.10.2009, this Original Side Appeal is dismissed. In this appeal, both the parties are directed to bear their own costs. Consequently, connected Miscellaneous Petitions are closed.