
(2015) 08 RAJ CK 0074

In the Rajasthan High Court

Case No : Civil Misc. Appeal No. 1625 of 2015

Rajasthan State Mines and Minerals Ltd.

APPELLANT

Vs

Chetak Travel Agency

RESPONDENT

Date of Decision : 24-08-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 10, 11, 33, 34, 37
Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, 11
Constitution of India, 1950 — Article 226, 32

Citation : (2015) 08 RAJ CK 0074

Hon'ble Judges : Vineet Kothari, J

Bench : Single Bench

Advocate : Tribhuvan Gupta, for the Appellant; Varun Gupta, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Dr. Vineet Kothari, J—The present Misc. Appeal has been filed by the appellant under Section 37 of the Arbitration and Conciliation Act, 1996 ("for short the Act of 1996") against the order dated 26.03.2015 passed by the Additional District Judge No. 3, Udaipur in Civil Misc. Case No. 16/2012 (CM) (RSMML Vs. M/s. Chetak Travel Agency) by which order, the learned Additional District Judge has rejected the application of the appellant-RSMML filed under Section 34 of the Act of 1996 seeking the setting aside of the Arbitral Award dated 31.12.2009 passed by Hon'ble Mis. Justice Kanta Bhatnagar (former Chief Justice of the Hon'ble Madras High Court and former Judge of this Court).

2. The Rajasthan State Mines & Minerals Limited (for short "RSMML"), a Government of Rajasthan enterprises, has filed the present Misc. Appeal under Section 37 of the Act of 1996 aggrieved by the order dated 26.03.2015 whereby, their application under Section 34 of the Act of 1996 was rejected by the learned Additional District Judge No. 3, Udaipur with the following observations:-

3. The Award in question was passed by the Hon'ble Justice Miss Kanta

Bhatnagar, J. (as Her Lordships then was having adorned the office of the Chief Justice of Hon''ble Madras High and a former Judge of this Court) on 31st December, 2009, while deciding the claim on merits about the claim of amount of the claimant M/s. Chetak Travel Agency for the transport services already provided by it to the appellant - RSMML on account of dispute between the parties against premature termination of contract of travel agency. The learned Arbitrator observing the following findings about the issue No. 5 raised before her by the appellant RSMML in the following manner:-

"Issue No. 5 being a legal issue, relating to the principle of Res Judicata, was taken as a preliminary issue. Arguments on that issue were heard and vide order dated 18/7/2009 that issue was decided in favour of the respondents and against the claimants.

Before dealing with the rival contentions of the learned counsel for the parties, a point raised by Shri Bhandari at the commencement of his reply to the arguments advanced by Shri Gupta requires discussion. Shri Bhandari contended that the principle of Res Judicata is attracted in the matter and the claimant having not raised the question of various claims in the Civil Court is now barred by virtue of Order 2, Rule 2 of the Civil Procedure Code. To substantiate his contention, Shri Bhandari placed reliance on the principle enunciated in the case of K.V. George - Appellant Vs. Secretary to the Government, Water & Power Department, Trivendrum and another - Respondents, (Reported in K.V. George Vs. Secretary to Government, Water and Power Department, Trivandrum and Another, AIR 1990 SC 53 : (1990) 1 ARBLR 55 : (1989) 4 JT 166 : (1989) 2 SCALE 822 : (1989) 4 SCC 595 : (1989) 1 SCR 398 Supp). In that decision, in view of the facts and circumstances of the case, their Lordships were pleased to hold that all the issues out of the termination of contract could have been raised in the first claim petition before the Arbitrator by the appellant and this having not been done, the second claim petition before the Arbitrator for remaining dispute was clearly barred under Order 2 Rule 2 of the Civil Procedure Code. It was also held that the principle of Res Judicata and constructive Res Judicata is applicable in Arbitration proceedings.

There is no dispute on the point about the applicability of the principle of Res Judicata and constructive Res Judicata being applicable in Arbitration proceedings. However, what requires consideration is whether in the facts and circumstances of the case in hand, this provision of law is applicable or not. The suit before the Civil Court was for injunction and redressal of other grievances could not have been prayed therein.

In view of the order passed by the Hon''ble High Court much discussion is not required on the points. His Lordship has observed that the applicant is entitled to certain amounts which include the amount of Security Deposit and amount of extra work done by it and amount of extra work done by it and illegal deduction of the bills and loss of business are the issues which can well be determined by the arbitrator after taking into consideration that, the issue which has been

decided by the trial court in the suit filed by the applicant is binding and is Res Judicata on the question of termination of the contract. It is the order of reference which gives jurisdiction to the Arbitral Tribunal. The Arbitral Tribunal can not go contrary to or beyond what has been directed in the order of reference.

Shri Bhandari submitted that the order passed by the Hon'ble High Court is an administrative order and Arbitral Tribunal is not bound by that administrative order. The argument is not at all palatable. The order of reference cannot be taken to be administrative order because it was passed under Section 10 & 11 of the Act. As such, the principle of Res Judicata or constructive Res Judicata is not attracted for certain relief claimed by the claimants as mentioned in the order of reference."

4. The earlier suit was filed for injunction only by the claimant - M/s. Chetak Travel Agency, who sought the relief against the premature termination of the Transport Agreement which suit was dismissed by the learned Trial Court on 05.02.2007 and thereafter, the dispute about certain claims were sought to be taken for arbitration and while deciding the application filed by the claimant-M/s. Chetak Travelling Agency under Section 10 & 11 of the Act of 1996 for appointment of Arbitrator [S.B. Civil Misc. (Arbitration) Application No. 70/2007], a coordinate Bench of this Court has dealt with precisely this contention raised by the appellant-RSMML in the following manner:-

"The learned counsel for the respondents vehemently submitted that when the issue has been decided once for all finally by the civil court, after the full trial of the suit and it has been held that the contract in question has not been terminated illegally by the respondents, then the applicant's prayer for adjudication of dispute by the arbitrator cannot be granted because of the reason that the finding given by the civil court between the parties is res judicata for all purposes and even the arbitrator cannot re-try the issue already decided. It is submitted that if the termination of the contract was lawful then there cannot arise any question of loss to the applicant-firm nor it can be argued that because of termination of contract, the applicant suffered loss and is entitled to recover the losses from the respondents.

I considered the submissions of the learned counsel for the parties and perused the facts of the case. So far as the contract in question is concerned, there is no dispute. Its termination before the period is also not in dispute. The civil court has dismissed the suit for injunction of the applicant wherein above referred issues were there but so far as claim of the applicant that yet the applicant is entitled to certain amounts which include the amount of security deposit and amount of extra work done by it and illegal deduction of the bills and loss of business are the issues which can well be determined by the arbitrator after taking into consideration that the issue which has been decided by the trial court in the suit filed by the applicant is binding and is res judicate on the question of termination of the contract. Even if the contract is terminated lawfully or the

work comes to an end then also if any claim of the party to the contract remains due in other, he can certainly seek adjudication for that claim. The question whether in the facts and circumstances and in view of the decision given by the civil court, the security amount could have been forfeited and the applicant could have been denied the amounts claimed on various accounts referred above, alone can be decided by the arbitrator.

Since there is arbitration agreement and dispute has been raised and the arbitrator has not been appointed by the respondents inspite of the notice by the applicant, therefore, the dispute is referred to the arbitrator. Hon"ble Miss Justice Kanta Bhatnagar is appointed arbitrator to adjudicate the dispute. Looking to the fact that the applicant has already filed the suit and his suit has been dismissed by the trial court, therefore, it will be appropriate to direct the applicant to initially pay the fees of the arbitrator which is fixed Rs. 50,000/- tentatively and the final fees may be determined by the arbitrator herself while deciding the arbitral proceedings and the arbitrator may also pass the order for sharing of the fees by the respondents if needed. The office expenses of Rs. 15,000/- shall also be paid by the applicant.

The application is allowed accordingly.

A copy of this order be sent forthwith to the learned arbitrator.

Sd/- (PRAKASH TATIA), J."

5. By the order dated 19th December, 2008, the learned Single Judge appointed Hon"ble Justice Miss Kanta Bhatnagar as the Arbitrator in the matter. The arbitration proceedings were concluded and the Arbitral Award was passed by the learned Arbitrator on 31st December, 2009 which was sought to be assailed and set aside by the appellant-RSMML under Section 34 of the Act of 1996 by moving the Court of learned Additional District Judge No. 3, Udaipur, who dismissed the said application by the impugned order dated 26.03.2015 and against which, the present Misc. Appeal has been filed by the appellant-RSMML.

6. The learned counsel Mr. Tribhuvan Gupta appearing for the appellant-RSMML only pressed one point namely, that the issue No. 5 about res judicata arising on account of filing of earlier suit by the claimant-M/s. Chetak Travel Agency seeking injunction against the respondents having been decided in favour of the appellant-RSMML by the learned Arbitrator on 18.07.2009, the learned Arbitrator could not have undertaken the proceedings for decision of the claim on merits and could not have passed the Award dated 31st December, 2009 and, therefore, the application under Section 34 of the Act of 1996 was filed by the appellant-RSMML justifiably and the same has wrongly been rejected by the learned Additional District Judge No. 3, Udaipur by the impugned order dated 26.03.2015.

7. These submissions of the learned counsel Mr. Tribhuvan Gupta appearing for the appellant-RSMML have been vehemently opposed by the learned counsel Mr. Varun Gupta appearing for the respondent-claimant-M/s. Chetak Travel Agency,

who submitted that the issue No. 5 relating to application of the principles of res judicata has not only been dealt with the learned Arbitrator, as quoted above, but by the coordinate Bench of this Court, while deciding the application of the claimant filed under Section 10 & 11 of the Act of 1996 in the order dated 19th December, 2008, while appointing the Arbitrator. The learned counsel Mr. Varun Gupta submitted that the present claim was filed by the respondent/claimant-M/s. Chetak Travel Agency for the money dues on account of transport services already provided by it to the appellant-RSMML and certain illegal deductions made by the appellant-RSMML, whereas the earlier suit was filed by the respondent/claimant seeking the relief of injunction only against the premature termination of its transport agreement and the dismissal of the suit could not operate as res judicata in the present arbitration claim proceedings in any manner. The learned counsel also submitted that the scope of Section 34 of the Act of 1996 is very limited and under the narrow para meters thereof, a valid and perfect arbitral Award cannot be set aside by the Court below for the aforesaid reason. The learned counsel Mr. Varun Gupta further submitted that filing of the present Misc. Appeal on behalf of the appellant - RSMML is misuse of the process of law and, therefore, the same deserves to be dismissed with costs.

8. The provisions of Section 34 of the Act of 1996 are quoted herein below for ready reference:-

"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 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) 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 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."

9. A bare perusal of the aforesaid Section 34 of the Act of 1996 makes it clear that the appellant-RSMML has to satisfy the Court for the aforesaid conditions for setting aside the Award but in the present case, it is noticed that the appellant-RSML has utterly failed to establish any of the conditions mentioned herein above but only a vague question of res judicata which already stood decided by this Court in the order dated 19th December, 2008 and, therefore, this Court is of the opinion that the learned Additional District Judge No. 3, Udaipur has very rightly dismissed the application filed by the appellant-RSMML under Section 34 of the Act of 1996 and the same does not require any interference by this Court.

10. Upon the perusal of the material available on record, including the reasons given by the learned Additional District Judge No. 3, Udaipur for dismissing the application of the appellant-RSMML filed under Section 34 of the Act of 1996, this Court is of the considered opinion and has to take rather strict but painful view against the appellant-RSMML. The appellant - RSMML, is a Government of Rajasthan Enterprise and it cannot be expected to act in an irresponsible and nonchalant manner like a rustic layman for invoking the appellate jurisdiction of

High Court, that too, under Section 34 of the Act of 1996 for setting aside of the Arbitral Award which, as per settled position, has a very narrow compass and providing very limited grounds for setting aside of the Arbitration Award. The Award was passed by a considered, detailed and reasoned order by a person none else than a former Chief Justice of Hon"ble Madras High Court and a Judge of this Court. The officials of the appellant-RSMML ought to have appreciated and understood fully well that the principles of res judicata and its applicability could very well be appreciated and distinguished by a learned Arbitrator of that level. Raising the plea of res judicata before the learned Single Judge of this Court in an application filed by the claimant/respondent under Section 10 & 11 of the Act of 1996, the appellant-RSMML failed to take any note of the observations, quoted herein above, as observed by the coordinate Bench of this Court. The Award was passed by the learned Arbitrator appointed by this Court but the appellant-RSMML still did not relent and filed the application under Section 34 of the Act of 1996 before the learned Additional District Judge No. 3, Udaipur seeking the setting aside of the Arbitral Award on a ground not envisaged by Section 34 of the Act of 1996 in an absolutely mechanical manner, that too, having been dismissed by the learned Court below but still, the appellant-RSMML did not desist and filed the present Misc. Appeal. As observed above, the principles of res judicata could not come in the way of the arbitration proceedings decided on merits about the claim of the respondent/claimant-M/s. Chetak Travel Agency once it was concluded that the suit filed by the respondent/claimant was only for the purpose of injunction against the premature termination of the Transport Agreement. The claim before the learned Arbitrator was about the money due from the appellant - RSMML for the services already provided to it by the respondent/claimant and certain illegal deductions made from the bills.

11. The learned counsel Mr. Tribhuvan Gupta appearing for the appellant-RSMML also admitted that the dues of the claimant M/s. Chetak Travel Agency represented the amount for the transport services already provided by it to the appellant-RSMML. Still, raising the plea on issue No. 5 about principles of res judicata having been decided earlier in favour of the appellant and one stage after another and moving the Court of learned Additional District Judge No. 3, Udaipur by filing the application under Section 34 of the Act of 1996 reflects poorly on the legal brains and advice available to the appellant-RSMML.

12. The judgment in the case of K.V. George Vs. Secretary to Government, Water and Power Department, Trivandrum and Another, AIR 1990 SC 53 : (1990) 1 ARBLR 55 : (1989) 4 JT 166 : (1989) 2 SCALE 822 : (1989) 4 SCC 595 : (1989) 1 SCR 398 Supp relied upon by the learned counsel Mr. Tribhuvan Gupta was rendered under old Arbitration Act, 1940, which contained specific provisions. Section 41 applying CPC to that Act whereas new Arbitration Act, 1996 does not contain any such provision. Para 17 of that judgment itself would make it clear:-

"17. With regard to the submission as to the applicability of the principles of res judicata as provided in Section 11 of the Code of Civil Procedure to arbitration

case, it is to be noted that Section 41 of the Arbitration case provides that the provisions of the Code of Civil Procedure will apply to the Arbitration proceedings. The provisions of res judicata are based on the principles that there shall be no multiplicity of proceedings and there shall be finality of proceedings. This is applicable to the arbitration proceedings as well. It is convenient to refer the decision in Daryao and Others Vs. The State of U.P. and Others, AIR 1961 SC 1457 : (1962) 1 SCR 574 , wherein it has been held that the principles of res judicata will apply even to proceedings under Articles 32 and 226 of the Constitution of India. It has been observed that:-

"Now, the rule of res judicata as indicated in S. 11 of the Code of Civil Procedure has no doubt some technical aspects, for instance the rule of constructive res judicata may be said to be technical; but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of res judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Art. 32."

13. In the case of State of Rajasthan and Another Vs. Nav Bharat Construction Co., AIR 2002 SC 258 : (2001) 3 ARBLR 561 : (2001) 10 JT 115 : (2001) 8 SCALE 292 : (2002) 1 SCC 659 : (2001) AIRSCW 4936 : (2001) 8 Supreme 481 , the Hon"ble Supreme court held as under:--

".....It is settled law that scope for setting aside the award is limited to the grounds available under the Arbitration Act which have been well defined by long line of decided cases. In this view of the matter, it is not necessary for us to consider the contention of the contractor that similar clause is interpreted by this Court in State of U.P. Vs. Harish Chandra and Others, (1998) 2 ARBLR 716 : (1998) 8 JT 74 : (1999) 122 PLR 174 : (1998) 6 SCALE 173 : (1999) 1 SCC 63 : (1998) 2 SCR 660 Supp : (1999) 1 UJ 241 and it is held that there is no bar on granting interest....."

14. The Hon"ble Supreme Court in the case of Snehadeep Structures Private Limited Vs. Maharashtra Small Scale Industries Development Corporation Limited, AIR 2010 SC 1497 : (2010) 1 JT 70 : (2010) 1 SCALE 108 : (2010) 3 SCC 34 : (2010) 2 SCR 76 : (2010) 2 UJ 688 , while dealing with the scope of Section 34 of the Act of 1996, has held as under:-

"Given the weight of authorities in favour of giving such a wide meaning to the term "appeal", we are constrained to disagree with the contention of the learned counsel for the respondent Corporation that appeal shall mean only a challenge to a decree or order where the entire matrix of law and fact can be re-agitated with respect to the impugned order/decreed. There is no quarrel that Section 34 envisages only limited grounds of challenge to an award; however, we see no

reason why that alone should take out an application under Section 34 outside the ambit of an appeal especially when even a power of revision is treated as an exercise of appellate jurisdiction by this Court and the Privy Council."

15. This Court views this type of casual and mechanical attempt on the part of the Government Enterprise very seriously and such a casual and nonchalant wastage of public time and money by the authorities of the appellant-RSMML and legal process of this Court, cannot be countenanced but rather on the other hand that deserves to be put down with the iron hand of justice. The State and the State instrumentalities are the biggest litigants in Courts of law at all levels in our system and this Court cannot encourage the institution of litigation by them, without application of mind, contrary to the National Litigation Policy. Therefore, this frivolous Misc. Appeal filed by the appellant-RSMML deserves to be dismissed with costs.

16. Accordingly and in view of the above, the present Misc. Appeal filed on behalf of the appellant-Rajasthan State Mines and Minerals Limited stands dismissed with costs of Rs. 1,00,000/- (Rupees One Lac only) to be deposited by the appellant-RSMML with the Deputy Registrar (Judicial) of this Court within three months from today. Half of the said costs shall be deposited with the Legal Services Authority, Jodhpur and remaining 50% of the amount of the costs shall be paid to the respondent/claimant-M/s. Chetak Travel Agency. However, it is made clear that the appellant-RSMML is free to recover the cost of Rs. 1,00,000/- from the persons concerned, who have advised and sanctioned the filing of the present Misc. Appeal before this Court. A copy of this order be sent to the learned Additional District Judge No. 3, Udaipur and to the parties concerned forthwith.