

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.11.2017

CORAM

THE HONOURABLE MR.JUSTICE M.M.SUNDRESH

O.P.No.652 of 2016

The Chief Engineer,
TWAD Board, Northern Region,
Vellore-6.

..Petitioner

Vs.

M/s Sekhar Deepak Constructions Ltd.,
Old No.132, New No.241, Peters Road,
Gopalapuram, Chennai-600 086.

... Respondent

Original Petition filed under Section 34(2) of the Arbitration and Conciliation Act, 1996, to set aside the Arbitrator's Award dated 13.02.2016.

For Petitioner : Mrs.S.Thamizharasi

For Respondents : Mr.Kabeer, S.C., for
Mr.T.Jayaraman

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On 14.12.2009, an agreement was entered into between the petitioner and the first respondent for the work of designing, providing

constructing, erection and commissioning start up and performance on DBOT basis for Krishnagiri Municipality in Krishnagiri District. The agreement contained a specific clause dealing with disputes to be dealt with by the Adjudicator and the Arbitrator. Clauses 24 and 25 of the agreement would be apposite and they are accordingly reproduced hereunder.

"24.Disputes

24.1. If the Contractor believes that a decision taken by the Engineer was either outside the authority given to the Engineer by the Contract or that the decision was wrongly taken, the decision shall be referred to the Adjudicator within 14 days of the notification of the Engineer's decision.

25. Procedure for Disputes

25.1. The adjudicator shall give a decision in writing within 28 days of receipt of a notification of a dispute.

25.2. The Adjudicator shall be paid daily at the rate specified in the Contract Data together with reimbursable expenses of the types specified in the Contract Data and the cost shall be divided equally between the Employer and the Contractor, whatever decision is reached by the adjudicator. Either party may refer a decision of the Adjudicator to an Arbitrator within 28 days of the

Adjudicator's written decision. If neither party refers the dispute to arbitration within the above 28 days, the Adjudicator's decision will be final and binding.

25.3. The arbitration shall be conducted in accordance with the arbitration procedure stated in the Special Conditions of Contract. The Arbitrators shall give a decision in writing within 120 days of start of the proceedings. The Arbitration shall entertain only those issues which have been earlier referred to the Adjudicator and either party is dissatisfied with the decision given by the Adjudicator."

2. The respondent made a claim for the work done, which is inclusive of escalation price. Initially, the bills raised were honoured. Subsequently, they were withheld in view of the audit objection raised by placing reliance upon the covenants in the agreement, which do not provide so in the opinion of the audit department. There was also an attempt to withhold the bills on the premise that excess amount has been paid by way of escalation price.

3. The respondent invoked Clauses 24 and 25 by approaching the Adjudicator. The Adjudicator gave an interpretation and accordingly, held that the respondent is entitled for price escalation.

Clause 25, as recorded above, speaks of two restrictions. One is with respect to the time limit for a party, who approaches the learned Arbitrator. The other is with respect to the issues to be adjudicated upon by the learned Arbitrator, which is relatable to those adjudicated earlier by the Adjudicator. Needless to state that the petitioner, for the reasons known, did not challenge the decision of the learned Arbitrator with respect to the price escalation. However, seeking approval of this issue and raising others, the respondent approached the Tribunal. The Tribunal rejected the other claims holding that it is not open to the respondent to raise them having not pleaded before the Adjudicator. Though the petitioner has not raised this issue by way of claiming afresh before the Adjudicator within the time prescribed, the Tribunal nonetheless went into it and gave a factual finding concurring with the Adjudicator that on a total analysis of the various covenants of the agreement it has to be understood that it does provide for price escalation. Accordingly, a sum of Rs.34,22,405/- was actually recovered by the petitioner and hence, it was directed to be realised.

4. The learned counsel appearing for the petitioner has made two submissions. The first is the jurisdiction of the Adjudicator to go

into the said issue. Insofar as this issue is concerned, the Adjudicator was not authorised to go into the said issue. The second issue is with regard to the finding rendered by the Tribunal to the effect that the agreement did provide for payment of escalation price. According to the learned counsel, the agreement did not provide for escalation payment.

5. The learned Senior Counsel appearing for the respondent would submit that this petition itself is not maintainable as admittedly, the petitioner has not approached the Arbitration Tribunal within the time prescribed and no issue was sought to be raised except by way of a reply statement to the claim made. The learned Senior Counsel also submitted that even otherwise the Arbitration Tribunal has given a factual finding on the interpretation of the agreement and therefore, such a finding is not amenable to interfere with Section 34 of the Arbitration and Conciliation Act, 1996.

6. Clause 24 of the agreement intends to put a finality to the decision made by the Adjudicator, which is of binding nature. Though such a decision is open to challenge, it can only be done within the time prescribed. Admittedly, the petitioner has not challenged it.

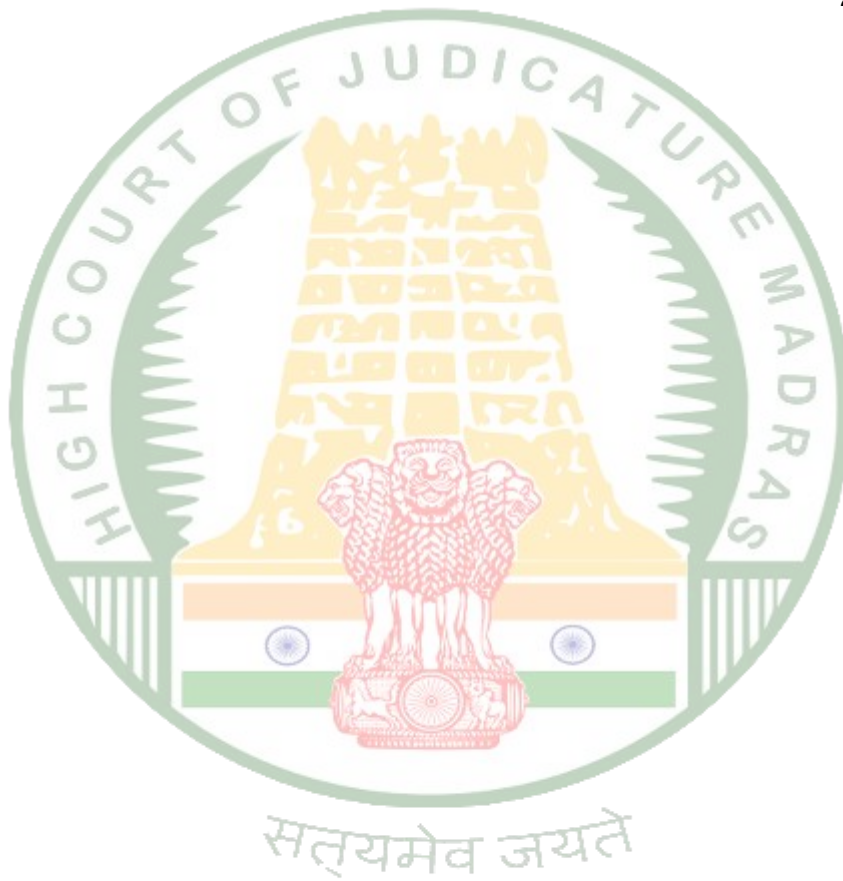
There is no need for the respondent to raise the said issue/claim again. Therefore, it was not even necessary for the learned Arbitrator to go into the said issue. The learned Arbitrator has not required to conform the decision of the learned Adjudicator. Nevertheless, a finding has been given, which cannot be stated to be one bordering on perversity.

7. Parties are bound by the agreement. The learned Arbitrator rightly rejected the other issues as they were not raised by the respondent before the Adjudicator. The role of the Arbitration Tribunal is very clear. It is not an executing authority. It can only decide the issues raised and adjudicated by the Adjudicator. Therefore, looking from any perspective, this Court is of the view that the original petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, deserves to be rejected both on maintainability as well as on merit. The learned Arbitrator gave a factual finding by taking into consideration the value of the contract and duration. The fact that the respondent has not quoted indices for various components was also taken note of. The problem arose only through the audit objection. To put it differently, but for the audit objection, the petitioner would not have raised this issue as it rightly understood the agreement *inter se*

parties with specific reference to the bill pertaining to the escalation of the price. No ground is made out for interference. Accordingly, the original petition stands dismissed. No costs.

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