

(2016) 07 MAD CK 0138

In the Madras High Court

Case No : O.S.A. No. 155 of 2008 and O.S.A. No. 79 of 2010 and M.P. No. 1 of 2008

Ms. Ennore Port Ltd.

APPELLANT

Vs

Hindustan Construction Company Ltd.

RESPONDENT

Date of Decision : 27-07-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34(2)(iv)

Citation : (2016) 6 MLJ 402

Hon'ble Judges : Mr. A. Selvam and Mr. P. Kalaiyarasan, JJ.

Bench : Division Bench

Advocate : Mr. K. Manoj Menon, Advocate, for the Appellant; Mr. D. Balaraman, Advocate, for the Respondent No. 1 in both appeals; Mr. R. Karthikeyan, Advocate, for the Respondent No. 2 in O.S.A. No. 155 of 2008; Arbitrators, for the Respondent No. 3 to 5 in O.S.A. N

Final Decision : Disposed Off

Judgement

Mr. P. Kalaiyarasan, J—These two Original Side Appeals in O.S.A.No.155 of 2008 and O.S.A.No.79 of 2010 are direct against the common order of the learned single Judge of this Court, dated 13.11.2006 passed in O.P.Nos.202 of 2004 and 208 of 2006.

2. The facts of the case in nutshell are that the Chennai Port Trust, predecessor-in-interest of the Appellant and the first respondent entered into Rock Quarrying and Transportation contract, dated 06.06.1996 to quarry and transport rock required for construction of break waters at Ennore. The rock transported from the quarry was to be stockpile in the port. On account of insufficiency of space and non-removal of the rock, additional stockpile was created within the Port. A claim was made for the costs of creation of the additional stockpile. The Arbitrators found that a part of additional stockpile, i.e., 9000 sq.mts. was utilised by the first respondent for another C-4 contract. Hence, cost of creation of 9000 sq.mts was excluded by the Arbitrators, while calculating the cost for

creating additional stockpile.

3. As per the contract, in the event of any dispute arising between the employer and the contractor, the dispute is required to be referred in the first place, to a Disputes Review Board (DRB). If either of the parties are dissatisfied with recommendations of the DRB, the dispute is to be referred to Arbitration. Either party may if the other party fails to comply with the recommendations of DRB, which become final, refer failure to Arbitration in accordance with Clause 67.3 of the Contract.

4. The first respondent raised certain disputes in the matter of Variation Order (Dispute No.8) and in the matter of non-release of certain payments (Dispute No.9) before the DRB, as stipulated in the contract. The DRB, had on 05.04.2001, given its recommendations on Dispute No.8 and Dispute No.9. Since the recommendations of DRB have become final and binding, the first respondent referred the dispute of Arbitration under Clause 67.4, due to failure of compliance.

5. The Arbitrators reduced the amount recommended by the DRB with regard to Dispute No.8 from Rs. 51.91 lakhs to Rs. 41.07 lakhs. The Arbitral Tribunal also reduced the rate of interest from 18% recommended by the DRB to 14.5%/15% in both the Dispute Nos.8 and 9.

6. O.P.No.202 of 2004 been filed by the first respondent to set aside the decisions of the Arbitrators made in respect of Dispute No.8 - Variation Order and reduction of the rate of interest in respect of claim in Dispute Nos.8 & 9. The appellant as petitioner filed O.P.No.208 of 2006 to reduce the rate of interest, according to the current rate of interest prevailing at the relevant period.

7. The learned single Judge allowed the O.P.No.202 of 2004 by setting aside the Arbitral award in so far as dispute Nos.8 and 9, holding that the Arbitral Tribunal exceeded its jurisdiction to reopen the dispute and to modify the recommendations instead of passing an Award on the basis of the recommendations of the DRB and dismissed O.P.No.208 of 2006. Aggrieved against the said order, the appellant preferred both the Original Side Appeals.

8. The short point that arises in these appeals is as to whether Arbitrators are to give their findings, after finalising the dispute as per the contract between the parties or to affix the rubber stamp approving the findings of the DRB as binding.

9. The relevant portions of the Clause in the contract essential to understand and resolve the above issue and dispute between the parties are extracted below :

"Sub-Clause 67.1 Board's Decision :

If a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with, or arising out of the Contract or the execution of the works, whether during the execution of the works or after their completion and whether before or after the repudiation or other termination of the Contract,

included any disagreement by either party with any action, inaction, opinion, instruction, determination, certificate or valuation of the Engineer, the matter in dispute shall, in the first place, be referred to the Disputes Review Board (hereinafter referred to as "the Board") established pursuant to the Disputes Review Board Agreement (hereinafter referred to as "the Board Agreement").

.....

Board's recommendations shall be binding on the Employer and the Contractor in respect of disputes involving individual claims up to one percent of the contract value subject a ceiling of Rs. 1(one) million for contracts valued upto Rs. 300/- (Three hundred) million or and (ii) a ceiling of Rs. 10/- (Ten) million for contracts valued above Rs. 300/- (Three hundred) million. In all other cases, upon receipt of the Board's recommendation(s) the parties shall within 14 days or such other time as the Board may specify give written notice to each other, the Board, may specify given written notice to each other, the Board and the Engineer of their acceptance or rejection of each Recommendation, failing which notice all of the Recommendation(s) shall be deemed accepted. Accepted and deemed accepted Recommendations shall be final and binding on the parties.

Sub-Clause 67.3 Arbitration

Any dispute in respect of which the Recommendation(s), if any, of the Board not become final and binding pursuant to Sub-Clause 67.1 shall be finally settled by arbitration as set forth below :

(i) A dispute with an Indian Contractor shall be finally settled by arbitration in accordance with the Indian Arbitration Act, 1940 or any statutory amendment thereof. The arbitral tribunal shall consist of 3 arbitrators, one each to be appointed by the Employer and the Contractor and the third to be appointed by the President of the Institution of Engineers (India). For the purposes of this Sub-Clause, the term "Indian Contractor" means a Contractor who is registered in India and is a juridic person created under Indian law as well as joint venture between such a Contractor and a Foreign Contractor.

.....

(iii) Neither party shall be limited in the proceedings before such arbitrators to the evidence or arguments already put before the Engineer or the Board, as the case may be, for the purpose of obtaining its/his said Recommendations/decision. No such Recommendations/decision shall disqualify the Engineer or any of the members of the Board, as the case may be, from being called as a witness and giving evidence before the arbitrators or any matter whatsoever relevant to the dispute.

Sub-Clause 67.4 Failure to comply

Where neither the Employer nor the Contractor given notice of intention to commence arbitration of a dispute within the period stated in Sub-Clause 67.1

and the related Recommendation or decision, as the case may be, become final and binding, either party may, if the other party fails to comply with such Recommendation or decision, as the case may be, and without prejudice to any other right it may have, refer the failure to arbitration in accordance with Sub-Clause 67.3. The provisions of Sub-Clause 67.1 shall not apply to any such reference."

10. As per Clause 67.1 of the Contract, recommendations of the DRB is final and binding in respect of disputes of a value of less than Rs. 1/- (one) crore. With respect to the recommendations in respect of dispute, the value of which exceeds Rs. 1/- (one) crore, either party who is dissatisfied with the recommendations to issue notice within 14 days rejecting the recommendations and expressing its intention to commence arbitration. The Arbitration is to be held as per Clause 67.3 of the Contract. In cases, wherein either party records its rejection, the recommendations of DRB become final. If the recommendation which became final is not complied with, then as per Clause 67.4, the affected party is required to refer the failure to Arbitration in accordance with sub-clause 67.3. When failure of compliance is referred to the Arbitrators, it is to be dealt with in accordance with Clause 67.3 of the contract and the provisions of sub-clause 67.1 shall not apply to such reference.

11. From the cumulative reading of the above mentioned Clauses in the contract, it is crystal clear that the dispute arising due to failure of compliance of the recommendations of DRB is to be treated as one not becoming final and binding and the dispute shall be finally settled by the Arbitration in accordance with the Arbitration and Conciliation Act, 1996. From the terms of the contract, there is no doubt that the Arbitrators are not bound to affix the rubber stamp approving the findings of the DRB, though the value of the dispute is below Rs. 1/- (one) crores, when the dispute is referred to the Arbitrators due to failure of the compliance of the recommendations by one party to the contract.

12. Here in this case, the first respondent was also the contractor under the ECPP/C4 contract for construction of break waters. For want of space, to stockpile the rock transported from the quarry, additional stockpile was created within the port. The Arbitrators found that a part of the additional stockpile, i.e., 9000 sq.mts was utilised by the C-4 contractor and therefore, while calculating the cost for creating additional stockpile, they excluded the cost for 9000 sq.mts. Thus, they reduced the claim of the first respondent from Rs. 51.91 lakhs to Rs. 41.07 lakhs. The decision of the Arbitrators is purely in terms of the contract between the parties, on the basis of the available materials placed before them.

13. As far as interest is concerned, sub-clause 60.8 recites as follows :

"In the event of the failure of the Employer to make or notify payment within the times stated, the Employer shall pay to the Contractor interest compounded monthly at the rate(s) stated in the Appendix to Bid upon all sums unpaid or not notified from the date upon which the same should have been paid or notified, in

the currencies in which the payments are due."

In the Appendix, rate of interest under the head fixed is given as 15%. Though DRB recommended for 18% interest, the Arbitral Tribunal awarded 14.5%/15% interest, as per the Contract. Therefore, the Award passed by the Arbitrator with respect to Dispute No.8 as well as 9 is in conformity with the terms of contract between the parties.

14. It is well settled that the Court can interfere with the Award passed by the Arbitral Tribunal, only on the grounds under Section 34(2) and (3) of the Arbitration and Conciliation Act, 1996.

15. The only ground urged on the side of the respondent is that the arbitrators exceeded their jurisdiction in contravention to the terms of the contract.

16. The Hon'ble Supreme Court held as to the limitations of the Court to interfere with the Arbitral award under Section 34 in Associate Builders v. DDA, reported in (2015) 3 SCC 49, wherein it been held as follows :

"13. Inasmuch as serious objections have been taken to the Division Bench judgment (DDA v. Associate Builders, 2012 SCC Online Del 769) on the ground that it ignored the parameters laid down in a series of judgments by this Court as to the limitations which a Judge hearing objections to an arbitral award under Section 34 is subject to, we deem it necessary to state the law on the subject.

14. Section 34 of the Arbitration and Conciliation Act 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 submit to arbitration can be separated from those not so submit, only that part of the arbitral award which contains

decisions on matters not submit 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), 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 under Section 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 subsection (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."

15. This section in conjunction with Section 5 makes it clear that an arbitration award that is governed by Part I of the Arbitration and Conciliation Act, 1996 can be set aside only on grounds mentioned under Sections 34(2) and (3), and not otherwise. Section 5 reads as follows:

"5. Extent of judicial intervention.- Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

16. It is important to note that the 1996 Act was enacted to replace the 1940 Arbitration Act in order to provide for an arbitral procedure which is fair, efficient and capable of meeting the needs of arbitration; also to provide that the tribunal gives reasons for an arbitral award; to ensure that the tribunal remains within the limits of its jurisdiction; and to minimise the supervisory roles of courts in the

arbitral process.

17. It will be seen that none of the grounds contained in sub-section (2)(a) of Section 34 deal with the merits of the decision rendered by an arbitral award. It is only when we come to the award being in conflict with the public policy of India that the merits of an arbitral award are to be looked into under certain specified circumstances."

17. In the instant case, the argument of the learned counsel appearing for the first respondent that the Award is in contravention with the terms of the Contract, falls under Section 34(2)(iv) of the Arbitration and Conciliation Act, 1996. As already discussed, this Court is of the considered view that the Award passed by the Arbitrators is well within parameters of the terms of the contract between the parties and the Arbitrators not exceeded their jurisdiction in deciding the dispute referred to them due to failure of compliance of the recommendations of DRB by one party.

18. As pointed out earlier, the Arbitrators reduced the interest from 18% to 14.5%/15% in terms of the Contract. The contention of the appellant that the rate of interest is to be further reduced as per the current rate of interest prevailing during the relevant period is not sustainable.

19. The order of the learned single Judge is not correct in setting aside the Award with respect to the claim and interest of the first respondent in Dispute Nos.8 & 9. Plea in another appeal of the appellant to reduce the rate of interest according to the current rate of interest prevailing at the time is to be negated as the award of the Arbitrators been upheld in these appeals.

20. In fine, O.S.A.No.155 of 2008 is allowed by setting aside the order, dated 13.11.2006 of the learned single Judge made in O.P.No.202 of 2004 and accordingly, the Award of the Arbitrators, dated 24.07.2002 with respect to Dispute Nos.8 and 9 is confirmed. In view of the order passed in O.S.A.No.155 of 2008, O.S.A.No.79 of 2010 is dismissed. No costs. Consequently, connected miscellaneous petition is closed.