

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

MONDAY, THE 24TH DAY OF JULY 2017

THE HON'BLE DR. JUSTICE ANITA SUMANTH

A. Nos.2947 and 2948 of 2017

in

O.P. Nos.360 and 361 of 2017

Disputes arising under the Agreement between M/s.Transtunnelstroy -Afcons (JV) and M/s.Chennai Metro Rail Limited Dated 31/01/2011- Design and Construction of underground stations at Washermanpet, Mannadi, High Court, Chennai Central and Egmore and associated tunnels-contract No.UAA01- Reference No.2 and Arbitration under the Arbitration and Conciliation Act, 1996(as amended in 2015)

M/s. Chennai Metro Rail Limited,
Administration Building,
Chennai Metro Rail Depot,
Poonamalle High Road,
Koyambedu, Chennai-600 107.

..Applicant/Petitioner
(in A. Nos.2947 and 2948 of 2017
in O.P. Nos.360 and 361 of 2017)
-Vs-

M/s.Transtunnelstroy -Afcons (JV)
represented by Afcons Infrastructure Limited
and comprising:

1. Transtunnelstroy Limited,
4/1 Luganskaya Str,
Moscow, 115583,
Russia.

2. Afcons Infrastructure Limited,
Afcons House,
16, Shah Industrial Estate,
Veera Desai Road, Azad Nagar (P.O),
Post Box No.11878, Andheri(W)

Mumbai-400 053.

...Respondents/Respondents
(in A. Nos.2947 and 2948 of 2017
in O.P. Nos.360 and 361 of 2017)

A.No.2947 of 2017:-

Application praying that this Hon'ble Court be pleased to pass an order of stay of the Impugned Award dated 07.03.2017 passed by the majority of the Arbitral Tribunal, pending disposal of the above Petition.

A.No.2948 of 2017:-

Application praying that this Hon'ble Court be pleased to pass an order of stay of the Impugned Award dated 07.03.2017 passed by the majority of the Arbitral Tribunal, pending disposal of the above Petition.

These Applications coming on this day before this court for hearing the court made the following order:-

These Applications have been filed by Chennai Metro Rail Limited, the applicant, seeking a stay of the majority award in arbitration between the parties dated 07.03.2017.

2. This Court, by order dated 08.06.2017 granted an interim stay of the award for a period of three weeks, extended periodically thereafter.

3. The respondents have filed their counter to the O.P. as well as to the applications seeking interim relief.

4. Heard Mr.R.Senthil Kumar, learned counsel for the

applicant and Mr.Masilamani, learned senior counsel for Mr.Balaraman, learned counsel appearing for the respondents.

5. The sole issue raised in the challenge under Section 34 of the Arbitration and Conciliation Act 1996 (in short 'act') relates to the methodology adopted to compute price variation on cement and steel. The parties had agreed contractually on the RBI (wholesale price index) to arrive at the price variation. Instead, by majority view the Tribunal had adopted the CPWD rates for steel and cements preferring the same to the RBI (wpi).

6. Mr.Senthil Kumar, learned counsel for the applicant would submit that the award is prima facie erroneous and perverse. He would place reliance on the minority award that, according to him, has taken note of the facts and circumstances in the proper perspective. This is, of course, a matter that will be decided in final hearing of the Original Petitions, when the demerits or otherwise of the arbitral award will be considered. I am however of the view that a prima facie case has been made out particularly when one of the members of the Arbitral Tribunal has found in favour of the applicant on merits.

7. Mr.Masilamani, learned senior counsel, while

relying on the reasoning adduced in the majority award would also refer to provisions of section 36 of the Act, particularly sub section (3) and the proviso thereunder.

The entire provision is extracted below:

"36(1)Where the time for making an application to set aside the arbitral award under Section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the Court.

(2)Where an application to set aside the arbitral award has been filed in the Court under Section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.

(3)Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908."

8. He would emphasise that the provisions of Section 36, particularly the proviso to sub section (3) that require due regard to be given to the provisions of the Code of Civil Procedure 1908 as regards the stay of a money decree, are to be construed very strictly. The larger question raised is as to whether at all the provisions of Section 36(3) read with the proviso envisage the grant of a stay without imposition of condition by the Court.

9. I believe so. Notwithstanding the proviso to Section 36(3) and the prescription therein, the discretion of the Court to consider the grant of stay upon furnishing of security or even un-conditionally if the circumstances so warrant, remains. The decision of the Court to either refuse a stay and direct payment or grant a stay conditionally or even un-conditionally will depend upon the facts and circumstances of each case. As pointed out by Mr.Senthil Kumar, the provisions of Order 41 Rule 5(5) extracted below stands omitted insofar as Madras is concerned:

"5.Stay by Appellate Court

.....

(5) Notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit or furnish the security specified in sub-rule(3) of rule 1, the Court shall not make an order staying the execution of the decree."

The rigour of sub rule 5 would thus not curtail the discretion available with this Court to grant an

unconditional stay.

10. In any event, the judgement of the Supreme Court in the case of **Malva Strips Private Limited vs. Jothi limited 2009(2) SCC 426** is to the effect that the provisions of Order 41 Sub Rule 5 which states that the Court shall not make an order staying the execution of the decree where the appellant fails to make a deposit or furnish security specified in Sub Rule 3 of Rule 1 are directory and not mandatory.

11. In view of the above discussion, I am of the categoric view that the provisions of Section 36(3) and the proviso thereunder are in no way a barrier to the full discretion available with Court to consider and grant an unconditional stay under Section 36(1) of the Act in appropriate cases.

12. In the facts of the present case, Mr.Masilamani would point out that there is no dispute that the work performed by the contractor is of good standard and acceptable quality. In fact, he would point out that the respondent is continuing to render services to the applicant. In these circumstances, he would seek a direction to the applicant to remit the entire amount as awarded, as in the alternative it would greatly prejudice

the operations of the respondents.

13. Learned counsel for the applicant on the other hand would express apprehension stemming from the fact that the respondents are a Joint Venture involving a Russian entity, narrating the experience of the applicant in another project involving a different Russian entity that came to be abandoned causing serious prejudice to the applicant. He would state that this fact be taken into account in deciding the interim prayer sought.

14. This argument does not appeal for the reason that the applicant has chosen to repose confidence in the very same respondent for continuance of the project entrusting certain other portions of the Metro Rail that had been abandoned by another contractor to it for completion.

15. In the facts and circumstances of this case and taking into account the balance of convenience, I believe that the interests of justice will be served by issuing the following directions:

(i) There will be a stay of award upon condition that the applicant deposits 50% of the amount awarded within a period of eight weeks from the date of receipt of a copy of this order in an interest bearing account in a Nationalised Bank to the credit of these applications.

(ii) Any application by the respondent seeking a payment out thereof will be considered only upon the respondent furnishing a bank guarantee to the extent of the amount sought to be withdrawn.

(iii) Non compliance of the condition imposed in point (i) above will result in the stay granted under this order being vacated without further reference to the Court.

These applications are disposed of in the above terms.

16. In so far as pleadings in the Original Petition are complete and the sole issue in dispute falls within a narrow compass, the main matters may be listed for final hearing in the month of October 2017.

sd/-A.S.M.J

24/07/2017

//Certified to be a true copy//

Dated this the day of 2017

JJ 11/08/2017

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.