

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : **20.10.2016**

CORAM:

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

O.S.A.No.353 of 2008

M/s. Bass Constructions
By its Proprietrix,
Sushila Brij Mohan,
No.83, Dr.Radhakrishnan Salai,
Mylapore, Chennai - 600 004.

.. Appellant

Vs.

1. The Board of Trustees of the
Port of Madras,
Rajaji Salai,
Chennai - 600 001.
2. The Chief Engineer
Rep. by Mr.Chellappan,
Chennai Port Trust,
Rajaji Salai, Chennai - 600 001.
3. The Hon'ble Mr.Justice K.Swamidurai
Retd. Judge, High Court, Madras,
YMCA Buildings, NSC Bose Road,
Sole Arbitrator.

..Respondents

Original Side Appeal filed under Clause 15 of the Letters Patent read with Order XXXVI Rule 1 of Original Side Rules against the Judgment and Decree, dated 07.08.2008 made in O.P.No.46 of 2004.

For appellant : Mr.M.Venkatachalapathy,
Senior counsel
for Mr.M.Sriram

For respondents : Mr.P.Wilson, Senior counsel for
Mr.J.Sathya Narayana Prasad for R1
R2 - Dismissed for default
R3 - Arbitrator

JUDGMENT

(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 07.08.2008 made in O.P.No.46 of 2004 wherein the Award passed by the learned Arbitrator has been set aside under Section 34 of the Arbitration and Conciliation Act, 1996.

2. The facts leading to the present appeal in nutshell are as follows :

(i) The work of construction of Revetment from North of sand screen up to southern side pillar was entrusted to the appellant herein by the work order, dated 09.02.1993 by the respondent-Port Trust. An agreement was entered into on

29.09.1993. The contract was for a period of two years and the total estimate of the work was Rs.2,52,02,915/-. The project of constructing the site revetment requires placing of armour stones (Heavy stone weighing 2 to 3 tonnes and above). The total quantity of armour stones required was about 46,500 tonnes. The quantity available in TAMIN quarry was only 15,000 tonnes.

(ii) The appellant / contractor could not succeed in getting the necessary stones. This led to a delayed execution and total completion cost after lapse of 5 years comes to Rs.1,60,60,294.41/- The delayed execution led to cost escalation resulting in claims under different heads, viz., (i) transportation; (ii) retrieval of armour stones near F.C.I Godown; (iii) escalation due to longer period of the contract; (iv) payment of idle time charges; (v) loss due to rough monsoon and cyclonic seasons for five years instead of two years; (vi) loss due to overheads for extra period of two years; (vii) loss due to corrosion of machinery and equipment due to proximity of the seashore for a longer period of three years; (viii) loss due to excess interest on mobilisation advance over a longer period and (ix) interest on the amounts as per the above claims.

3. The learned Arbitrator pointing out the difficulties meted out by the contractor in acquiring armour stone and all other aspects, awarded Rs.1,70,00,000/- under the above said claims excepting the claim No.5-monsoon and claim No.7-corrosion of machinery. Aggrieved by the said Award, Port-Trust filed Original Petition under Section 34 of the Arbitration and Conciliation Act, 1996.

4. The learned single Judge, after hearing the rival contentions of both sides and considering the award and terms of contract concluded that the Award is not based on the appreciation of contract clauses or any material of evidentiary value and the findings are not based on appreciation of evidence in terms of the contractual clauses and the findings of fact do not rest on the relevant provisions of the contract. Therefore, the learned single Judge set aside the award invoking the jurisdiction under Section 34 of the Act. Against the order of the learned single Judge, the claimant as appellant has preferred this appeal.

5. The learned Senior counsel appearing for the appellant / claimant contends that none of the grounds stipulated under

Section 34 of the Arbitration and Conciliation Act are available for setting aside award and despite the same, the Award was set aside; that the appellant can maintain the claim as there was change of circumstances in procuring of armour stones due to issuance of ban by the Tamil Nadu Government in procuring such stones; that the delay can never be attributed on the part of the appellant; that the total ban for procuring the armour stones was not visualised at the time of entering into a contract and therefore, the quoting of price is only on then prevailing circumstances; that due to extension of contract for a period of three years and 8 months there was escalation of cost and therefore, the learned Arbitrator after considering the entire facts in terms of contract, awarded the claim and the order of the learned single Judge setting aside the award is not correct.

6. The learned senior counsel appearing for the first respondent per contra contends that as per the terms of the contract, the contractor shall maintain adequate stock of stones and extension of time will not bestow on the contractor any claim or compensation and the award passed by the learned Arbitrator is contrary to the terms of the contract and the learned single Judge has rightly set aside the award. He further argued that in this case,

the Arbitrator has passed the award against the terms of the contract, which is patently illegal and therefore, the award is liable to be set aside under Section 34(2) (a) (v) of the Arbitration and Conciliation Act, 1996 and the learned single Judge has rightly invoked the jurisdiction in this case.

7. The learned Senior counsel appearing for the appellant cited the Judgment of the Hon'ble Supreme Court, M/s. Harish Chandra & Company v. State of U.P, through Superintending Engineer (S.L.P (C) No.24443 of 2007). This Judgment deals with the question of illegal misconduct in the context of Section 30 of Act, 1940 (Repealed Act). The learned Senior counsel also cited Associate Builders v. DDA, reported in (2015) 3 SCC 49.

8. The learned Senior counsel appearing for the first respondent cited (i) ONGC Ltd., v. Western GECO International Ltd., reported in (2014) 9 SCC 263; (ii) McDermott International Inc. v. Burn Standard Co., Ltd., reported in (2006) 11 SCC 181 and (iii) ONGC Ltd., v. Saw Pipes Ltd., reported in (2003) 5 SCC 705.

9. As per the rulings cited by both sides, it is clear that as per the Arbitration and Conciliation Act, 1996, an arbitral award

governed by Part I of the Act can be set aside only on the grounds mentioned under Section 34(2) and (3) and not otherwise.

10. As we are concerned in this case as to whether the award was passed in contravention of the terms of the contract, it is suffice to quote the propositions laid down by the Hon'ble Supreme Court as to patent illegality.

11. In **Associate Builders v. DDA**, reported in **(2015) 3 SCC 49**, it has been held by the Hon'ble Supreme Court as follows :

"IV. Patent Illegality

The fourth head of public policy, namely, is patent illegality. It must be remembered that under the Explanation to Section 34(2)(b)(ii) of the 1996 Act, an award is said to be in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption. This ground is perhaps the earliest ground on which courts in England set aside awards under English law. Added to this ground (in 1802) is the ground that an arbitral award would be set aside if there were an error of law by the arbitrator.

Champsey Bhara Co. v. Jivraj Balloo Spg. and

Wvg. Co., Ltd., AIR 1923 PC 66 : (1922-23) 50
IA 324 : 1923 AC 480 : 1923 All ER Rep 235
(PC), relied on

R. v. Northumberland Compensation Appeal
Tribunal, ex p. Shaw, (1952) 1 All ER 122 :
(1952) 1 KB 338 (CA), approved

Kent v. Elstob, (1802) 3 East 18 : 102 ER 502;
Hodgkinson v. Fernie, (1857) 3 CB (NS) 189 :
140 ER 712; Jivraj Baloo Spg. and Wvg. Co.,
Ltd., v. Champsey Bhara and Co., ILR (1920)
44 Bom 780 cited.

In the 1996 Act, the principle stands as the
"patent illegality" principle which, in turn,
contains three sub-heads :

(i) A contravention of the substantive law of
India would result in the death knell of an
arbitral award. Violation of Indian statutes i.e.,
the award which is, on the face of it, patently
in violation of statutory provisions cannot be
said to be in public interest. Such award /
judgment / decision is likely to adversely affect
the administration of justice and would be
regarded as being contrary to the fundamental
policy of Indian law. Furthermore, the binding
effect of the judgment of a superior court
being disregarded would be equally violative of
the fundamental policy of Indian law. 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 1996 Act.

(ii) Contravention of A&C Act, 1996

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 1996 Act, such award will be liable to be set aside.

(iii) Contravention of the terms of the contract

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. Thus, the third sub-heads of patent illegality is really a contravention of Section 28(3) of the Arbitration Act. This 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."

12. In **McDermott International Inc v. Burn Standard Co., Ltd.**, reported in **(2006) 11 SCC 181**, it has been held as follows :

"The arbitral award can be set aside, if it is contract to (a) fundamental policy of Indian law; (b) the interests of India; (c) justice or morality; or (d) if it is patently illegal or arbitrary. Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Lastly, where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute, would come within the purview of Section 34 of the Act."

13. In **ONGC Ltd v. Saw pipes Ltd.**, reported in **(2003) 5 SCC 705**, the Hon'ble Supreme Court has held as follows :

"15. The result is - if the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered under Section 34.

However, such failure of procedure should be patent affecting the rights of the parties."

14. Thus it is clear from the above Judgments of the Hon'ble Supreme Court that if the award is contrary to the terms of the contract affecting the rights of the parties, it would be patently illegal and the same could be interfered under Section 34 of the Act.

15. The important Clauses of the contract required for just decision of the case are referred below :

"Clause 14 : Supply of plant, materials and labour : (a) Except where otherwise specified in the contract, the contractor shall at this own expense, supply and provide all the constructional, plant temporary works, materials both for temporary and for works under the contract, labour (including the supervision thereof) transport to or from the site and in and about the works and other things of every kind required for the construction, completion and maintenance of the works.

(b) The contractor shall not hire out any item of plant or equipment brought by him in connection with the execution of the work

under the contract to any other party in connection with any work of the latter in the Port. Without the written permission of the Chairman, such permission may or may not be granted by the Chairman.

Clause 7 of Schedule 'B' : The contractor shall maintain adequate stocks of stones of various categories so as to enable them to comply with all demands which may be made up on them under this contract.

Clause 7 of Schedule 'C' : If the progress of work is held up owing to circumstances which in the opinion of the Chief Engineer are beyond the control of the contractor, such as war, stormy weather and other reasonable causes, the Chief Engineer may, at his discretion, grant to the contractor such extension of time as he considers reasonable for the completion of the work. The grant of such extension of time will not bestow on them any claim or compensation / extra payment at a future date whatsoever.

Clause 8 of Schedule 'B' : Delivery of stones will not be considered complete until the stones are delivered and accepted at unloading and at Harbour and are conveyed and placed in position.

Clause 9 of Schedule 'D' : The contractor shall make their own arrangements for the stones

and stone metal required including quarrying, handling, loading, transporting the stones and stone metals. No quarry will be spared by the Board.

The contractor shall ensure that only the quantities that are required to be issued in the works above shall be retrieved from the existing and screen and East Quay. In case of any disturbances in the other area, the same shall be made good by the contractors at no extra cost."

16. All the claims have been made by the appellant mainly on the basis of extension of the period of contract. The work is expected to be completed within two years but the period of contract was extended and the work was completed after five years. There is no dispute that the appellant / claimant requested the Port Trust for extension of time in its letters, dated 20.10.1995 and 20.04.1998 and the period of contract was also extended by the Port Trust. The appellant / claimant has not attributed the cause of delay on the respondent-Port Trust.

17. The contentions of the appellant / claimant before the learned Arbitrator are that due to ban issued by the Government of Tamil Nadu, the claimant could get the armour stones from the

place at a distance of 70 kms instead of 40 kms; that the claimant had to spend more amount for retrieval of armour stones and that there was loss and escalation of price for the extended period of contract.

18. It is pertinent to note that Clause 7 of Schedule 'C' of the agreement specifically says that grant of extension of time will not bestow on the contractor any claim or compensation / extra payment at a future date whatsoever. Even when the request was made by the claimant for extension of time, the Port Trust while granting of extension of time specified that the same would not bestow upon the contractor for any right to claim for compensation / extra payment at a future date whatsoever.

19. The learned Senior counsel appearing for the appellant brought to the notice of this Court the letters issued by the Port Trust to the authorities concerned requesting to allot quarry with specifications to enable the claimant to procure the armour stones and contended that the Port Trust having accepted the delay and distance made a request to the authorities. The letters cited by the appellant were sent by the Port Trust only to facilitate the contractor to get the armour stones with specifications for supply as per the agreement. The above said facilitating letters

does not give any right to the claimant as contended.

20. Clause 9 of Schedule 'D' specifies that the contractor shall make their arrangements for the stones and stone metal required including quarrying, handling, loading, transporting the stones and stone metal and no quarry will be spared by the Board. Therefore, the appellant / contractor agreed quarrying and transporting the stones to the work spot. Clause 7 and 8 of Schedule 'B' specify that the contractor shall maintain adequate stocks of stones of various categories so as to enable them to comply with under the contract. As per Clause 14 of Schedule 'C' of the agreement, the contractor shall at his own expense supply and provide all materials for works under the contract.

21. It is not the case of the appellant / claimant that distance of the quarry was mentioned in the contract and he could get the stones from a longer distance than the distance so mentioned. Having agreed as per the contract to bring the materials at his cost, the appellant cannot make a claim saying that he could get the stones at a longer distance due to the ban order issued by the Government of Tamil Nadu.

22. It is to be noted that the respondent-Port Trust is no way responsible for bringing the armour stones from a distance of 70 kms. Having gone through the tender and entered into a contract accepting the terms therein, the appellant / claimant cannot claim enhanced amount under the guise of distance and transportation.

23. As far as Claim No.2-Retrieval of armour stones, the appellant / claimant contended before the learned Arbitrator that they were forced to accept for the retrieval of the stones at the agreed rate. The Port Trust in its letter, dated 10.07.1994 had stated that the armour stones from nearby F.C.I Godowns inside the Madras Port Trust might be retrieved at the agreed rate. The letter further says that no extra amount could be claimed by the claimant for the retrieval of the stones. The appellant / claimant also retrieved the stones. Now the appellant / claimant seeks enhanced rate saying that they did the work by accepting the letter of the Port Trust under coercion. Having done the work in 1994, the appellant / claimant has made allegation of coercion in 1999 before the learned Arbitrator for the first time. Therefore, the above enhanced claim is contrary to the above mentioned agreement between the parties.

24. Regarding Claim No.3 as to payment for escalation for the extended period of contract, as already pointed out, the delay was not caused by the respondent-Port Trust. As requested by the appellant / claimant, the Port Trust extended the time. As already noted Clause 7 of Schedule 'C' specifically provides that extension of time will not bestow on the contractor any claim or compensation / extra payment at a future date whatsoever. Therefore, the payment for escalation for the extended period of contract by the learned Arbitrator is also contrary to the terms of the contract.

25. As far as idle charges, loss due to overheads for the extended period, the claim cannot be made as there are clauses in the terms of contract prohibiting such a claim. As already pointed out under the guise of extended period, the appellant / claimant cannot claim any compensation or charges. In Schedule A Part II (A), there is a specific clause, which reads thus :

"The contractor cannot claim any compensation for idling of plant, labour, corresponding overhead charges, loss etc."

Therefore, the claim awarded under the head of Idle charges, loss due to overhead charges for the extended period is contrary to the

terms of the contract.

26. As far as the claim of interest for mobilisation advance, it is also contrary to the terms of the contract.

27. Thus, the Arbitrator has gone contrary to the terms of the contract and granted relief, which is patently illegal. It undoubtedly affects the rights of the parties. If a party suffers by any breach, will be entitled to receive compensation for any loss which naturally arises in the usual course of things from such breach under Sections 73 and 74 of Contract Act. Here, it is not the case of the appellant / claimant that the respondent-Port Trust breached the contract thereby the appellant suffered loss.

28. As the award is patently illegal, the learned single Judge has rightly invoked the jurisdiction under Section 34 of the Arbitration and Conciliation Act and set aside the Award and this Court does not find any reason to interfere with the orders of the learned single Judge and accordingly, this Original Side Appeal is liable to be dismissed.

In fine, this Original Side Appeal is dismissed, confirming the order of the learned single Judge, dated 07.08.2008 made in O.P.No.46 of 2004. No costs.

(A.S.,J.) (P.K.,J)
20-10-2016

Index : Yes
tsvn

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

tsvn

Judgment
in O.S.A.No.353 of 2008

20-10-2016