

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : **23.08.2016**

CORAM:

THE HONOURABLE MR.JUSTICE A.SELVAM
and
THE HONOURABLE MR.JUSTICE P.KALAIYARASAN

O.S.A.No.320 of 2008

HCC Van Oord ACZ Joint Venture
Hincon House, L.B.S. Marg,
Vikhroli (W), Mumbai 400 083,
Rep. by Mr.M.Parameshwaran

.. Appellant

Vs.

1. Ennore Port Limited
New No.15 (Old No.8),
Kasthuri Rangan Road,
Alwarpet, Chennai - 600 018,
Now changed at
P.T.Lee Chengalvaraya
Naicker Maaligai (1st Floor),
No.23, Rajaji Salai,
Chennai - 600 001.

2. Shri.M.C.Bhide

3. Shri.O.P.Goel

4. Shri.M.Velu

..Respondents

Original Side Appeal under Clause 15 of the Letters Patent read with Order XXXVI Rule 1 of Original Side Rules, to set aside the Order, dated 01.08.2008 made in O.P.No.258 of 2005 on the file of this Court.

For appellant : Mr.G.Masilamani, Senior counsel
for Mr.D.Balaraman

For respondents : Mr.K.Manoj Menon for R1
Arbitrators - R2 to R4

J U D G M E N T

(Judgment of the Court was delivered by
P.KALAIYARASAN, J)

This Original Side Appeal is directed against the order of the learned single Judge, dated 01.08.2008 made in O.P.No.258 of 2005, setting aside of the award of the Arbitral Tribunal.

2. The first respondent / petitioner awarded contract for construction of the breakwaters for the Ennore Port Project to the appellant. The contract was entered into on 22.08.1997. The works to be executed under the contract comprised of the construction of the North and South breakwaters. The rocks to be used for the construction of the two breakwaters was provided to the appellant at the stock pile in the Ennore Port.

3. The contract for quarrying and transporting the rocks from the quarry at Karikkal village near Arakkonam to the Ennore Port site was awarded to M/s. Hindustan Construction Company Ltd., under C1 Contract.

4. The terms of the agreement was that on the removal of the rocks from the stock pile on the basis of the weight measured in

the weigh bridge kept, the cost of the rock would be calculated at the rate of Rs.250/- per tonne and deducted from contractors monthly statement. The payment to the contractor were governed by the provisions set out in the conditions of particular applications on the basis of the volume of the work determined in accordance with the measuring principles enunciated in the contract. The execution of the work under the C4 contract is a separate contract from that of supply of rock.

5. During the course of execution of the work, which was almost an year after the awarding of the contract, the appellant wanted tests to be conducted on the rocks stating that the specific density of the rocks had increased. The Engineer rejected the said request on the ground that the specific density of rocks were not relevant to the contract and further, it was not technical specification prescribed in the contract. The appellant raised a dispute and made a claim for a sum of Rs.10,07,36,760/- before the Dispute Review Board (DRB) constituted under the agreement and also sought an extension of time of 90 days for completion of the work. As per the contract, work is to be completed by 15.08.2000. The DRB held that the appellant was entitled to a sum of Rs.4,75,29,491/- together with interest at 18% p.a, towards the

cost said to have occurred due to the increase in the specific density of rocks and also recommended for extension of time of 90 days for completion of the work. The recommendation of the DRB was not accepted by the first respondent herein.

6. The first respondent moved this Court with an application under Section 43(3) of the Arbitration and Conciliation Act, 1996, to condone the delay in issuing the notice of its intention to commence arbitration proceedings and the same was allowed. The appellant thereupon filed its statement of claim before the learned Arbitrators.

7. The learned Arbitration Tribunal passed an award directing the first respondent to pay the appellant a sum of Rs.1,75,78,750/- together with interest at 12% p.a., from 16.07.2000 and also extended time of 27 days for completion of the work.

8. The first respondent / employer filed Original Petition before the learned single Judge under Section 34 of the Arbitration and Conciliation Act. The learned single Judge, after analysing the Contract, Arbitral Award and divergent contentions found that the

learned Arbitral Tribunal misdirected itself in its view that density was a vital data in the matter of assessing the contractual obligations and allowed the Original Petition.

9. The learned Senior counsel appearing for the appellant contends that the specific density of rock is the specification under the technical specification of the contract; that due to supply of rock with increased density by the employer, which is varied from the contractual obligation caused additional loss to the appellant / contractor; that the technical specification in the contract are mainly relating to the execution work by the appellant / contractor and it did not provide the mechanical properties of rock. The data relating to the properties of the rock were provided by the employer under Clause 11.1 of the General Conditions of the Contract (GCC), 11.2 of Conditions of Particular Applications (CPA) of contract and also during the pre-bid clarifications. It is also contended that the learned single Judge, reappraised the entire claim and materials under the Award, which is not permissible under Section 34 of the Arbitration and Conciliation Act, 1996. It is further contended that the DRB consisting of three Engineers and Arbitral Tribunal consisting of another three Engineers, who are experts in the field, unanimously held that the density of the rock is the vital contractual

requirement, which is purely a technical issue, ought not to have been interfered with by the Court.

10. The learned counsel appearing for the first respondent inter alia contends that the learned single Judge, after analysing the terms of the contract and the award has rightly found that specifications prescribed in the contract does not mention about the density of rocks and the Arbitral Tribunal has gone outside the contract. It is further contended that the learned single Judge has rightly interfered with the Award, as Tribunal's interpretation of the terms of the contract amounts to legal misconduct.

11. The learned Senior counsel for the appellant cited, Associate Builders v. DDA, reported in (2015) 3 SCC 49, for the proposition that interpretation of a contract is a matter for the arbitrator to determine even if it gives rise to the determination of a question of law and if an Arbitrator construes a term of contract in reasonable manner, the Award cannot be set aside. In the said Judgment, the Hon'ble Supreme Court has held thus :

"42. In the 1996 Act, this principle is substituted by the 'patent illegality' principle which, in turn, contains three sub heads -

42.1. (a) A contravention of the substantive law of

India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is a really a contravention of Section 28(1) (a) of the Act, which reads as under:

"28. Rules applicable to substance of dispute.-(1) Where the place of arbitration is situated in India,- (a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"

42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality- for example if an arbitrator gives no reasons for an award in contravention of Section 31 (3) of the Act, such award will be liable to be set aside.

42.3. (c) Equally, the third sub-head of patent illegality is really a contravention of Section 28 (3) of the Arbitration Act, which reads as under:

"28. Rules applicable to substance of dispute.- (3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

This last contravention must be understood with a caveat. An arbitral tribunal must decide in accordance with the terms of the contract, but if

an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do.

43. In *McDermott International Inc. v. Burn Standard Co., Ltd.*, (2006) 11 SCC 181, (2006) 11 SCC 181, this Court held as under:

"112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. (See *Pure Helium India (P) Ltd. v. ONGC* [(2003) 8 SCC 593] and *D.D.Sharma v. Union of India* [(2004) 5 SCC

325]).

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award."

12. The learned counsel appearing for the first respondent placed reliance on the following rulings of the Hon'ble Supreme Court (i) ONGC Ltd., v. Western Geco International Ltd., reported in (2014) 9 SCC 263; (ii) M/s. Sree Kamatchi Amman Constructions v. The Divisional Railway Manager / Works, Palghat Division and others, reported in 2007-4-LW 379 and (iii) ONGC Ltd., v. Garware Shipping Corpn., Ltd., reported in (2007) 13 SCC 434, for the propositions

(i) The three distinct fundamental, distinct and non-exhaustive juristic principles have been identified by Hon'ble Supreme Court as forming part of the Fundamental policy of India - (i) Arbitrator should adopt judicial approach; (ii) comply with the principles of natural justice, more importantly applying his mind to attendant facts and circumstances; and (iii) Decision is not so perverse or irrational that no reasonable person would have arrived at - Wednesbury principles of reasonableness.

(ii) Where fundamental terms of the agreement are ignored by the Arbitrator, the Arbitrator exceeds his jurisdiction, even where the jurisdiction clause is widely worded.

(iii) If the Award contains perverse conclusions and even very basis of the Award is wrong then interference by the Court is warranted.

13. From the above rulings, it is to be borne in mind that if the Arbitral Tribunal is not deciding the dispute in accordance with the terms of the contract and if any interpretation is unreasonable or if fundamental terms of contract is ignored, the Court can interfere under Section 34 of the Arbitration and Conciliation Act, 1996.

14. In this case, the claim made by the first respondent / contractor is mainly on the basis of density of rocks, it took for the execution of the work. Therefore, whether density of rocks is prescribed in the specification under the contract between the parties is to be looked into. There is no dispute that the first respondent / contractor took two different contracts, one for supply of rocks under C1 contract and another for execution of work under C4 contract. The dispute is with respect to the C4 contract.

15. Under this contract, the contractor undertook construction of the North and South breakwaters. The rocks to be used for the construction of two breakwaters was provided to the contractor at the stock pile by the appellant employer. The terms of the contract was that on the removal of rocks from the stock pile on the basis of the weight measured in the weigh bridge kept, the cost of the rock would be calculated at the rate of Rs.250/- per tonne and deducted from the contractors monthly statement.

16. According to the learned senior counsel for the appellant cumulative analysis of the pre-bid conclusion, technical specifications and tests held through L&T will lead to construe that the terms of contract emphasize on the density of the rock.

17. Clause 1.1 of the General conditions of Contract provides the definition of "specification", which reads thus:

"1.1 (ii) "Specification" means the specification of the works included in the contract and any modification there of or addition thereto made under clause 51 or submitted by the contractor and approved by the Engineer."

18. Any modification of the bidding document as a result of the pre-bid meeting shall be made by the employer through an addendum pursuant to clause 11 and not through minutes of the pre-bid meeting.

19. Clause 19.4 of instructions to Bidders provide thus :

"Minutes of the meeting, including the text of the questions raised and the responses given, will be transmitted without delay to all purchasers of the bid documents. Any modification of the bidding documents listed in Sub-clause 9.1 which may become necessary as a result of the pre-bid meeting shall be made by the Employer exclusively through the issue of an Addendum pursuant to Clause 11 and not through the minutes of the pre-bid meeting."

20. In the pre-bid meeting minutes, dated 24.09.1996, it is clearly mentioned that the minutes are a record of the pre-bid meeting only and do not constitute any modification of the bidding documents. Unless there is addendum to the terms of contract pursuant to the decision of pre-bid meet, it will not form part of the contract. However, perusal of the pre-bid details does not lead to

infer that either party considered density as a matter of specification to be binding on both parties. The clarifications made in the pre-bid meet are with regard to the mechanical properties, query as to whether contractor would find unsuitable rock, the specified rock gradings and the rates to any additional rock placing on account of sinkage. The technical specifications do not emphasize on the density of the rock.

21. It is to be pointed out that pre-bid meeting is only to clarify the doubts before participating in the bid. Even in that pre-bid meeting, the contractor had not raised any query to consider the density of the rock as specification in the contract. The work under the contract does not depend on the density but solely on the rock supplied with gradings given under the table. If there is non-supply or supply of rock with faulty character, then the contractor is entitled to question.

22. Another contention of the appellant is that the density of the rock was tested through L & T and test was also conducted by the IIT, Kharagpur. The test conducted by the IIT, Kharagpur was made without prejudice to its contention. The report of the L&T was no doubt furnished before bidding. The report of the L&T along with

other particulars were furnished to the contractor to form its interpretation and participate in the bid. Even in the pre-bid meeting as already pointed out, the contractor has not raised the issue of density. Therefore, as per the specifications, the density of the rock is not considered as vital one. Therefore, the learned Arbitral Tribunal had gone beyond the terms of the contract by interpreting the clause "Specification" in an unreasonable manner.

23. The contention of the learned Senior counsel for the appellant that interpretation of the DRB and Arbitral Tribunal consisting of totally six experts need not be interfered with cannot be accepted, in the light of the above findings of this Court. It is to be pointed out that experts interpreted the contract, contrary to the terms of the contract.

24. For the aforesaid reasons, this Court is of the considered view that the learned single Judge has rightly interfered under Section 34 of the Arbitration and Conciliation Act, 1996 and set aside the Award.

In fine, this Original Side Appeal is dismissed, confirming the order of the learned single Judge, dated 01.08.2008 made in O.P.No.258 of 2005. No costs.

(A.S.,J.) (P.K.,J)
23-08-2016

Index : Yes / No

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**A.SELVAM,J.
AND
P.KALAIYARASAN,J.**

tsvn

**Judgment
in O.S.A.No.320 of 2008**

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