

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.4.2016

CORAM

THE HON'BLE MR.JUSTICE V.RAMASUBRAMANIAN

Original Petition No.694 of 2007

Ennore Port Limited

P.T.Lee Chengalvaraya Naicker Maaligai

1st Floor, No.23, Rajaji Salai

Chennai 600 001.

.. Petitioner

Vs.

1. HCC-VAN OORD Joint Venture

Hincon House, LBS Marg

Vikhroli (West), Mumbai 400 083.

2. M.C.Bhide

3. O.P.Goel

4. M.Velu

5. The Board of Trustees of Chennai Port Trust

rep. by its Chairman

Rajaji Salai, Chennai 600 001.

.. Respondents

[R5 impleaded vide order dated 23.10.2009 in
A.No.5334 of 2009 & extended on 05.11.2009]

Petition under Section 34 of the Arbitration and Conciliation Act, 1996,
against the award dated 12.12.2006 passed by respondents 2 to 4.

For Petitioner	:	Mr.K.Manoj Menon
For Respondent-1	:	Mr.P.S.Raman, S.C. For Mr.T.K.Bhaskar
For Respondent-5	:	Mr.M.Ravindran Addl. Solicitor General For Mr.R.Karthikeyan

ORDER

This is a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, seeking to set aside an arbitration award dated 12.12.2006.

2. I have heard Mr.K.Manoj Menon, learned counsel appearing for the petitioner, Mr.P.S.Raman, learned senior counsel appearing for the first respondent and Mr.M.Ravindran, learned Additional Solicitor General appearing for the fifth respondent. The respondents 2 to 4 are the Arbitrators.

3. An Agreement No.33 of 1997 was entered into by the Chennai Port Trust (5th respondent herein) on 22.8.1997, with the first respondent for the construction of breakwaters at the Ennore Port. The scope of the work was to dredge and remove fine sand from the sea bed, replace/backfill the area with coarser sand and compact the sand so backfilled, with Vibro-Compaction equipments. However, after the entrustment of the contract, the Port authorities decided to delete the work of compaction. As per the suggestion of the Engineer/Consultant, a Pilot Compaction Test (PCT) was conducted and thereafter, the deletion of the work of compaction was recommended.

4. The first respondent raised a claim for abortive costs, on the ground that the omission of compaction resulted in losses and also led to a disruption in their operations. The Engineer rejected all the claims. But when

the first respondent made a claim before the Dispute Review Board, in terms of clause 67.1 of the contract, the Board awarded abortive costs of Rs.3 crores, mobilisation and demobilisation charges of Rs.2.15 crores and costs of carrying out Pilot Compaction Test of Rs.1.60 crores. However the Board rejected two claims viz., (i) disruption of rock dumping operations and (ii) primary compaction.

5. Both the petitioner as well as the first respondent did not accept the recommendations of the Dispute Review Board. Hence, the dispute was referred to arbitration in terms of clause 67.3 of the contract. The respondents 2 to 4, who acted as the Arbitrators, passed an award dated 12.12.2006, whose operative portion is as follows:-

<i>S. No</i>	<i>Item of Claim</i>	<i>Amount awarded</i>	<i>Eligibility for escalation</i>	<i>Day from which the payment of interest is due</i>
1	<i>Mobilisation/Demobilisation towards compaction vessel and equipments</i>	21,500,000/-	<i>From 28.10.1996 to 8.10.1998</i>	<i>27.7.1999 upto 12.12.2006</i>
2	<i>Abortive cost due to late omission by the Engineer for compaction of the sand fill</i>	40,301,337/-	<i>No</i>	<i>22.2.1999 upto 12.12.2006</i>
3	<i>Primary compaction of sand fill</i>	<i>No Payment</i>	--	--
4	<i>Pilot Compaction Test</i>	96,73,511/-	<i>From 28.10.1996 to 22.2.1999</i> <i>On 90% of the awarded amount</i>	<i>22.2.1999 upto 12.12.2006</i>
5	<i>Disruption to rock dumping</i>	<i>No Payment</i>	--	--

Challenging the award so passed, the petitioner has come up with the above

petition under Section 34.

6. The first respondent has filed a counter statement contending inter alia that the scope of enquiry under Section 34 is very limited and hence the petitioner is not entitled to canvas the merits of the case, as if it is an appeal; that an award can be set aside only on a finding of misconduct on the part of the Arbitrators or when the award is found to be contrary to the provisions of the contract; that the Arbitral Tribunal determined the damages in accordance with the provisions of Section 73 of the Contract Act, 1872; that the award of interest was in terms of Section 31(7)(a) of the Act and cannot be said to be contrary to Section 28(3) of the Act; that the petitioner has no locus standi to file this original petition since the contract in question was entered into with Chennai Port Trust, who had not chosen to challenge the award; that the omission/deletion of the work of compaction was an acknowledged variation of the terms of the original contract under clause 51.1 and hence should be valued under clause 52.1; that the first respondent became entitled to abortive costs for the omission of compaction and also entitled to other claims for disruption of operations; that in terms of clause 67.3 (vii), the decision of the Arbitral Tribunal shall be treated as final and binding; that all the Arbitrators were experienced Engineers, familiar with FIDIC Contracts; that though the first respondent claimed abortive costs for the whole period during which the vessel "JAN STEEN" was engaged under the Charter, the Tribunal awarded only 60% in terms of clause 52 and hence

cannot be taken exception to; that though the vessel supplied was different from the one indicated in the contract specification, it was found not only by the Arbitral Tribunal, but also by the Engineer of the Chennai Port Trust to be suited to carry out the compaction works; that the Arbitral Tribunal found that the vessel was lying idle in Singapore for 116 days under the Charter Party Agreement; that the award towards costs of Vibrocore equipments cannot be said to be arbitrary since the Tribunal reduced the claim by 50%; and that the other portions of the award are also unassailable.

7. From the pleadings and rival contentions, it is seen that broadly 3 issues arise for consideration in this original petition viz.,:-

- (i) The locus standi of the petitioner to challenge the award;
- (ii) The availability of valid grounds of challenge under Section 34;

and

(iii) The merits of the challenge to the award, if the petitioner is found to have locus standi and if valid grounds of challenge exist.

LOCUS STANDI OF THE PETITIONER

8. The locus standi of the petitioner to challenge the award, has been raised by the first respondent, on the strength of the following admitted facts:-

(i) It was the Chennai Port Trust which entered into an Agreement on 22.8.1997 with the first respondent herein.

(ii) Ennore Port Limited which is the petitioner herein was not a

"party" to the Arbitration Agreement within the meaning of Section 2(1)(h) of the Arbitration and Conciliation Act, 1996.

(iii) Ennore Port Limited came into the picture when the arbitration proceedings were half way through. It was roped in as one of the respondents before the Arbitral Tribunal, by Chennai Port Trust by filing an application contending that by a Memorandum of Understanding dated 30.3.2002, between Chennai Port Trust and Ennore Port Limited, all the assets and liabilities relating to Ennore Port have devolved upon Ennore Port Limited.

(iv) The impleadment was allowed by the Arbitral Tribunal on the basis of the stand taken by Chennai Port Trust that Ennore Port Limited became the successor-in-interest. However, the Arbitral Tribunal held that the first respondent's right as against the Chennai Port Trust, would remain extant.

(v) Chennai Port has not challenged the award. The time limit for challenging has also expired. Therefore the award has become final in so far as Chennai Port Trust is concerned. Consequently, the petitioner who claims to be a successor to Chennai Port Trust, has no locus standi to challenge the award.

9. On facts, it is pertinent to note, in addition to what is extracted above, that Chennai Port Trust is a statutory authority constituted under the Major Port Trusts Act, 1963. Ennore Port Limited is a Government of India

undertaking, incorporated under the Companies Act, 1956. It is seen from a copy of the Memorandum of Understanding dated 30.3.2002 entered into between Chennai Port Trust and Ennore Port Limited (i) that the Government of India directed the Chennai Port Trust to construct a new Port at Ennore; (ii) that after construction, the Government of India directed Chennai Port Trust to hand over the completed Port to Ennore Port Limited; (iii) that accordingly the Ennore Port was handed over on 22.6.2001 by Chennai Port Trust to Ennore Port Limited; and (iv) that the assets and liabilities were also directed to be transferred.

10. Under clause 1 of the MOU dated 30.3.2002, Ennore Port Limited took over the Port along with all its assets and liabilities, rights, licenses etc. Under clause 11, Ennore Port Limited was named as the successor to Chennai Port Trust, for the agreements entered into by them. It was also named as the successor to the Chennai Port Trust *"for the disputes pending in the DRB/ Arbitration/Courts relating to the Ennore Coal Port Project (as per Annexure IV)"*.

11. Section 2 of the "Contract Document" bearing Agreement No.33 of 1997, containing "General Conditions of Contract-Part I" defines the word "Employer" under clause 1.1(a)(i) to "mean the person named as such in Part II of these conditions and ***the legal successors-in-title to such person***". Even the definition of the word "Contractor" under clause 1.1(a)(ii) of Section 2, takes within its fold, the legal successor-in-title to the

contractor. In the case on hand, Chennai Port Trust was the employer and the first respondent herein is the contractor.

12. Therefore, it is clear that the original contract itself contained an in-built provision for the successors-in-title of both parties viz., Employer and Contractor to enforce the contract against each other. As between themselves, the Chennai Port Trust and Ennore Port Limited have not taken any contradictory or conflicting stand, in so far as the issue of succession is concerned. In other words, there is no dispute between Chennai Port Trust and Ennore Port Limited as to who should ultimately bear the burden of the award.

13. Keeping in mind the above, let me now turn to the objection raised by the first respondent on the strength of Section 2(1)(h) and Section 34 of the Arbitration and Conciliation Act, 1996.

14. Obviously the petitioner was not a party to the Arbitration Agreement. But the petitioner is a successor-in-interest to one of the parties to the Arbitration Agreement. The petitioner was also impleaded as a party to the arbitration proceedings. The operative portion of the impugned award, contained in para 18.0 under the heading "CONCLUSIONS", does not make a whisper as to whether the amounts awarded therein are liable to be paid jointly and/or severally by Chennai Port Trust and Ennore Port Limited. The award is in favour of the first respondent herein (claimant before the Arbitral Tribunal). The issue of joint and several liability was not raised before the

Tribunal.

15. But the manner in which the award has been passed, shows that it is possible for the first respondent herein to enforce the award (i) as against Chennai Port Trust alone or (ii) as against Ennore Port Limited alone or (iii) as against both. Therefore, the impediment for a person who is not a party to an arbitration agreement within the meaning of Section 2(1)(h), to seek arbitration, does not continue as against a person who was made party to the arbitration proceedings and who has also suffered an award. The first respondent herein did not challenge the action of the Arbitral Tribunal in permitting the petitioner herein to come on record. Therefore, Section 34 cannot be a bar for a person who is not a party to the Arbitration Agreement, to challenge an award passed in his presence and which is also capable of being enforced against him.

16. Section 2(1)(h) does not exclude a successor-in-interest or successor-in-title from its purview. A successor-in-interest actually steps into the shoes of the party to the agreement. Upon succession taking effect, the successor becomes "party" to the agreement. A successor-in-interest is not a stranger. Take for instance a case where a named individual is a party to an Arbitration Agreement and he dies in the course of the arbitration proceedings. If the right to sue survives in the other party to the Arbitration Agreement and if the subject matter of the dispute is still available, there is no bar for the proceedings to continue as against the legal representatives on

whom the estate of the deceased devolves. The provisions analogous to Order XXII, CPC could certainly be invoked in such cases, to the benefit of the surviving party to the Arbitration Agreement. After the decision of the Supreme Court in ***ITI Limited v. Siemens [2002 (5) SCC 510]***, the Courts are not averse to the idea of importing analogies from the provisions of the Civil Procedure Code, 1908. Take for instance another case where a company which is a party to an Arbitration Agreement goes into liquidation pending arbitration or a case where an individual, who is a party to an Arbitration Agreement, becomes insolvent. The continuation of the proceedings in such cases, by impleading the Official Liquidator/Official Assignee, would not militate against the provisions of Section 2(1)(h) of the Act.

17. The decisions relied upon by the learned Senior Counsel for the first respondent on this aspect, are clearly distinguishable. In ***Chennai Container Terminal Pvt. Ltd v. Union of India [AIR 2007 Mad 325]***, relied upon by the first respondent, the Union of India was not a party to the Arbitration Agreement nor a party to the award. The Union of India came into the picture post-award. In other words, there was no award against the Union of India and yet they sought leave to challenge the award or at least to become a co-applicant along with the party who suffered the award. The Union of India was also not a successor-in-interest to the party to the Agreement or the party to the award. Therefore, the said decision is of no

application to the case on hand.

18. The next decision relied upon by the first respondent, is the one in ***Mrs.Vasantha Ramanam v. Official Liquidator [(2003) 114 Comp Cases 747 (Mad)]***. Even in that decision, the question of entitlement of a successor to challenge an award did not arise for consideration. The ratio laid down in that decision was to the effect that only the parties to the agreement can seek a reference and not third parties. But it is a fundamental misconception on the part of the first respondent to think that the petitioner is a third party. A third party is distinct and different from a successor.

19. Even the decision in ***Florentine Estates of India Limited v. CREF Finance Limited [110 (2004) DLT 742]***, relied upon by the first respondent, did not deal with the issue of the right of the successor-in-interest. In that case, 5 persons were sought to be impleaded as parties to the arbitration proceedings, on the ground that they were confirming parties to the agreement. The Arbitrator held that they were neither necessary nor proper parties to the proceedings. Thereafter, those parties filed a petition before the Delhi High Court under Section 36 of the Act. Therefore, while dealing with the said petition, the Delhi High Court held that the legality and validity of an arbitral award can be challenged only by a party to the agreement and that the same is made clear by Section 34. As a matter of fact, what was before the Delhi High Court in that case was virtually an Execution Petition under Section 36, filed by third parties, whom the

Arbitrator refused to implead in the proceedings before him. The ratio decidendi of the said decision is to the effect that any order passed by an Arbitral Tribunal deciding the question as to whether someone is a necessary and proper party or not, cannot strictly be called an award or interim award. Therefore, the said decision is not on the question which now falls for consideration in this case. In any event, the emphasis laid by the learned Judge of the Delhi High Court in the said decision, to sub-section (2) of Section 34, may not with respect, be appropriate. In fact, clause (a) of sub-section (2) of Section 34 uses the expression "the party making the application". But sub-clause (i) of clause (a) uses the expression "a party under some incapacity". Clause (b) of sub-section (2) takes the challenge to an award, to a higher level than even those prescribed under clause (a).

20. Therefore, it is impossible to think that the petitioner has no locus standi to challenge the award (i) despite being the successor-in-title to one of the parties to the Arbitration Agreement (ii) despite being impleaded as a party to the arbitration proceedings and (iii) despite suffering an award. A contention of this nature would not have been advanced by the first respondent (i) if the first respondent itself had undergone a change in its constitution, by way of merger/amalgamation or (ii) if the principal entity viz., The Chennai Port Trust had ceased to have a legal existence, after the petitioner had succeeded to their position.

21. In view of the above, I hold on the preliminary objection that

the petitioner has locus standi to challenge the award to which they have been a party and one which is also capable of execution against them.

GROUND OF CHALLENGE AND THEIR VALIDITY IN LAW AND ON FACTS

22. The grounds on which an arbitration award could be challenged are enumerated in sub-clauses (i) to (v) of clause (a) or sub-clauses (i) and (ii) of clause (b) of Section 34 (2). A reading of the main petition shows that the challenge to the award will not fall under any of the grounds stipulated in sub-clauses (i), (ii), (iii) or (v) of clause (a). It will not even fall under sub-clause (i) of clause (b). Therefore, the challenge made by the petitioner should necessarily fall under sub-clause (iv) of clause (a) and/or sub-clause (ii) of clause (b).

23. Placing reliance upon the decisions in *Narayan Prasad Lohia v. Nikunj Kumar Lohia* [(2002) 3 SCC 572], *Olympus Superstructures Pvt. Ltd v. Meena Vijay Khetan* [AIR 1999 SC 2102], *U.P.Hotels v. UPSEB* [(1989) 1 SCC 359], *ONGC v. Dai Ichi Karkaria* [MANU/MH/0071/2007], *Arosan Enterprise Ltd v. Union of India* [(1999) 4 SCC 449], *Union of India v. Supreme Construction* [AIR 1998 Bom 198], *Board of Trustes of Port v. Pioneer Engineering & Anr.* [2006 (4) ARBLR 343 (Bom)], *BOC India Ltd v. Bhagwati Oxygen Ltd* [(2007) 9 SCC 503], *Indu Engineering and Textiles Ltd v. DDA* [(2001) 5 SCC 691] and *Ennore Port Limited v. Hindustan Construction Company Ltd & Ors* [(2005) 4 MLJ 86], it was contended by the learned Advocate General appearing for the first respondent that an award

cannot be interfered with very lightly. From the above decisions, the following indisputable propositions emerge:-

(i) that the scope of interference under Section 34 is very restrictive;

(ii) that the award cannot be interfered with, either on the ground of reasonableness of the reasons or on the ground of alleged mistake of facts;

(iii) that this Court cannot sit in appeal over the decision of the Arbitral Tribunal by reappraising the evidence;

(iv) that the award can be set aside only where the Arbitrator has misconducted himself or passed the award contrary to the provisions of the Contract Act;

(v) that the Court should normally preserve the award as far as possible and avoid a close scrutiny of the findings of the Arbitrator; and

(vi) that even in the case of misconstruction or mis-appreciation of the material on record, the Court cannot interfere with the award.

24. It is too late in the day to have any quarrel with the above propositions, which are now well settled. Keeping these principles in mind, let me now turn to the facts of the case and the grounds on which the award is assailed.

25. The background facts that could be culled out from the award of the Arbitral Tribunal, can be summarised as follows:-

(i) By Agreement No.33 of 1997, entered into on 22.8.1997, the Chennai Port Trust entrusted the contract (ECP/C4) of construction of two breakwaters at Ennore Port to the first respondent herein. The contract provided for the replacement of the soil/sand over the area on which the breakwaters were to be constructed. The first respondent was to dredge the sand/soil and replace (backfill) with a better quality of sand (coarse sand) and thereafter compact the backfilled area by Vibro Compaction Method. The approximate cost of the work entrusted to the first respondent was Rs.232,86,74,685/-.

(ii) In the course of execution of the contract, the Chennai Port Trust decided to omit the work of compaction of backfill, from the contract. Aggrieved by such omission, the first respondent herein made a claim before the Engineer on 22.2.1999 for a sum of Rs.14,94,32,818.94 towards primary compaction, abortive costs due to omission of compaction and disruption to rock dumping operations.

(iii) After the Engineer rejected the claim made by the first respondent and proposed a draft variation order, the first respondent made a claim before the Dispute Review Board. The claim comprised of 5 components viz.:-,

	Rs.
(i) Abortive costs resulting from omission of compaction	- 10,96,57,179.00
(ii) Disruption to the claimant's Rock Dumping Operations	- 98,54,575.00
(iii) Towards Primary Compaction	- 32,85,103.00

(iv) Towards mobilisation and demobilisation of compact equipment-	2,15,00,000.00
(v) Payment of day works for pilot compact test	- 2,49,88,483.00

Total	- 16,92,85,340.00
	=====

(iv) The Dispute Review Board rejected the claim for (i) disruption to rock dumping operations and (ii) primary compaction. However, the Dispute Review Board allowed 3 claims totalling to a sum of Rs.6.75 crores, comprising of (i) mobilisation and demobilisation charges of Rs.2.15 crores (ii) abortive costs of Rs.3 crores resulting from omission to compaction and (iii) cost of carrying out Pilot Compaction Test in an amount of Rs.1.60 crores.

(v) Since both parties rejected the recommendations of the Dispute Review Board, the dispute was referred to the Arbitral Tribunal under clause 67.3 of the contract.

26. It is seen from the award of the Tribunal that the total claim made by the first respondent comprised of 5 components viz., (i) mobilisation and demobilisation towards compaction vessel, plant and equipment (ii) abortive costs due to late omission of the work of compaction (iii) cost of primary compaction of sand fill (iv) cost of carrying out Pilot Compaction Test and (v) loss due to disruption to rock dumping operations.

27. Apart from the above 5 components, there was also a claim for

escalation and the claim for payment of interest. The Arbitral Tribunal awarded escalation on the ground that under clause 70 of CPA of the Contract, payment of escalation was incidental. On the question of interest, the Tribunal held that the first respondent is entitled to 9% per annum from the dates indicated in the last column of the table under para 18.0 of the award. The Tribunal also awarded future interest at 12% per annum, if the award amount was not paid within 90 days.

28. Now let me see how the Tribunal dealt with each of the 5 components of the claim and how the Tribunal dealt with the claim for escalation and interest. While doing so, it could be found out whether the Tribunal committed any error that would fall within sub-clause (iv) of clause (a) and/or sub-clause (ii) of clause (b) of sub-section (2) of Section 34.

MOBILISATION AND DEMOBILISATION CHARGES

29. Admittedly, the amount claimed by way of mobilisation and demobilisation charges, in a total amount of Rs.2.15 crores, was certified by the Engineer's representative in the monthly statement No.10, for the work carried out upto the end of August 1998. But these two items were deleted in the Interim Payment Certificate No.20 dated 30.7.1999.

30. The contention of the petitioner was that the first respondent deviated from the contract conditions, not only by changing parameters, but also by engaging different vibrator and vessel. But on a careful consideration of the documents, the Arbitral Tribunal came to the conclusion that the

amounts certified by the Engineer for payment, ought not to have been deleted after 10 months, without even assigning any reasons. The Dispute Review Board itself took note of this fact and the statement of the Engineer and came to the conclusion that this amount of Rs.2.15 crores should not have been deleted. The Arbitral Tribunal took note of the admission made by the Engineer before the Dispute Review Board that the vessel and compaction equipment conformed to the information contained in the Method Statement of the first respondent.

31. Apart from the above, the Tribunal appears to have studied the relevant specifications and drawings of the vessel Jan-Steen and found it to be self-propelled. The Tribunal also found that the weight and size of the vessel was greater than the jack up platform prescribed by the petitioner. Therefore, I do not find the award passed in respect of component No.1 viz., mobilisation and demobilisation charges, to fall within sub-clause (iv) of clause (a) and/or sub-clause (ii) of clause (b) of sub-section (2) of Section 34.

ABORTIVE COSTS

32. The claim made by the first respondent for abortive costs, is on the basis that the first respondent incurred/committed itself to substantial costs, which became irrevocable by the time the compaction work was deleted from the contract. According to the first respondent, if the compaction work had been deleted in the early 1996, the first respondent

could have avoided incurring a huge expenditure and hence the petitioner should compensate them.

33. The total claim made by the first respondent towards abortive costs was Rs.8,68,92,417/-, comprising of five components and overheads on those components at 18%. The Arbitral Tribunal rejected the claim under three components and allowed the claim only in respect of two components. The components of abortive costs, the amount claimed by the first respondent and the amount awarded by the Arbitral Tribunal can be summarised in the form of a tabular statement as follows:-

<i>Component</i>	<i>Amount claimed</i>	<i>Amount Awarded</i>
<i>External Geo Technical Services</i>	<i>Rs.5,68,182/-</i>	<i>Nil</i>
<i>Internal Geo Technical Services</i>	<i>Rs.16,68,129/-</i>	<i>Nil</i>
<i>Technical Support</i>	<i>Rs.28,80,711/-</i>	<i>Nil</i>
<i>Hired equipment including vessel Jan-Steen</i>	<i>Rs.5,83,68,808/-</i>	<i>i) Jan-Steen – Rs.3,09,25,600/- ii)Vibro-Core- Rs.30,12,578/- iii)Crane - Rs.1,44,719/-</i>
<i>Purchased equipment</i>	<i>Rs.98,45,864/-</i>	<i>Rs.62,18,440/-</i>
<i>Overheads at 18%</i>	<i>Rs.1,35,40,723/-</i>	<i>Nil</i>

34. In the light of the award of the Tribunal, the area of dispute under the heading "abortive costs" is confined only to (i) hired equipment such as the vessel Jan-Steen, Vibro-Core equipment and Crane and (ii) purchased equipment.

35. Before testing the validity of the challenge made by the

petitioner to the award of abortive costs, it is necessary to have certain dates and sequence of events. They are as follows:-

- 7.8.1997 - Date of commencement of the contract.
- 22.8.1997 - Date of execution of the contract.
- 2.5.1998 - Request for deletion of the work of compaction.
- 21/22.8.1998 - Pilot Compaction Test
- 27.8.1998 - Jan-Steen was demobilised
- 24.11.1998 - Variation Order No.C4.16 indicating (i) additional work items and (ii) deleted work items.

36. It is seen from a letter dated 2.5.1998 issued by the Engineer to the first respondent that they claimed to have received a request for deletion of compaction in October 1997. But, by a letter dated 6.5.1998, the first respondent denied the same and stated that the letter of the Engineer dated 2.5.1998 alone would be taken as an instruction to stop further mobilisation of the compaction equipment. Therefore, the deletion of the work of compaction, even according to the first respondent, could be taken to have happened at least on 2.5.1998. The vessel Jan-Steen was demobilised on 27.8.1998, after completion of Pilot Compaction Test and this fact is confirmed by the Minutes of the meeting held on 28.8.1998, filed as one of the documents. Thereafter, a Variation Order No.C4.16 was issued on 24.11.1998, indicating (i) additional work items and (ii) deleted work items. The additional work items were – (i) Pilot compaction to the sand backfill to

the Head of the South Breakwater, including mobilisation and demobilisation and carrying out tests before and after trial compaction, (ii) Revised Bill of Quantities Items 1.125A and 1.132A plus additional items 16.01 to 16.08 and (iii) Revised Technical Specification Sub-clause Nos.605.6A and 605.7A. The deleted work items were – (i) 1.125-Mobilisation of equipment and vessels required for compaction of fill in dredged trenches, (ii) 1.132-Demobilisation of equipment and vessels required for compaction of fill in dredged trenches, (iii) 3.105-Compaction of placed sandfill in South Breakwater trench, (iv) 3.106-Compaction of placed sandfill in North Breakwater trench and (v) Technical Specification Sub-clause Nos.605.6 and 605.7.

37. A perusal of the contents of paragraph 2.1.9 of the statement of claim filed by the first respondent before the Arbitral Tribunal (under the heading "contractual basis of claim") shows that even admittedly, there was no provision in the contract for claiming abortive costs. Clause 52.1 of the General Conditions of Contract, extracted in para 2.1.9 of the statement of claim filed by the first respondent, contemplates 3 methods for determining any addition to the contract price. The first method of evaluating an additional item of work carried out due to any variations as per Clause 51, is to just adopt the rates and prices set out in the contract itself, if in the opinion of the Engineer, the same are applicable. The second method of evaluation is to take the rates and prices fixed under the contract as the basis for arriving at a fair rate/price. If both these methods fail, the Engineer

is conferred with the power to fix the rates and prices, which in his opinion, are appropriate. This is the third method of evaluation, prescribed under Clause 52.1 of the General Conditions, as extracted by the first respondent themselves in para 2.1.9 of their statement of claim.

38. It is admitted by the first respondent in para 2.1.9 of their statement of claim that the contract does not prescribe any rates or prices which would reimburse the contractor of the abortive costs. Therefore, the claim for abortive costs, made by the first respondent, was virtually in the nature of "damages", which could fall under Section 73 of the Contract Act, 1872. Keeping in mind this fundamental nature of the claim for abortive costs, we have to see if the challenge to the award is sustainable under Section 34.

39. Section 73 of the Contract Act, 1872, entitles a party who suffers by the breach of a contract, to receive compensation for any loss or damage which naturally arose in the usual course of things from such breach or which the parties knew even at the time of making the contract, to be likely to result from the breach of it. But it is made clear by Section 73 that such compensation cannot be given for any remote or indirect loss or damage. The Second Part of Section 73 confers a similar right even in respect of quasi contracts (obligations resembling those created by contracts). The Explanation to Section 73 makes it clear that in estimating the loss arising from breach of contract, the means which existed of

remedying the inconvenience caused by the non-performance must be taken into account.

40. On the purport of Sections 73 and 74 of the Indian Contract Act, 1872, the Supreme Court held as follows in **ONGC Ltd v. Saw Pipes Ltd [2003 (5) SCC 705]**:

"(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

(4) In some contracts, it would be impossible for the Court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the Court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation."

41. If we look at the facts of the case on hand, keeping in mind the principles behind Sections 73 and 74, it could be seen ***that fundamentally there must be a breach of contract, to enable a party to claim damages. But in this case, what had actually happened was only an alteration of the terms of the contract and not a breach of the contract.*** One of the items of the contract viz., the work of compaction was deleted from the items of work to be performed, even while adding new items. Such variation in the terms of the contract had happened with the consent of the first respondent and hence the case would only fall under Section 62 of the Contract Act and not under Sections 73 and 74.

42. Section 62 of the Contract Act, 1872, dealing with the effect of novation, rescission and alteration of contract states that if the parties to a contract agree to substitute a new contract for it or to rescind or alter it, the original contract need not be performed. In this case, there was only a variation in the terms of the contract, by the deletion of the work of compaction. The fact that the deletion of compaction work amounted to variation, is admitted even in para 2.1.9 of the statement of claim made by the first respondent before the Arbitral Tribunal. Admittedly, the deletion of the work of compaction was ordered after the Pilot Compaction Test was carried out.

43. The Variation Order issued by the petitioner, after the Pilot Compaction Test, was accepted by the first respondent and the Vessel Jan

Steen was demobilised by them. Once the Variation Order was accepted, either expressly or impliedly, the case would fall only under Section 62 of the Contract Act, since the primary requirement under Section 62 is the consent of parties and it stands satisfied here.

44. The very fact that the first respondent relied upon Clause 52.1 or in the alternative Clause 53.1 of the Conditions of Contract, in paragraphs 2.1.9 and 2.1.10 of their Statement of Claim, for evaluating the alteration shows that the alteration in the terms of the contract was accepted by the first respondent at least impliedly. Therefore, the case may not really be one under Section 73 of the Contract Act, 1872, which deals only with the effect of breach of a contract. But unfortunately, neither the parties nor the Arbitral Tribunal has ever taken note of this aspect in the entire proceedings.

45. Even if the above aspect is ignored for a moment, it must be remembered that the parties are bound by the terms of the contract. The contract in its varied form prescribed the method of evaluation of the varied terms. This is why, the first respondent sought to peg their claim only on Clause 52.1 or in the alternative Clause 53.1 of the Conditions of Contract, as seen from their pleadings in their Statement of Claim. Therefore, unless the claim for damages falls within the parameters of either of these two clauses, the Arbitral Tribunal would have no power to award damages on general principles.

46. The relevant portions of Clause 52.1 and Clause 53.1 extracted

and relied upon by the first respondent in paragraph 2.1.9 and 2.1.10 of their Statement of Claim read as follows:-

"52.1 ... All variations referred to in Clause 51 and any additions to the Contract Price which are required to be determined in accordance with Clause 52 (for the purposes of this Clause referred to as "varied work"), shall be valued at the rates and prices set out in the Contract if in the opinion of the Engineer, the same shall be applicable. If the Contract does not contain any rates or prices applicable to the varied work, the rates and prices in the Contract shall be used as the basis for valuation so far as may be reasonable, failing which, after due consultation by the Engineer with the Employer and the Contractor, suitable rates or prices shall be agreed upon between the Engineer and the Contractor. In the event of disagreement the Engineer shall fix the rates or prices as are, in his opinion, appropriate and shall notify the Contractor accordingly, with a copy to the Employer. Until such time as rates or prices are agreed or fixed, the Engineer shall determine provisional rates or prices to enable on-account payments to be included in Certificates issued in accordance with Clause 69 .."

"53.1 ... Notwithstanding any other provisions of the Contract, if the Contractor intends to claim any additional payment pursuant to any Clause of these Conditions or otherwise, he shall give notice of his intention to the Engineer, with a copy to the Employer, within 28 days after the event giving rise to the claim has first arisen .."

47. It is admitted in para 2.1.13 of the Statement of Claim filed by the first respondent before the Arbitral Tribunal that a claim for abortive

costs was actually made to the Engineer, vide their letter dated 22.2.1999. The Engineer did not agree to allow the claim for abortive costs. However, the Disputes Review Board allowed a part of the claim, but the same was not accepted by the petitioner.

48. Though the Engineer rejected the claim for abortive costs, he allowed for Pilot Compaction Test and mobilisation and demobilisation charges, by the Draft Variation Order. Since the parties are bound by Clauses 52.1 and 53.1 of the Conditions of Contract, the parties were bound to accept the rate fixed by the Engineer, as per the relevant portions of these Clauses extracted above. Since the Arbitral Tribunal is the creature of contract between the parties, it cannot ignore the specific terms of the contract. If it ignores, it would amount to jurisdictional error, which has to be rectified by the Court, as held by the Apex Court in ***Rajasthan State Mines and Minerals Ltd v. Eastern Engineering Enterprises [1999 (9) SCC 283]***.

49. In para-44 (h) and (j) of the decision in ***Rajasthan State Mines and Minerals***, the Supreme Court held as follows:-

"(h) The award made by the arbitrator disregarding the terms of the reference or the arbitration agreement or the terms of the contract would be a jurisdictional error which requires ultimately to be decided by the Court. He cannot award an amount which is ruled out or prohibited by the terms of the agreement. Because of a specific bar stipulated by the parties in the agreement, that claim could not be raised. Even if it is raised and referred to arbitration because of a wider arbitration clause

such claim amount cannot be awarded as the agreement is binding between the parties and the Arbitrator has to adjudicate as per the agreement. This aspect is absolutely made clear in Continental Construction Co., Ltd., by relying upon the following passage from Alopi Parshad vs. Union of India which is to the following effect: (SCC p.88, para 5)

"There it was observed that a contract is not frustrated merely because the circumstances in which the contract was made, altered. The Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. There is no general liberty reserved to the Courts to absolve a party from liability to perform his part of the contract merely because on account of an un contemplated turn of events, the performance of the contract may become onerous."

(j) The Arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks just and reasonable; the Arbitrator is a Tribunal selected by the parties to decide the disputes according to law."

50. Therefore, the claim for abortive costs, should be considered only in the light of the Variation Order dated 24.11.1998, by which certain items of contract were deleted and certain items included. Consequently, the original contract stood altered and the obligation to perform the original

contract stood substituted with an obligation to perform the new contract, in terms of Section 62 of the Contract Act. Once a party to a contract accepts the alteration in the terms of the original contract, he also accepts the consequences flowing therefrom. The consequences are two fold viz., (i) that the original contract need not be performed as per the stipulations contained therein and (ii) that as a corollary, the party who accepts such alteration, cannot also claim damages.

51. It was open to the first respondent not to accept the Variation Order, but to insist on the performance of the original contract as it stood or in the alternative, to claim damages. Both were not done by the first respondent. On the other hand, the first respondent accepted the Variation Order (i) by performing the additional items of work (ii) by deleting certain items of work and (iii) by carrying out Pilot Compaction Test.

52. The issue can be looked at from another angle also. If there had been no variation in the contract, the first respondent would have carried out the work of compaction. In such a case, there would not have been any necessity to carry out Pilot Compaction Test, since the compaction carried out as per the original contract, would have satisfied the requirement of a Pilot Compaction Test. Now after receiving payment for the Pilot Compaction Test, if the contractor also claims abortive costs, it would no more be a claim under Sections 73 and 74 of the Contract Act, but would be a claim for payment as per the original contract.

53. Therefore, I have no doubt in my mind that the award of abortive costs by the Tribunal in respect of two components, namely (i) hired equipments including the vessel Jan Steen and (ii) purchased equipments, was not correct. But, unfortunately, I am not sitting on an appeal against the award of the Arbitral Tribunal. As I have pointed out in paragraph 28 above, the award could be set aside only if I find that the Arbitral Tribunal committed an error that would fall within Sub-clause (iv) of Clause (a) or Sub-clause (ii) of Clause (b) of Sub-section (2) of Section 34.

54. In other words, I cannot set aside the award of abortive costs, unless I find that the Arbitral Tribunal dealt with a dispute not contemplated by or not falling within the terms of submission to arbitration or it contains decisions on matters beyond the scope of the submission to arbitration. But, that is not the case here. Even before invoking the arbitration clause, the first respondent made a claim before the Engineer who rejected the same. Thereafter, the first respondent made a claim before the Dispute Review Board and got an award for abortive costs. Therefore, this is a case where the claim for abortive costs formed part of a dispute that was always raised by the first respondent and hence, the award cannot be assailed on the basis of Section 34(2)(a)(iv).

55. The case will also not fall under Section 34(2)(b)(ii), since a wrongful award on the basis of an erroneous appreciation of Sections 73 and 74 of the Contract Act, 1872, may not fall under the category of an award

which is in conflict with the public policy of India. Therefore, despite my finding that the Arbitral Tribunal may not be wholly justified in awarding abortive costs, I am unable to set aside the same.

COST OF PRIMARY COMPACTION OF SAND FILL

56. The claim in this regard was made on the ground that the first respondent incurred additional cost for compaction of sand by means of static dumping. According to the first respondent, static dumping involved additional costs and work. Both parties appear to have actually measured and accepted the sand fills for Rs.1.19 per cubic metre.

57. The Engineer as well as the Dispute Review Board rejected the claim under this heading. The Tribunal also found in paragraph 11.1.1 of its award that the initial intention of both parties at the time of tender was that the filling will be done in static condition. It had been done as such. The Tribunal found that because of better quality of sand, there could have been better compaction and that the claimant cannot take advantage of the same and stake a claim for something not done by them. On the basis of such a finding, the Tribunal rejected the claim for primary compaction of sand fill. The first respondent has not come up with a petition as against the said rejection. Therefore, there is no necessity for me to go into this claim.

COST OF CARRYING OUT PILOT COMPACTION TEST

58. As seen from paragraph 12.3.1 of the award of the Arbitral Tribunal, the first respondent was instructed by the Engineer, vide letter

dated 20.7.1998 to carry out the Pilot Compaction Test in an area of 100m in length and the full width of soil improvement area. The Tribunal recorded a finding of fact in paragraph 12.3.2 that as per the records, the Engineer had agreed to value the Pilot Compaction Test in accordance with Clause 52 of the General Conditions of Contract. Payment was also agreed to be made on day work basis.

59. The Engineer himself had valued the work of Pilot Compaction Test based on BOQ rates. It worked out to Rs.3.87 million. The Tribunal found that some of the rates quoted by the first respondent towards wages for crane operators, expatriate labour, etc. were on the high side. Therefore, the Tribunal valued the same on day work basis using the contract rate wherever available. Eventually, the Tribunal arrived at an amount of Rs.96,73,511/-, after taking into consideration various aspects and parameters, such as the rates for such items of work and the inputs shown by the first respondent in their statements PT1 to PT8.

60. In simple terms, the award of costs for carrying out Pilot Compaction Test, was based upon facts and an interpretation of the terms of the General Conditions of Contract. Therefore, there is no scope for me to interfere with the same in a petition under Section 34. Hence, the challenge to the award under this heading should fail.

DISRUPTION TO ROCK DUMPING OPERATIONS

61. The claim under this heading was rejected by the Arbitral

Tribunal on the ground that there was no disruption to rock dumping operation due to Pilot Compaction Test. The first respondent is not before us, challenging the said finding. Therefore, there is no need for me to test the correctness of the said finding.

ESCALATION AND INTEREST

62. The first respondent claimed escalation, not in the first instance when they filed a statement of claim, but only by filing an application for amendment to the original statement of claims. Therefore, the petitioner resisted the claim as barred by limitation as well as on the ground that it was beyond the scope of reference.

63. The Tribunal found that even in the original statement of claim dated 24.7.2001, the first respondent had made a pleading with regard to the necessity to cover escalation at a later date. Therefore, the Tribunal held that the claim for escalation was not time barred. Moreover, Clause 70 of the CPA made it very clear that escalation was incidental to the payment of BOQ items. Therefore, the Tribunal held that the first respondent is entitled to escalation.

64. As pointed out earlier, this finding of the Tribunal will not also fall under the category of an award vitiated in terms of Section 34(2)(a)(iv) or 34(2)(b)(ii). The interpretation by an Arbitral Tribunal, of a contract, cannot be subjected to scrutiny by this Court under Section 34. Therefore, the findings in paragraph 14.2 of the award cannot be interfered with.

65. Insofar as the award of interest is concerned, I have gone through the reasonings given by the Tribunal in paragraphs 15 and 16 of the award. As a matter of fact, the rate of post award interest granted by the Arbitral Tribunal is lesser than the rate stipulated in the statute. Therefore, I find no reason to interfere with the award for payment of interest.

CONCLUSION

66. As I have indicated in paragraph 7 of this order, there are three issues that broadly arose for consideration in this petition under Section 34. The first concerned locus standi of the petitioner to challenge the award. I have answered this in favour of the petitioner. The second issue related to the availability of valid grounds of challenge. In my discussion from paragraphs 22 to 65, I have found that there are no valid grounds to challenge the award. Therefore, as a consequence, the third issue does not arise for consideration.

67. Therefore, in fine, the challenge to the award is bound to fail. Hence, the original petition is dismissed. No costs.

25-4-2016

Index : Yes or No
Internet : Yes or No

Svn/kpl/RS

V.RAMASUBRAMANIAN,J

Svn/kpl/RS

Order in
O.P.No.694 of 2007.

25.4.2016

Original Petition No.694 of 2007

V.RAMASUBRAMANIAN,J

After orders were pronounced, a request was made by Mr.R.Karthikeyan, learned counsel appearing for Chennai Port Trust, which is the fifth respondent herein, to clarify that in the event of the award attaining finality, the same has to be executed only as against the petitioner herein, namely Ennore Port Limited. But, this request is opposed by Mr.T.K.Baskar, learned counsel for the first respondent on the ground that the original agreement dated 22.8.1997 was entered into only with the Chennai Port Trust.

2. However, I have rejected the objection of the first respondent to the locus standi of the petitioner to challenge the award, on the ground that by a Memorandum of Understanding dated 30.01.2002, the assets and liabilities relating to Ennore Port devolved upon the petitioner. I have also found that the original contract contained an in built provision for the successors-in-title of both parties to enforce the contract against each other.

3. Therefore, in the light of my findings on the first issue, there is no need for me to deal with the present request. I leave it open to both parties to raise all issues at the stage of execution.

25.4.2016.

kpl

V.RAMASUBRAMANIAN,J

Original Petition No.694 of 2007.

25.4.2016.