

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 29-11-2007

CORAM:

THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN
AND
THE HONOURABLE MRS.JUSTICE CHITRA VENKATARAMAN

O.S.A.NO.257 OF 2004

1. The Chairman and Managing Director
Tamil Nadu Civil Supplies Corporation
Limited, 42, Thambusamy Road
Kilpauk, Chennai - 600 010.
2. The Senior Regional Manager
Tamil Nadu Civil Supplies Corporation
Limited, Thirunelveli. ... Appellants

Versus

1. L.Helen
M/s.T.T.N. & Sons
Main Road
Valliyoor
Thirunelveli District - 627 117
2. K.Kannayiram
Arbitrator
C/o.Tamil Nadu Civil Supplies Corporation
Limited, Flat No.10 'A' Block
Sarojini Apartment
No.140, Sarojini Street
T.Nagar, Chennai - 600 017 ... Respondents

(2nd Respondent given up)

For Appellant :: Mr.N.Kannadasan
Addl.Advocate General
for M/s.V.Selvanayagam
For Respondents :: Mr.R.Gandhi, Senior Counsel
for M/s.A.R.Nixon for R1

Prayer: Original Side Appeal No.257 of 2004 preferred against the judgment and decree made in O.P.No.188 of 2002 dated 26.9.2003 passed by the single Judge.

JUDGMENT

K.RAVIRAJA PANDIAN, J.

This appeal is filed against the order dated 26.9.2003 passed by the learned Single Judge in O.P.No.188 of 2002 setting aside the award passed by the Arbitrator dated 21.9.2001 non-suiting the first respondent for the claim made before him in the arbitration proceedings and granted a sum of Rs.25,87,500/- in respect of the first contract and Rs.27,46,990/- in respect of the second contract without interest.

2. The learned Additional Advocate General appearing for the appellants contended that the learned Single Judge has miserably erred in granting the relief as claimed by the first respondent while setting aside the award, which is beyond the scope of Section 34 of the Arbitration and Conciliation Act, 1996. Section 34 empowers the Court only to set aside the award on the stated contingencies. It never granted any power to the Court to pass an award treating the Court as an arbitrator.

3. However, Mr.Gandhi, learned Senior Counsel appearing for the first respondent submitted that the order of the learned single Judge is perfectly correct and it is based on the interpretation of clause 43 of the agreement entered into by the parties.

4. The material facts relevant for disposal of the appeal are as follows:

The first respondent was appointed as a transport contractor by the appellant and to that effect agreements were entered into between the appellant and the first respondent on 17.7.1996 for the year 1996-97 and on 9.12.1997 for the year 1997-98. Clause 43 of the agreement provided that the rate offered by the successful tenderer and approved by the Tamil Nadu Civil Supplies Corporation would be final and would be in force till the contract period in question and it further provided that the rates approved by the Tamil Nadu Civil Supplies Corporation shall be revised in the case of upward/downward revision of diesel price by Government during the currency of the period of the contract to the extent necessary as might be approved by the Tamil Nadu Civil Supplies Corporation.

5. It is the further case of the appellants that the first respondent claimed hike in the agreed charge of transportation due to the increase in the diesel price. Thus, a dispute arose and the same was referred to the arbitrator - the second respondent herein and taken up as Arbitration Case No.4 of 2001.

6. The first respondent made a claim of Rs.44,50,500/- for the year 1996-97 and Rs.40,65,540/- for the year 1997-98 on the ground of increase in the diesel price.

7. The arbitrator by his award dated 21.9.2001 disallowed the claim of the first respondent on the ground that the first respondent has not paid any increased charges to the lorry owners whose lorries were operated by the first respondent for the purpose of the appellant

Corporation and has not passed on the burden of increase in the diesel prices to the vehicle owner but only paid the contracted price. As such in spite of the availability of the provision for increase of rates due to the escalation of diesel prices, non-suited the first respondent for the claim.

8. Aggrieved by the said award, the first respondent filed O.P.No.188 of 2002 under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the award passed in Arbitration Case No.4 of 2000 dated 21.9.2001.

9. The learned Single Judge upon hearing the parties has set aside the award passed by the arbitrator on the interpretation of clause 43 of the agreement to the effect that it is established that as diesel price has been increased during the relevant period, the first respondent is entitled to escalation notwithstanding the fact that the escalated diesel cost has not been paid to the lorry owner, and passed an award in favour of the first respondent as aforesaid. The correctness of the said order is canvassed before this Court.

10. We heard the argument of the learned counsel on either side and perused the materials on record.

11. The relevant clauses of 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 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) of clause (b), 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)

(4)"

12. Thus, it could be seen that an application under Section 34 of the Arbitration and Conciliation Act, 1996 can be filed only for setting aside the arbitral award.

13. The Apex Court in the case of MC.DERMOTT INTERNATIONAL INC. VS. BURN STANDARD CO.LTD., AND OTHERS, (2006) 11 SCC 181 has held thus:

"In terms of the 1996 Act, a departure was made so far as the jurisdiction of the court to set aside an arbitral award is concerned vis-a-vis the earlier Act. Whereas under Sections 30 and 33 of the 1940 Act, the power of the court was wide, Section 34 of the 1996 Act brings about certain changes envisaged thereunder. Section 30 of the Arbitration Act, 1940 did not contain the expression "error of law...." The same was added by judicial interpretation. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as the parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it. The arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian law; (b) the interests of India; (c) justice or morality; or (d) if it is patently illegal or arbitrary. Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Lastly, where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute, would come within the purview of Section 34 of the Act."

(underline supplied)

14. It is also a well established legal principle that so long as the arbitrator has decided the matter in accordance with the terms of the contract and has acted within his authority, and according to the principle of fair play, the award of the arbitrator is ordinarily final and conclusive and power of the Court to set aside the award is restricted to the incenses set out under Section 34 of the Arbitration Act and the reappraisal of the evidence by the Court is not permissible. Useful reference can be had to the judgments of the Supreme Court in ISPAT ENGINEERING & FOUNDRY WORKS VS. STEEL AUTHORITY OF INDIA LIMITED, (2001) 6 SCC 347 and ONGC LIMITED VS. SAW PIPES LIMITED, (2003) 5 SCC 705.

15. Thus, under the provisions of the Act, if any one of the above contingencies is there in the award passed by the arbitrator, the Court exercising the jurisdiction under Section 34 of the Act can set aside the award. It cannot take the role of the arbitrator and pass an award.

16. On behalf of the first respondent, the decision of the Supreme Court in the case of RAJASTHAN STATE MINES AND MIERNALS LIMITED VS. EASTERN ENGINEERING ENTERPRISES AND ANOTHER, (1999)9 SCC 283 has been sought to be pressed into service. We have gone through the said judgment, which is no way relevant to the facts of the present case.

17. In the facts of the present case, the learned single Judge has interpreted Clause 43 in favour of the first respondent and on that ground set aside the arbitral award, which non-suited the claim. To that extent, there may not appears to be any illegality or arbitrariness attributable to the order of the learned single Judge. However, the subsequent aspect of the order of the learned single Judge granting the award in favour of the first respondent is beyond the power and jurisdiction vested on the Court under Section 34.

18. In view of the reasoning stated above and in the light of the decisions of the Supreme Court to the effect that the Court cannot correct the error of arbitrator and it could only quash the award leaving the parties free to begin the arbitration again, if it is so desired by them, the impugned order of the learned single judge is set aside and the appeal is allowed. However, there is no order as to costs.
usk

Sd/
Asst. Registrar

/true copy/

Sub Asst.Registrar

To

1.The Sub Asst.Registrar

Original Side,High Court,Madras.

+ One cc to Mr. V. Selvanayagam, Advocate SR 70600

+ One cc to Mr. A.R. Noxo, Advocate SR 70966

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