

(2007) 03 MAD CK 0330
In the Madras High Court
Case No : O.P. No. 531 of 2005

Prime Technologies Division of Hindustan Ferro and Industries Ltd. APPELLANT

Vs

Mr. N. Vasudevan, I.A.S., Chairman Industry Facilitation Council and Hamsa Watch Glass Pvt. Ltd. RESPONDENT

Date of Decision : 05-03-2007

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 13(5), 16, 16(2), 16(3), 16(6)
Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 — Section 6(2)

Citation : (2007) 03 MAD CK 0330

Hon'ble Judges : S. Rajeswaran, J

Bench : Single Bench

Advocate : A. Narayanan, for the Appellant; P. Subba Reddi, for R2, for the Respondent

Final Decision : Allowed

Judgement

S. Rajeswaran, J.—This Original petition has been filed u/s 34 of the Arbitration and Conciliation Act, 1996, hereinafter called "the Act", to set aside the impugned arbitral award dated 8.2.2005 passed by the 1st respondent in O.P. No. IFC/CR/04/2004 on the file of the 1st respondent/Learned Arbitrator.

2. The brief facts leading to the above petition are as follows:

3. The petitioner is a division of the company called Hindustan Ferro and Industries Ltd. This Division was doing wrist watch cases manufacturing business. The 2nd respondent is a manufacturer of watch glass which is an accessory for the writ-watch cases manufactured by the petitioner.

4. In a dispute arose between the petitioner and the 2nd respondent, 2nd respondent appointed the 1st respondent as arbitrator and after receiving the notice dated 9.8.2004 sent by the 1st respondent, the petitioner appeared before the 1st respondent on 23.10.2004. Even before that, the petitioner filed an

application u/s 16(2) of the Act raising preliminary objection as to the jurisdiction of the 1st respondent to try the dispute. Even before orders could be passed on the application questioning the jurisdiction of the 1st respondent, an award has been passed on 8.2.2005 and aggrieved by the same, the above O.P., has been filed u/s 34 of the Act, 1996.

5. The 2nd respondent appeared through their counsel and filed a counter statement supporting the award dated 8.2.2005.

6. Heard the learned Counsel for the petitioner and the learned Counsel for the 2nd respondent. I have also perused the documents filed and the judgments referred to by them in support of their submissions.

7. The 2nd respondent is a small scale industry and they made a reference to the Regional Industry Facilitation Council, Guindy, Chennai-32 by raising a dispute that the petitioner failed to pay a sum of Rs. 15,48,875/- towards the supply of watch glasses. This reference was made u/s 6(2) of the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 (Act 32/1993). After receiving the notice, the petitioner submitted an application questioning the jurisdiction of the Arbitral Tribunal itself. This application questioning the jurisdiction was also sent to the 2nd respondent by the Council and the matter was adjourned to 8.2.2005. On 4.2.2005, the petitioner sent a letter to 1st respondent requesting him to allow the application filed by them u/s 16(2) of the Act, 1996 as no reply was filed by 2nd respondent. But on 8.2.2005, final award itself was passed by the arbitrator in favour of 2nd respondent.

8. In view of the above facts, I am of the considered view that the 1st respondent/arbitrator has failed to follow the provisions of the Act, 1996 and also the basic principles of natural justice. The petitioner was not at all afforded an opportunity to contest the matter on merits and therefore the award dated 8.2.2005 is to be set aside u/s 34 of the Act, 1996.

9. It is not in dispute that the petitioner raised a preliminary objection as to the jurisdiction of the arbitral tribunal to try the dispute. Therefore an objection was raised by the petitioner u/s 16 of the Act, 1996. The following paras in the objection petition are relevant for deciding the issue involved in this matter:

2. Without prejudice to the rights and contentions of the respondent/applicant insofar as the merits of the case is concerned, the respondent/applicant most respectfully submit that the instant proceeding by itself is not maintainable before this learned tribunal. The respondent/applicant submits that under the said Act of 1993 the instant Arbitral Tribunal does not have the jurisdiction to hear, try, adjudicate and determine the contentious issues as alleged to have been raised by the petitioner/opposite party in the instant case.

4. It is imperative that before the main petition, being O.P. No. IFC/CR/04/2004 (Hamsa Watch Glass Pvt. Ltd. v. Prime Technologies), is taken up for hearing the instant application be heard and decided first, inasmuch as by doing so the

parties may not have to contest such litigation in extenso, before such adjudicatory body, which does not have the jurisdiction to hear and determine the contentious issues.

8. The applicant/respondent submits that in the event a reference is made to the Arbitrator under Arbitration and Conciliation Act 1996, a mandatory provision has to be complied with and/or to be decided by the Arbitrator as preliminary issue before proceeding further with the adjudication of disputes on merits, as to whether there exist an "Arbitration agreement" in writing or not? It is a well-settled law that in absence of an agreement, reference made to the Learned Arbitrator is bad in law.

13. Nevertheless the respondent/applicant reserves its right under the law to place and/or contend its defence insofar as the merits of the case is concerned. The respondent/applicant contend that the alleged claim of the petitioner/opposite party is baseless, false concocted and fabricate and those points may be urged before the appropriate court having jurisdiction to hear the contentious issues but not this Tribunal. The applicant/respondent further reserve its right to file appropriate pleadings to have the correct and facts and circumstances of the case.

10. From the above averments, it is very clear that the petitioner wanted to decide the preliminary objection as to the jurisdiction of the arbitral tribunal first before deciding the matter on merits as provided u/s 16 of the Act, 1996. The petitioner has also reserved their right to place their defence insofar as the merits of the case are concerned and in such circumstances, a duty is cast upon the 1st respondent to decide the question of preliminary objection as to the jurisdiction of the tribunal first and if the objections are overruled an opportunity should be extended to contest the matter on merits. This is the procedure contemplated u/s 16 of the Act, 1996 which is extracted below for better appreciation:

16. Competence of arbitral tribunal to rule on its jurisdiction:-(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objection with respect to the existence or validity of the arbitration agreement, and for that purpose-

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall

be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in Sub-section (2) or Sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in Sub-section (2) or Sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34.

11. The provisions of Section 16 of the Act, 1996 are not at all followed by the 1st respondent in this case, even after the petitioner reminded 1st respondent by letter dated 4.2.2005 to consider their preliminary objections.

12. In fact, in the award dated 8.2.2005, 1st respondent took pains to decide the preliminary issue of jurisdiction by referring to the relevant provisions in Act 32/1993 and Act 26 of 1996. 1st respondent has also referred to a supreme court judgment and rightly came to the conclusion that he has got jurisdiction to try the dispute. Instead of stopping with that decision as to the jurisdiction and further proceeding with the matter on merits after affording an opportunity to the petitioner, 1st respondent has hastily passed final award itself on 8.2.2005. In fact the award was running to 3 pages and only in the last two paras, the final verdict was given by 1st respondent on merits and the entire previous paras are dealing with the preliminary objections of jurisdiction only. For better appreciation, the last two paras are extracted below:

The council after hearing both sides noted that there is no inclination on the part of the respondent to settle the dues to the petitioner company even after lapse of 9 years. Hence the following orders are passed.

The respondent company will pay the petitioner company a sum of Rs. 5,79,177.19 along with the interest at 1.5 times the prime lending rate of State Bank of India from the appointed day (i.e., the day following immediately after the expiry of 30 days from the date of acceptance of the goods) or deemed acceptance of goods till the date of payment within 30 days from the date of receipt of this order.

13. There is absolutely no evidence to come to the above conclusion and in fact, it is more or less like an award without containing any reasons. Therefore the award is vitiated for not following Section 16, for not giving an opportunity to the petitioner to contest the matter on merits, thereby the petitioner was certainly prevented from establishing their case and the award is also not a reasoned one.

14. In Naginder Singh Vs. Commander 44 Border Road Task Force and Another, , a Division Bench of the Gauhati High Court held that the arbitrator is ordinarily free from fetters of adjective law, but that does not make him free from the

fundamental principles of justice. It is further observed that though the arbitrator may not be strictly bound by the rules and procedures observed in court, it does not mean that his procedure should be opposed to natural justice.

15. In 2003 2 CTC 282 (ONGC Ltd. v. SAW Pipes Ltd.), the Hon''ble Supreme Court held as follows:

A.(1) The Court can set aside the arbitral award u/s 34(2) of the Act if 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;

(2) The court may set aside the award:

(i)(a) if the composition of the arbitral tribunal was not in accordance with the agreement of the parties;

(b) failing such agreement, the composition of the arbitral tribunal was not in accordance with Part-I of the Act.

(ii) if the arbitral procedure was not in accordance with:

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with part-I of the Act.

However, exception for setting aside the award on the ground of composition of arbitral tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of part-I of the Act from which parties cannot derogate.

(c) If the award passed by the arbitral tribunal is in contravention of provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:

(a) fundamental policy of Indian law:

(b) the interest of India; or

(c) justice or morality, or

(d) if it is patently illegal.

(4) It could be challenged:

(a) as provided u/s 13(5);

and

(b) Section 16(6) of the Act.

16. In the above decision, the supreme Court held that if the party making the application furnishes proof that it was under some incapacity, it was otherwise unable to present the case and the arbitral tribunal procedure was not in accordance with Part I of the act, the court can set aside the arbitral award u/s 34(2) of the Act, 1996.

17. In the present case, it was established that the petitioner was not at all given an opportunity to contest the matter on merits and the objection petition filed by them was not dealt with as per Section 16 of the Act, 1996 and therefore the award is liable to be set aside.

18. Learned Counsel for the 2nd respondent relied on the following decisions to contend that no ground was made out to interfere with the award:

19. In : AIR2004SC1766 (Secur Industries v. Godrej & Boyce Mfg. Co. Ltd.), the Hon"ble Supreme court held that under the 1996 Act, the arbitral, tribunal has been given a very wide and deep area of operation and it is the court's powers which have been statutorily curtailed. The arbitral tribunal's authority u/s 16 of the 1996 Act is not confined to the width of its jurisdiction but goes to the very root of the jurisdiction. Having regard to the scope of the authority of the arbitral tribunal u/s 16, jurisdiction is not a matter which the court can adjudicate upon.

20. In the above decision, the Supreme Court dealt with the powers of the tribunal to decide its own jurisdiction and this decision, rather than supporting the case of 2nd respondent, is in fact support the case of the petitioner.

21. In The State of Kerala Vs. Arya Refrigeration and A/C Co. etc. etc., , the Hon"ble Supreme court held as follows:

8. It has to be noticed that the arbitrator has given a very well-reasoned and detailed award. It could not be shown as to in what way the fundamental terms of the contract were disregarded. The arbitrator has referred to various clauses of the contract and the effect thereof. The findings are in no way perverse or unreasonable. We do not find substance in the plea of learned Counsel for the claimant that the award suffered from any infirmity. So far as applicability of the Interest on Delayed Payments Act is concerned, it appears that before the arbitrator no claim in that regard was made. In order to attract the provisions of

the said Act, the factual aspects like the prevailing bank rate of interest were to be brought on record. This has not been done. So the plea in that regard is also without any substance. We, however, find substance in the plea relating to computation of the amounts receivable by the claimant. As rightly submitted, there was nothing on record to show that the claimant had withdrawn the amount which was deposited with the Subordinate Court, Trivandrum. Similarly, a sum of Rs. 47,000 has been adjusted more than once. Necessary adjustment in this regard has to be made. So far as the plea relating to 15% rate of interest is concerned, it has to be noted that this Court directed that in case appeal is allowed, the State would be entitled to interest @ 15%. That situation has not come. It would, therefore, be proper to apply 9% rate of interest on the sum of Rs. 5,75,000.

22. In the above decision the arbitrator has given a very well reasoned and detailed award. In the present case, 1st respondent has passed a cryptic award and it cannot be said that it is a reasoned award. The facts in the above Supreme court decision and the facts in the case on hand are different and easily distinguishable.

23. In the result, the award dated 8.2.2005 passed by the 1st respondent is set aside and O.P. No. 531/2005 is allowed. No costs.