IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.01.2022

CORAM

THE HONOURABLE MR. JUSTICE S.S.SUNDAR

C.R.P.(PD) No.3790 of 2019

Bharat Heavy Electricals Ltd.
(A Government of India Undertaking)
Boiler Auxiliaries Plant
Indra Gandhi Industrial Complex
Ranipet, Tamil Nadu-632 406 ...Petitioner

Vs.

Sudhir Cranes Pvt. Ltd.,

...Respondent

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India against the order dated 17.09.2019 passed in I.A.No.1 of 2019 in A.R.O.P.No.1 of 2015 on the file of the II Additional District and Sessions Judge, Vellore District, Vellore at Ranipet.

For Petitioner : Mr.V.Karthik
Senior Counsel for
Mr.John Zachariah

For Respondent : Mr.Vasantham Baskaran

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ORDER

The Civil Revision Petition is directed against the order of the learned II Additional District and Sessions Judge, Vellore District, Vellore at Ranipet dated 17.09.2019 in I.A.No.1 of 2019 in AR.O.P.No.1 of 2015.

2. The revision petitioner herein entered into a contract dated 08.12.2011 with the respondent and the respondent herein was to supply ten tonne mobile cranes/ on tonnage basis for material handling at the rate of Rs.44/- per ton. Disputes arose at the time when the contract was about to be completed. The respondent made various claims and the revision petitioner disputed such claims.

3. Thereafter, the respondent raised a dispute before the Arbitral Tribunal consisting of a sole Arbitrator. As provided under the agreement, as against the claim for a sum of Rs.2,13,51,346.19/-, the revision petitioner also made a counter claim for a sum of Rs.3,31,36,000/-. The Arbitral Tribunal considering the facts, documents and arguments of both sides was pleased to pass an award dated 09.04.2015. The Arbitral Tribunal rejected the claim of the respondent and the counter claim of the petitioner.

4. Aggrieved by the award of the Arbitral Tribunal dated 09.04.2015, the revision petitioner as well the respondent filed independent application under Section

34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act'). The revision petitioner is the applicant in the application in AR.O.P.No. 3 of 2015 filed before the II Additional District Judge at Ranipet, Vellore District. The respondent is the applicant in AR.O.P.No.1 of 2015 filed before the same Court. After presenting the AR.O.P. on 13.06.2015, the respondent filed I.A.No.1 of 2019 seeking permission to amend the arbitration petition filed under Section 34 of the Act.

5. According to the learned counsel for the revision petitioner, the amendments are not only to correct certain errors and mistakes in the cause title but also to introduce additional grounds. Therefore, the said application was opposed by the revision petitioner on the ground that such amendments introducing new facts or pleading is not permissible. However, the lower Court allowed the application filed by the respondent by order dated 17.09.2019 and therefore, the revision petitioner has preferred the above Civil Revision Petition.

6. Mr.V.Karthik, learned Senior Counsel appearing for Mr.John Zachariah, learned counsel for the revision petitioner submitted the following points:

(i) The lower Court failed to see that the application for amendment introducing new ground cannot be entertained at the belated stage after the limitation for filing an application under Section 34 itself is over.

(ii) The provisions of the Code of Civil Procedure, 1908 (CPC) would not apply to the proceedings either before the Arbitrator or before the lower Court when the petition is filed under Section 34 of the Act.

(iii) Though it is permissible in law that some error in figures or typographical mistakes can be corrected by way of amendment, the deletion and inclusion of substantial pleading and grounds, which are not raised at the time of filing the application, cannot be entertained.

(iv) The respondent is trying to introduce entirely new grounds based on new facts by way of amendment and the lower Court has, in fact, allowed the respondent to reopen the proceedings by allowing new grounds which were not taken at the first instance.

7. From the narration of events and submissions on the legal issues raised by the learned Senior Counsel appearing for the petitioner, one of the issues that arise for consideration before this Court is whether the lower Court has power to entertain an application under Order VI Rule 17 of the CPC. Several arguments are advanced and precedents cited before this Court.

8. This Court is able to see that the Hon'ble Supreme Court has in several cases recognized the application for amendment of an application under Section 34 of the Act under Order VI Rule 17 of C.P.C. In particular, a learned Single Judge of

this Court has specifically dealt with the issue in the case of *Srikumar Textiles (P) Ltd. And Others Vs. Sundaram Finance Ltd.,* [(2008) 1 ARB LR 217 (Mad)]. The question that arose in that case was whether Order IX Rule 9 read with Section 151 CPC is applicable to restore Arbitral Original Petition which was dismissed for default. After considering the provisions to understand the scope of the Act in extenso, the Court though accepted the position that the Civil Procedure Code (CPC) is not specifically provided for, came to the conclusion that unless there being express prohibition against the application of the Code to a proceeding arising out of the Act before the Civil Court, the Court need not infer that the Civil Procedure Code is not applicable. The learned Single Judge also held that the proceedings before the Arbitrator is slightly different when the matter comes before the Court arising out of certain orders and in the application filed under Section 34 of the Act. It is relevant to extract the statement expressed by the learned Single Judge in para 30 of the judgment:

> *30. The extent of judicial intervention or the restriction placed on the Court is confined only to the proceedings pending before the Arbitral Tribunal to the extent so provided under the Act. In other words, the provisions of the Code of Civil Procedure, may not be applicable to the proceedings pending before the Arbitral Tribunal except so provided in part-I of the Act. The jurisdiction of a Civil Court is determinable by application of the provisions of Civil Procedure Code. Once the matter goes out of the hands of the Arbitral Tribunal to the Civil Court, the provisions, contained in the Civil Procedure Code are applicable to all the proceedings, i. e., orders or appeals arising out of provisions of Arbitration Act. Since the proceedings before the Court are of civil nature, whatever*

procedure applicable and followed for other civil proceedings, equally apply to the proceedings arising out of orders passed under Sections 9, 27, 34, 36 and 37 of the Act. In view of the decision of the Supreme Court and this Court, the issue as to whether the civil Procedure Code is applicable to the Arbitral proceedings pending on the file of the civil Court is no longer res integra. The statute does not exclude the applicability of Civil Procedure Code to the proceedings arising out of the Arbitration Act. The non- obstante clause in Section 5 of Act does not take away the powers of the Principal Civil Court i. e., original jurisdiction in a District of the High Court in applying the Civil Procedure Code, while deciding the matters arising out of the Act. As regards the decision made by the Arbitral Tribunal, any party aggrieved by the decision can apply to the Civil Court under Section 34 of the Act to set aside the award. Judicial intervention is permissible in any matters arising out of Sections 9, 27, 34, 36 and 37 in part-I of the Act and provisions of the Code of Civil Procedure Code are applicable to such proceedings.

9. Learned counsel appearing for the respondent, however, cited several judgments of the Hon'ble Supreme Court relating to amendment of pleadings as contemplated under Order VI Rule 17 of the CPC. The Hon'ble Supreme Court in a few judgments has recognized the application of Order VI Rule 17 of C.P.C., when the question arose in relation to amendment of memorandum of an application filed under Section 34 of the Act.

10. Learned counsel for the petitioner relied on a decision of the Hon'ble Supreme Court in the case of *State of Maharashtra Vs. Hindustan Construction Company Limited* [(2010) 4 SCC 518], wherein the Hon'ble Supreme Court has upheld the maintainability of a petition for amendment of the application filed under Section 34 of the Act or the memo of appeal filed under Section 37 of the Act. However, while accepting the legal position governing the amendment of pleadings in

the suit or memorandum of appeal, the Hon'ble Supreme Court was reluctant to apply the same principles to an application for amendment of petition filed under Section 34 of the Act to set aside the award. It is further held that the application seeking to add new grounds in the memorandum of appeal for which no foundation had been laid in the application for setting aside the award cannot be entertained. It is useful to refer to the relevant portions of the judgment of the Hon'ble Supreme Court which are in paragraph 29 to 36, which are extracted below:

> *29. There is no doubt that application for setting aside an arbitral award under Section 34 of 1996 Act has to be made within time prescribed under sub-section(3) i.e., within three months and a further period of thirty days on sufficient cause being shown and not thereafter. Whether incorporation of additional grounds by way of amendment in the application under Section 34 tantamounts to filing a fresh application in all situations and circumstances. If that were to be treated so, it would follow that no amendment in the application for setting aside the award howsoever material or relevant it may be for consideration by the Court can be added nor existing ground amended after the prescribed period of limitation has expired although application for setting aside the arbitral award has been made in time. This is not and could not have been the intention of Legislature while enacting Section 34.*
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> *30. Moreso, Section 34 (2) (b) enables the Court to set aside the arbitral award if it finds that the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force or the arbitral award is in conflict with the public policy of India. The words in Clause (b) "the Court finds that" do enable the Court, where the application under Section 34 has been made within prescribed time, to grant leave to amend such application if the very peculiar circumstances of the case so warrant and it is so required in the interest of justice.*
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> *31. L.J. Leach and Company Ltd.1 and Pirgonda Hongonda Patil2, seem to enshrine clearly that courts would, as a rule, decline to allow amendments, if a fresh claim on the proposed amendments would be barred by limitation on the date of application but that would be a factor for consideration in exercise of the*

discretion as to whether leave to amend should be granted but that does not affect the power of the court to order it, if that is required in the interest of justice. There is no reason why the same rule should not be applied when the Court is called upon to consider the application for amendment of grounds in the application for setting aside the arbitral award or the amendment in the grounds of appeal under Section 37 of 1996 Act.

32. It is true that, the Division Bench of Bombay High Court in Vastu Invest and Holdings Pvt. Ltd.4 held that independent ground of challenge to the arbitral award cannot be entertained after the period of three months plus the grace period of thirty days as provided in the proviso of sub-section (3) of Section 34, but, in our view, by `an independent ground' the Division Bench meant a ground amounting to a fresh application for setting aside an arbitral award. The dictum in the aforesaid decision was not intended to lay down an absolute rule that in no case an amendment in the application for setting aside the arbitral award can be made after expiry of period of limitation provided therein.

33. Insofar as Bijendra Nath Srivastava8 is concerned, this Court did not agree with the view of the High Court that the trial court did not act on any wrongprinciple while allowing the amendments to the objections for setting aside award under 1940 Act. This Court highlighted the distinction between `material facts' and `material particulars' and observed that amendments sought related to material facts which could not have been allowed after expiry of limitation. Having held so, this Court even then went into the merits of objection introduced by way of amendment. In our view, a fine distinction between what is permissible amendment and what may be impermissible, in sound exercise of judicial discretion, must be kept in mind. Every amendment in the application for setting aside an arbitral award cannot be taken as fresh application.

34. In the case of Dhartipakar Madan Lal Agarwal9 this Court held that a new ground cannot be raised or inserted in an election petition by way of an amendment after the expiry of the period of limitation. It may not be proper to extend the principles enunciated in Dhartipakar Madan Lal Agarwal9 in the context of the provisions contained in Section 81 of the Representation of the People Act, 1951 to an application seeking amendment to the application under Section 34 forsetting aside an arbitral award or an appeal under Section 37of 1996 Act for the reasons we have already indicated above.

35. The question then arises, whether in the facts and circumstances of the present case, the High Court committed any error in rejecting the appellant's application for addition of new grounds in the memorandum of arbitration appeal.

36. As noticed above, in the application for setting aside the award, appellant set up only five grounds viz., waiver, acquiescence, delay, laches and

res judicata. The grounds sought to be added in the memorandum of arbitration appeal by way of amendment are absolutely new grounds for which there is no foundation in the application for setting aside the award. Obviously, such new grounds containing new material/facts could not have been introduced for the first time in an appeal when admittedly these grounds were not originally raised in the arbitration petition for setting aside the award. Moreover, no prayer was made by the appellant for amendment in the petition under Section 34 before the concerned court or at the appellate stage.

11. Learned Senior Counsel for the petitioner further relied upon a judgment of the High Court of Calcutta in the case of *Prakash Industries Limited Vs. Bengal Energy Limited and Another* [2020 AIR Cal 279]. After referring to several judgments of the Hon'ble Supreme Court, a learned Single judge of the Calcutta High Court rejected an application filed for amendment of the grounds by applying the test whether the proposed grounds would necessitate filing of a fresh application for setting aside the award. When the new grounds do not have a foundation or basis in the application already filed, it was held that the applicant before the Court cannot contend that the amendment is just an amplification of existing grounds. It is also useful to refer to judgments of the Hon'ble Supreme Court in *Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited* [(2009) 17 SCC 796], *Venture Global Engineering Vs. Satyam Computer Services Ltd.* [(2010) 8 SCC 660], *Emkay Global Financial Services Limited Vs. Girdhar Sondhi* [(2018) 9 SCC 49] and *State of Maharashtra Vs. Hindustan Construction Company* [(2010) 4 SCC 518], wherein the Hon'ble Supreme Court had occasion to recognize the power

to entertain a petition for amendment of the application filed under Section 34 of the Act. However, the question before this Court is whether the application for amendment is just to amplify the grounds which are already in existence or the object of amendment is to introduce additional grounds for which there is no foundation in the existing application filed under Section 34 of the Act. It is also to be seen whether the new grounds introduced by amendment would change the character of the petition originally filed under Section 34 of the Act.

12. Learned Senior Counsel himself has fairly conceded that up to Item nos. 1 to 6, there is no difficulty as the amendment is regarding some corrections in the cause title and mistakes which are typographical errors. However, it is not in dispute that item nos. 7 to 20 contemplate introduction of additional facts and grounds. Learned counsel, though argued the matter elaborately, did not point out with reference to each item of amendment as to how it has no factual foundation from the existing application filed under Section 34.

13. It is seen that the original application filed by the respondent contains 33 paragraphs with additional paragraphs relating to the prayers. Up to paragraph nos. 1 to 15 the facts of the case, the pleadings of the respective parties and the nature of award are narrated. Thereafter, paragraph nos. 16 to 30 are the grounds raised by the respondent. The arbitral award of the sole Arbitrator was challenged on many

grounds in the original petition. Reference to some of the grounds raised by the respondent in the application filed under Section 34 are necessary and hence they are extracted below in a truncated form:

(a) The award of the arbitrator is against law and facts and contrary to the material on record and hence it is against public policy.

(b) The interpretation of some of clauses in the agreement particularly clause 41 by the Arbitrator is erroneous and the arbitrator failed to appreciate the contents of the letter marked as Ex. P9 dated 26.11.2012.

(c) The conclusion of the Arbitrator is contrary to the findings on facts.

(d) The Arbitrator failed to appreciate the rights, liabilities and obligations of the parties arising under the contract and the Arbitrator failed to appreciate the deposition of witnesses.

(e) The Arbitrator failed to appreciate the nature of contract and omitted to take into account several factors.

(f) The Arbitrator failed to consider several factors and communications to infer that the respondent before Arbitrator has promised to provide minimum quantity of 10,70,000 MT and to compensate if there is reduction of quantity to be handled.

(g) Though material was available, the respondent before Arbitrator did not give any valid explanation for reduction of quantity to be handled by claimant and the Arbitrator failed to appreciate the consequential loss caused to the claimant by reeducation of volume. When the agreement was also to handle all materials, finished goods, steel coil etc, the respondent before Arbitrator gave only finished goods for handling to the claimant whereas other materials were allowed to be handled by other persons. The Arbitrator, however, came to a wrong conclusion that the claimant fell short in deploying sufficient number of cranes.

(h) The arbitrator failed to consider oral representations which are not disputed by the respondents and erred in observing that there was substantial delay in raising the issue regarding losses on account of reduction in quantity.

(i) The learned sole Arbitrator erred in concluding that the risk and loss due to reduction of volume cannot be the basis of claim on an erroneous interpretation of Clause 44 of the agreement dated 08.12.2011.

14. By way of amendments as stated earlier, additional grounds were introduced. For example Item No. 8 relates to introduction of additional facts. The respondent raised an additional ground that the Arbitrator failed to appreciate that the petitioner ensured deployment of sufficient number of cranes to report in full readiness throughout contract period without any break. Item No. 9 of the proposed

amendment was relating to clause 41 of the agreement. Though the existing application refers to clause 41 and the findings of the Arbitrator, the addition appears to be to amplify the grounds which are already in existence. Similarly all other grounds are relating to the conclusions of the Arbitrator explaining how they are contrary to the agreement and the obligation of respondent before Arbitrator to compensate the loss on account of reduction of volume which was promised to the claimant. The additional grounds are all about the loss incurred by the claimant while performing the contract in terms of the agreement, due to the reduction of quantity of material offered by M/s.Bharat Heavy Electricals Ltd. for handling.

15. This Court is unable to find any new ground which is either outside the scope of the original Arbitral proceeding or without the factual background. None of the grounds will change the character of original application. This Court is also unable to find any new ground for which no foundation is laid in the application for setting aside the award under Section 34. It is to be noted that the original application filed under Section 34 is elaborate and this Court is unable to find a totally new ground which changes the very nature of the grounds raised in the application filed under Section 34. This Court cannot precisely determine, at this stage, whether any of the new grounds go contrary to the agreement. It is a matter to be considered on merits.

16. Under the pretext of amendment, it is not open to the respondent to go beyond the original pleadings. Any elaboration of the original application or amplification is permissible in law. This Court is unable to find any candid reason which is analogous to one identified by the Calcutta High Court in *Prakash Industries Limited* (supra) to reject the proposed amendment in the application filed under Section 34 of the Act.

17. The governing principles which are applied while considering an application under Order VI Rule 17 cannot be applied when a person seeks amendment of the application filed under Section 34 of the Act. This Court is of the view that some amount of discretion in the matter of amendment is still available with the Court and the Court while exercising such discretion judiciously cannot refuse unless this Court has reasons to believe that the amendment proposed are not legitimate or that the amendment is likely to take away the right accrued to the other side.

18. It is admitted that the revision petitioner has also filed a petition under Section 34 of the Act which is numbered as AR.O.P.No. 3 of 2015. When both sides have challenged the Arbitral award on various grounds, this Court is of the view that the amendments are necessary and not for enlarging the scope of arbitral proceedings. Since the lower Court is expected to consider the application under

Section 34, strictly in accordance with law, this Court is inclined to dismiss the Civil Revision Petition subject to the right of the revision petitioner opposing any existing or additional ground which has no factual foundation.

19. The observation of this Court cannot be construed or misunderstood to interpret as if this Court has given liberty to the revision petitioner to raise all the grounds that were raised by the revision petitioner in the Civil Revision Petition.

20. This Civil Revision Petition is dismissed. The lower Court is directed to dispose of both AR.O.P.Nos.1 of 2015 and 3 of 2015 as expeditiously as possible, preferably within a period of three months from the date of receipt of a copy of this order. No costs.

04.01.2022

ska
Index: Yes/No
Speaking order/Non-speaking order

To

II Additional District and Sessions Judge,
Vellore District,
Vellore at Ranipet

S.S.SUNDAR, J.,

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C.R.P.(PD) No.3790 of 2019

04.01.2022