

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 04.01.2018

Delivered on : 09.02.2018

CORAM:

THE HONOURABLE MS.JUSTICE INDIRA BANERJEE, CHIEF JUSTICE
and
THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

O.S.A.No.301 of 2017
and C.M.P.No.18730 of 2017

Project Director,
Tamil Nadu Road Sector Project II,
TNMB Building - 1st Floor,
171, South Kesavaperumalpuram,
Off Greenways Road,
R.A.Puram, Chennai - 600 028. ... Appellant/Petitioner

Vs.

1.M/s.RNS Infrastructure Ltd - GPL(JV)
Murudeshwar Bhavan,
Gokul Road,
Hubli - 580 030.

2.Mr.M.V.S.Rao, Presiding Arbitrator,
No.147/G, 10th Main, 3rd Block,
Koramangala, Bangalore - 560 034.

3.Mr.S.Sivaraman, Arbitrator,
5/8, Second Street,
Marackayar Nagar, Neelangarai,
Chennai - 600 041.

4.Mr.N.R.Venkatesh Prasad, Arbitrator,
No.87, 14th, A Cross, XI Main,
Malleshwaram, Bangalore - 560 003. ... Respondents/Respondents

Prayer: Original Side Appeal filed under Order XXXVI Rule 1 of O.S Rules read with Clause 15 of the Letters Patent, to set aside the order passed by the ordinary original civil jurisdiction of this court made in O.P.No.256 of 2013 dated 08.02.2017 that was filed under section 34 of the Arbitration and conciliation Act 1996 to set aside the award dated

30.04.2012 passed by the Arbitral Tribunal Comprising of respondents 2 to 4.

For Appellant : Mr.S.T.S. Moorthy, (AAG)
Asst. by Mr.M.Venugopal
Spl.Govt.Pleader(C.S)

For Respondent : Mr.Prasad Vijayakumar for R1

JUDGMENT

ABDUL QUDDHOSE, J.

The instant appeal has been filed by the Appellant under Clause 15 of the Letters Patent read with Section 37 of the Arbitration and Conciliation Act, 1996, against the order of the learned Single Judge dated 08.02.2017 passed in O.P.No.256 of 2013, dismissing the petition filed by the Appellant under Section 34 of the Arbitration and Conciliation Act, 1996, seeking to set aside the Arbitration Award dated 30.04.2011 passed by the Arbitral Tribunal against the Appellant.

2.The Arbitral Tribunal, comprising of the Second respondent as the Presiding Arbitrator and the third and fourth respondents as the Arbitrators, passed the following Arbitration Award against the Appellant.

Summary of the Award:

Claim No.	Description	Claim Amount (in INR)	Award Amount (in INR)
1.a	Redetermination of Time Extension and Refund of L.D. Levied.	1,51,93,924	1,50,00,191
1.b	De-freezing of indices for the quantity of work executed beyond the disputed extended period.	2,01,00,523	1,42,91,340
2.a	Idling of Machinery	7,76,44,627	3,41,39,143
2.b	Loss in Overhead	5,25,45,954	2,73,36,525
2.c	Loss of Profit	3,50,30,636	31,84,603

Claim No.	Description	Claim Amount (in INR)	Award Amount (in INR)
3.	Revised Rate for the quantity of work executed beyond the O.C.P.	22,09,71,592	10,07,23,370
4.	Payment of Interest		
4.1	Interest for claim no.1.a	At 18% per annum from the date on which the L.D. is levied till the date of Award	At 10% per annum s.i., on the amount awarded from the date the claim was made to the Engineer till the date of Award: Rs.31,72,643
4.2	Interest for claim no.1.b	At 18% per annum from the date on which the induces were frozen till the date of Award.	At 10% per annum s.i., on the amount awarded from the date the claim was made to the Engineer till the date of Award: Rs.30,22,716
4.3	Interest for claim no.2.a	At 18% per annum from the date on which the claimant started incurring damage till the date of Award.	At 10% per annum s.i., on the amount awarded from the date the claim was made to the Engineer till the date of Award: Rs.72,20,663
4.4	Interest for claim no.2.b	At 18% per annum from the date on which the claimant started incurring damage till the date of Award.	At 10% per annum s.i., on the amount awarded from the date the claim was made to the Engineer till the date of Award: Rs.57,81,862

Claim No.	Description	Claim Amount (in INR)	Award Amount (in INR)
4.5	Interest for claim no.2.c	At 18% per annum from the date on which the claimant started incurring damage till the date of Award.	At 10% per annum s.i., on the amount awarded from the date the claim was made to the Engineer till the date of Award: Rs.6,73,565
4.6	Interest for claim no.3.	At 18% per annum from the date on which they started incurring damage till the date of Award.	At 10% per annum s.i., on the amount awarded from the date the claim was made to the Engineer till the date of Award: Rs.2,13,03,683
4.7	Interest on all the Sum Awarded	At 18% per annum on the Sums Awarded from the date of Award till the date of Actual payment.	At 18% per annum simple interest from the date of award on all the awarded sums till the date of payment if the awarded amounts are not paid by the Respondent to the Claimants within one month from the date of award

3. There arose disputes between the Appellant and the first respondent under the contract dated 30.11.2005, by which the Appellant awarded a contract to the first respondent for the work of upgrading the Road from Ramanathapuram to Tuticorin. The first respondent made claims against the Appellant, as mentioned supra before the Arbitral Tribunal comprising of the second, third and fourth Respondents constituted in accordance with the arbitration clause contained in the contract. Even though, the first Respondent made a larger claim under each of the heads namely:

(a) Redetermination of time extensions and refund of liquidated damages levied,

(b) De-freezing indices for the quantity of work executed beyond the disputed extended period,
(c) Idling of Machinery,
(d) Loss in Over Head,
(e) Loss of Profit,
(f) Revised rate for the quantity of work executed beyond the O.C.P., the Arbitral Tribunal awarded a reduced amount to the first respondent under each of the heads of claim.

4. The first respondent has not challenged the award of reduced sum by the Arbitral Tribunal before this Court. The Appellant against whom the Arbitration Award has been passed, preferred O.P.No.256 of 2013 under Section 34 of the Arbitration and Conciliation Act, 1996 seeking to set aside the Arbitration Award, which was dismissed by the learned Single Judge of this Court on 08.02.2017. Against the said order, the instant appeal has been filed by the Appellant.

Findings of the learned Single Judge:

5. The learned Single Judge, after analyzing the Arbitration Award, has given the following findings for each of the claims made by the first respondent against the Appellant before the Arbitral Tribunal. The findings of learned Single Judge and the conclusion reached by the Arbitral Tribunal for each of the claims are as follows:

(A) Claim No.1(a) - Redetermination of time extension and refund of liquidated damages levied.

a) Under this head, the first respondent had made a claim of Rs.1,51,93,924/-, whereas, the Arbitral Tribunal awarded only a sum of Rs.1,50,00,191/-. The discussion on the said claim in the said Arbitration Award starts from Paragraph No.8.5 and the Arbitral Tribunal held that it cannot agree with the submission of the Appellant herein that EPM Section of 12 Km length in Section 1 was available for the first Respondent/Claimant to work as it is evidenced by the first respondent that this not true and as a matter of fact, re-investigation was carried out even in the EPM section and this EPM section in question was cleared for construction on 05.03.2007 which is a date later than that of issue of revised design for other part of Section 1. The Arbitral Tribunal further held the averment that the Engineer agreed without any change to the revised program given by the first Respondent/Claimant is a bald statement as Ex-R.4 produced before the Arbitral Tribunal is nothing but the letter of the first Respondent herein submitting a revised program and not an evidence for acceptance by the Engineer, which he should have done after the consultation with the first Respondent herein.

b) The Arbitral Tribunal, further found, as a matter of fact, that the Appellant's acceptance in principle is the reason

for the delay and found fault with the Appellant for having not demonstrated the reasonability of time determined by him for executing the changed scope of work by stating that the Employer had granted extension of time in a fair and justifiable manner, which has adequately compensated the first Respondent herein is nothing but a bald statement. The Arbitral Tribunal therefore held that extensions granted are arbitrary and unilateral done without consulting the first Respondent. The Arbitral Tribunal, further held that consequential upon the delay of 14 to 18 months, the first Respondent was prevented from executing the original scope of work affecting the productivity and due to change in scope of work, the first Respondent had to execute the changed scope of work by increasing the resources.

c) The Arbitral Tribunal accepted the case of first Respondent herein that they could not perform the contract till the drawings were given and after the drawings were given, it was found that the design has been changed. Consequently, there has been a change in the scope of attracting Section 52 of the Indian Contract Act and referring to clause 6.4 of the General Conditions of Contract (GCC), the Arbitral Tribunal held that the first respondent is entitled to compensation.

d) Similarly, the other findings recorded from paragraph No.8.13 clearly show that the Arbitral Tribunal while appreciating the entire scope of work, took into consideration the documents produced and only thereafter came to the conclusion that the first respondent was entitled to compensation. Further, the Arbitral Tribunal took up for consideration with regard to the redetermination of extension of time and refund of deposit. The finding is at paragraph No.9.1.3. In the said paragraph, the Arbitral Tribunal clearly brought out the factual position that there has been an initial delay in giving the drawings and that the drawings were given with changed design, resulting in change in scope of work more time for execution and that the Appellant herein had not applied its mind in giving extension of time with the change in scope of work from upgradation to reconstruction for the entire stretch of road and the section-wise completion had become redundant and the first respondent herein having completed the entire project within the extension of time granted in the complete stretch of road, it cannot be held liable for payment of any liquidated damages and if any collected, was ordered to be refunded.

e) The learned Single Judge while upholding the findings of the Arbitral Tribunal insofar as the claim No.1(a) is concerned has concluded that the factual findings given by the Arbitral Tribunal which are not based on presumptions and surmises, but are borne out of records, communications and evidence placed before the Tribunal.

6.(B) Claim No.1(b) - De-freezing of indices for the quantity of work executed beyond the disputed extended period

a) Under this head, the first respondent had made a claim for Rs.2,01,00,523/-, but the Arbitral Tribunal awarded only a sum of Rs.1,42,91,340/-. The same reasoning which would be applicable to claim No.1(a) would equally apply to claim No.1(b). The Arbitral Tribunal reiterated that while granting extension of time, the Appellant did not apply its mind. This finding stems out of undisputed fact that there was a total change in the scope of work from upgradation to reconstruction. Hence, essentially, there should have been reworking of entire terms of the agreement, revised price fixation, and time schedule. For the reasons best known to them, the Appellant unilaterally extended time and it has been faulted by the Arbitral Tribunal being an outcome of total non-application of mind.

b) The learned Single Judge has, therefore, concluded that claim no.1(b) which falls out of clause no.1(a) also does not call for interference.

7.(C) Claim No.2(a) - Idling of Machinery:

a) Under this head, the first Respondent made a claim for Rs.7,76,44,627/-, but the Arbitral Tribunal awarded only a sum of Rs.3,41,39,145/-. The Arbitral Tribunal took into consideration Section 54 of the Indian Contract Act and thereafter, proceeded to analyze the factual position and calculated the claim for idling of machinery in a scientific manner by adopting the procedure and also took into consideration the letter of the Appellant, which was marked as Ex.R.2-1. The said communication, which is a tabulated statement, sets out the location, completion of erection of machinery, date of obtaining statutory approval and when the commission/production started. Ex.R.2-2 is a document, which shows the statutory clearance obtained on various dates.

b) Thus, a scientific approach has been adopted by the Arbitral Tribunal for calculating the charges towards idling of machinery and the Arbitral Tribunal had taken the date as per schedule of dates as found in Ex.R.2-1, which is a document signed by the Appellant's Engineer. After considering the entire aspect, the weighted average was taken and the machinery component of 22% of the financial progress achieved was considered and the amount was awarded.

c) The learned Single Judge concluded that there is no reason to substitute such a finding in the absence of any proof or in the absence of any document to dislodge their own documents Ex.R.2-1 and Ex.R.2-2.

d) Thus, the learned Single Judge also upheld the finding of the Arbitral Tribunal as regards claim No.2(a).

8.(D).Claim No.2(b) - Loss in overhead:

Under this head, the first Respondent made a claim of Rs.5,25,45,954/- but the Arbitral Tribunal awarded only a sum of Rs.2,73,36,525/-. On a perusal of the reasons given by the Arbitral Tribunal, it is seen that it has made an in-depth consideration of the claim made by the first respondent which had claimed overhead cost at 15%. However, the Arbitral Tribunal did not, mechanically, accept the said claim, but examined the matter in full and after satisfying themselves that overhead cost has been incurred, proceeded to consider as to what would be the appropriate percentage for compensation towards overhead costs. Thus, by adopting the guidelines in the MORTH data book, which has made recommendations for compensation to the overhead component, the Arbitral Tribunal arrived at weightage average at 9.39%, as against the claim of 15% and such claim was fixed on the prime cost and not on the final cost. The learned Single Judge concluded that the Arbitration Award under 'overhead cost' is supported by proper reasoning, which shows that the Arbitral Tribunal applied its mind to the facts as well as the standard established procedure and rendered a finding on claim No.2(b) holding that the Award under this head also does not call for any interference.

9.(E) Claim No.2(c) - Loss in Profit:

Under this head, the first Respondent made a claim of Rs.3,50,30,636/-, but the Arbitral Tribunal awarded only a sum of Rs.31,84,603/-. The learned Single Judge while upholding the finding of the Arbitral Tribunal has concluded that the Arbitral Tribunal has considered all the aspects insofar as this claim is concerned and only thereafter awarded a sum of Rs.31,84,603/- under the head loss of profit for a claim of Rs.3.50 crores made by the first Respondent. The learned Single Judge therefore, did not find any reason to interfere with the finding of the Arbitral Tribunal on the loss of profit claim.

10.(F) Claim No.3 - Revised rate for the quantity work executed beyond the O.C.P.

a) This claim was taken up for consideration by the Arbitral Tribunal and the discussion starts from paragraph No.9.6 of the award. With regard to the contention raised by the first Respondent as well as the Appellant, in paragraph No.9.6.3, the Arbitral Tribunal has given its finding. The undisputed fact, as noticed earlier, is that there was a drastic change in the scope of work, as the work of upgradation had become work of reconstruction and there was a change in design and admittedly, the project did not begin on the start date originally envisaged. There was a delay of more than 14 months. The contract had to be performed within a period of 36 months and

the contention of the first Respondent/Claimant is that going by the date of revised price, it was submitted that the first Respondent/Claimant had completed the work well within 36 months, i.e., by 34 months and it would be unreasonable on the part of the Appellant to contend that the time for completion of contract should be reckoned either from the original start date or from the date unilaterally fixed by the Appellant on a request made by the Appellant for extension of time. After noting the change in the scope of work, the Arbitral Tribunal held that the Appellant was solely responsible to arrive at the new reciprocal promises with new contract price/new rates and new completion time with due consultation with the first Respondent/Claimant as required under the terms of the Contract. Thus, by applying Section 73 of the Indian Contract Act, the Arbitral Tribunal held that the first Respondent/Claimant is entitled for compensation.

b) The learned Single Judge concluded that he is in full agreement with the view expressed by the Arbitral Tribunal. The claim made by the first Respondent/Claimant is for compensation and the revision of rates which were done by the Appellant, on account of change of scope of work, may not have any impact on the present claim. The learned Single Judge has given a finding that the revision of rates has been factored solely by considering the change in the scope of work and the consequent revision of BOQ. However, one important aspect, which has been lost sight of by the Appellant, is the delay in commencement of the project, which is not attributable to the first Respondent / Claimant.

c) In paragraph No.9.6.4 of the Arbitration Award, the Arbitral Tribunal has clearly pointed out that (a) the quantities available at the time of submission of the claim to the Arbitral Tribunal was based on measurements and quantities available at that point of time and correct quantity of the items could be accounted only after final account was prepared; (b) in the calculation of rate analysis, the component of transportation of bitumen was omitted; and (c) to avoid duplication, the price adjustment component which was included in Claim No.1.b. namely, de-freezing of price indices, was separately calculated and deducted from the claim amount.

d) While testing the correctness of the manner, in which, the Arbitral Tribunal arrived at the said figure on a reading of paragraph No.9.6.5, it is evident that the Arbitral Tribunal gave due consideration to the claim for revised rates in respect of various category of works and resolved to allow 8% provided for in the MORTH data for road items and use rate of machinery was calculated by deriving scheduled life in hours from scheduled life in years considering 8 hours day, 25 days months. Based on these parameters, the hourly used rates of all the

machinery were worked out, the interest on average annual investment was re-calculated in accordance with the formula IS 11590:1995, as the Arbitral Tribunal opined that the said formula has more clarity than the guidelines given by the Indian Road Congress, but disallowed the overhead component in the use rate of machinery and took note of other factors and considered the price adjustment for the new rates, taking January 2009, as the base month. Thus, the award passed by the Arbitral Tribunal having being a reasoned award, with full justification, more particularly technical aspects, cannot be set at naught in a proceeding under Section 34 of the Act. The learned Single Judge, also accepted the findings of the Arbitral Tribunal under this head also.

11. After analyzing the findings of the Arbitral Tribunal in respect of each of the heads of the claim and after considering the scope of Section 34 of the Arbitration and Conciliation Act, 1996 in the light of the following decisions of the Supreme Court (i) Renusagar Power Co. Ltd., (ii) ONGC Ltd. Vs. Saw Pipes Ltd. [reported in 2003 5 SCC 705], (iii) Hindustan Zino Ltd. Vs. Friends Coal Carbonisation [reported in (2006) 4 SCC 445], (iv) McDormett International Inc. vs. Burn Standard Co. Ltd. [reported in (2006) 11 SCC 181], (v) Centrotrade Minerals & Metal Inc. Vs. Hindustan Copper Ltd. [reported in (2006) 11 SCC 245] and (vi) Delhi Development Authority vs. R.S.Sharma & Co. [reported in (2006) 13 SCC 80] the learned Single Judge came to the conclusion that there is no scope for interference in the Arbitration Award passed by the Arbitral Tribunal in favour of the first Respondent.

Submissions of the learned Counsels:

12. Mr. S.T.S. Moorthy, learned Additional Advocate General appearing on behalf of the Appellant made the following submissions:

(a) After narrating the facts leading to the filing of this appeal, the learned Additional Advocate General submitted that though there was an overall change in the scope of work by 31%, the cost of work was revised to Rs.155 crores, as against the original contract value of Rs.119 crores and that the contract being a BOQ contract, the claim made by the first Respondent was grossly inflated and without jurisdiction. According to him, the Arbitral Tribunal without appreciating the scope of work and terms and conditions of the contract had erroneously awarded various sums under various heads of claim.

(b) The contract was invited by a single tender for a total length of 114.695 Kms and it was divided into four sections namely:

- (i) Ramanathapuram - Edampadal
- (ii) Sayalkudi - Kulathur
- (ii) Kulathur - Tuticorin
- (iv) Edampadal - Sayalkudi

The length of each of these sections was separately mentioned and the time for completion was also stipulated in the contract. According to him, the work was completed by the first respondent beyond the time extension granted and therefore the claim made by the first respondent are not sustainable.

(c) He further submitted that after the bills submitted by the first Respondent in terms of the BOQ and the bills were processed and settled, the contractor has come forward with the claim seeking extension of time. In this regard, the learned Additional Advocate General has circulated a tabulated statement furnishing details pertaining to the extension of time sought for by the first Respondent/Claimant, extension of time granted by the Appellant and the date of actual completion of work which are as follows:

Section	EOT claimed by the contractor	EOT granted by the employer/petitioner	Date of actual completion of work
Section 1	19.6.2008	27.3.2008 (except 1.22 Km) 14.5.2008 (for 1.22 Km)	1.4.2009
Section 2 Bridge 122 & 123	08.5.2009 24.7.2009	13.2.2009	30.12.2009
Section 3 Bridge 129 & 130	08.7.2009 30.7.2009	10.4.2009	01.12.2009
Section 4	08.3.2010	31.12.2009	Not applicable

d) In view of the delay in the completion of work beyond the time extension granted by the Appellant, the claims made by the first Respondent/Claimant are not maintainable.

(e) There is total non-application of mind on the part of the Arbitral Tribunal in awarding liquidated damages to the first Respondent/Claimant.

(f) There is absolutely no finding recorded by the Arbitral Tribunal before awarding the overhead cost. Under Claim No.2(b)

made by the first Respondent/Claimant, the Arbitral Tribunal had erroneously awarded a huge amount towards extra cost to the first Respondent/Claimant.

(g) According to him, the Award passed by the Arbitral Tribunal is against public policy especially when the work performed by the Contractor is a road laying work which is in public interest.

(h) He submitted that the award for a sum of Rs.10,07,23,370/-, with regard to Claim No.3 for the revised rate for the quantity of work executed beyond the O.C.P. is highly excessive. It is submitted that the first Respondent/Claimant has been paid price escalation, in terms of sub-clause 70.3 of COPA and any fluctuation in the market are to be absorbed by this provision and the parties having accepted the revised construction programme and bill of quantities and when the period is extended on the grounds, as provided for, in the contract, the revision of rate of any item, at any time, till the completion of work will not be permitted under the terms of the contract. Further, it is submitted that there is no provision in the original contract for revising any item rate, when the same is executed beyond the original contract period, all variations referred to in clause 51 of COPA and any addition to the contract price required to be determined pursuant to clause 52.2 of COPA, which states that items accounting for change of amount more than 2% of the contract price and the actual quantity of work executed exceeds or falls short of 25% of the BOQ, the rates will have to be varied. The learned Additional Advocate General referred to the letter given by the first Respondent/Claimant dated 12.02.2009, wherein the first Respondent/Claimant has accepted the fact that rate, as per analysis, works out to Rs.482.50 considering the actual site condition, such as lead, cost of borrow areas, use rate of equipments and price of petroleum products, as prevailed at the time of offer of bid, and the rate is higher than BOQ rate. However, as per the conditions of the contract, since the first Respondent/Claimant had not given notice till the specified time, they were not entitled to claim this rate or price or extra payment at this distance of time.

i) The learned Additional Advocate General therefore, contends that when such a stand has been taken by the first Respondent/Claimant, they are clearly estopped from raising a claim before the Arbitral Tribunal claiming extra cost for the work carried out beyond the period of contract.

j) It is submitted that the amount awarded by the Arbitral Tribunal under the said head is excessive and has to be interfered with by this Court. Thus, it is his submission that the first Respondent/Claimant having accepted the increase in the value of contract from about Rs.119 crores to about Rs.156 crores, cannot object/protest against the revised contract and seek revised rates for quantities, especially, when the same has been factored in the revised rate, which is almost 125 % the initial contract value.

(k) The interest awarded by the Arbitral Tribunal is excessive, as it has directed interest to be paid at 18% per annum from the date of award till the date of payment. He referred to a decision in the case of Krishna Bhagya Jala Nigam Ltd. Vs. G.Harish Chandra Reddy and Another reported in 2007 2 SCC 720 and submitted that the Supreme Court interfered within the Arbitration Award when the interest awarded was excessive and the Supreme Court awarded both pendente lite interest and future interest at 9%.

13.Per contra, Mr.Prasad Vijayakumar, learned counsel for the first Respondent, submitted that the Arbitral Tribunal has considered judiciously the defences raised by the Appellant for each of the claims and has in fact awarded a much lesser sum than what was made in the claim. The learned counsel submitted that the Arbitration Award is a well considered and a reasoned award and does not call for any interference. According to him, any interference to the factual findings of the Arbitral Tribunal by this Court would undoubtedly amount to reviewing the Arbitration Award passed by the Arbitral Tribunal as if this Court is exercising Appellate jurisdiction which is not possible under Section 34 of the Arbitration and Conciliation Act. According to him, the reasons given by the Arbitral Tribunal for giving its findings in favour of the first Respondent/Claimant for each and every claim is based on facts supported by documentary evidence and sound reasoning which does not call for any interference by this Court. According to him, the scope of Section 34 of the Arbitration and Conciliation Act, 1996 is very limited and any interference by this Court to the Arbitration Award would be falling foul of the settled principles of law laid down by the Supreme Court in its various decisions and it be would converting this Court as a Court of appeal over an award passed by the Arbitral Tribunal which is not permissible under Section 34 of the Arbitration and Conciliation Act, 1996. According to the learned counsel, the award of interest by the Arbitral Tribunal is also reasonable and is in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The learned counsel for the first Respondent/Claimant submitted that the learned Single Judge while dismissing the application

under Section 34 of Arbitration and Conciliation Act, 1996 filed by the Appellant has also considered each and every ground of challenge raised by the Appellant meticulously and judiciously and has rightly come to the conclusion that the Appellant is not entitled to the relief of setting aside the Arbitration Award passed by the Arbitral Tribunal.

Discussion:

14. The claim of the first respondent against the Appellant before the Arbitral Tribunal was made under various heads. Even though, the first respondent made a larger claim under each of the heads namely:

- (a) Redetermination of time extensions and refund of liquidated damages levied.
- (b) De-freezing indices for the quantity of work executed beyond the extended period.
- (c) Idling of Machinery.
- (d) Loss in Overhead.
- (e) Loss of Profit.
- (f) Revised rate for the quantity of work executed beyond the O.C.P., the Arbitral Tribunal awarded a reduced amount to the first respondent under each of the heads of claim.

15. We shall now consider as to whether the findings of the Arbitral Tribunal which resulted in the Award being passed in favour of the first respondent can be challenged under Section 34 of the Arbitration and Conciliation Act. As seen from the Award, it is a reasoned Award. The claim made by the first respondent under various heads has been duly considered by the Arbitral Tribunal after considering the pleadings, documents and the submissions made by both the parties.

16. The submissions made by the learned Additional Advocate General for the Appellant have been duly considered by the Arbitral Tribunal in the Arbitration Award passed in favour of the first respondent.

17. The grounds for challenge raised by the Appellant attacks the factual findings given by the Arbitral Tribunal which is based on pleadings, documents and submissions of the respective parties.

18. The learned Single Judge while considering the application under Section 34 of the Arbitration and Conciliation Act has also elaborately considered each and every finding given by the Arbitral Tribunal for each and every head of claim and has come to the conclusion that there is no scope for interference under Section 34 of the Arbitration and

Conciliation Act, 1996.

19. We have also perused the Arbitration Award and are in agreement with the findings of the learned Single Judge.

20. The scope for interference to an Arbitration award is very limited. Unless and until the applicant satisfies the requirements of Section 34 of the Act, the Arbitration Award cannot be set aside by this Court.

21. The scope of interference under Section 34 of the Arbitration and Conciliation Act 1996, to an Arbitral Award is covered by the decisions of Hon'ble Supreme Court in

(a) Oil & Natural Gas Corporation Ltd., vs Saw Pipes Limited reported in (2003) 5 SCC 705, wherein it was held that the Court can set aside an award, if -

- 1) it is contrary to:-
 - (a) fundamental policy of Indian law; (or)
 - (b) Interest of India; (or)
 - (c) Justice and morality.
- 2) it is patently illegal
- 3) it is so unfair and unreasonable that it shocks the conscience of the Court.

(b) McDermott International Tnc., Vs Burn Standard Co., Ltd and others reported in (2006) 11 SCC 181, which followed the decision in Oil & Natural Gas Corporation Ltd., vs Saw Pipes Limited referred to supra and the Hon'ble Supreme Court explained the term patent illegality and observed that patent illegality must go to the root of the matter. Public policy violation should be so unfair and unreasonable as to shock the conscience of the Court. The supervisory role of the Court under section 34 is to be kept a minimum level and interference is envisaged only in case of fraud or bias, violation of the natural justice, etc. If the Arbitrator has gone contrary to or beyond the express law of the contract or granted relief in the matter not in dispute, that would come within the purview of Section 34 of the Arbitration and Conciliation Act 1996.

22. According to the said decision, what would constitute public policy is a matter dependent upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant to enable the Court to judge what is in public good or public interest or otherwise would be injurious to the public good at the relevant point. The Supreme Court in its latest decision in the case of Associated Builders vs. DDA (2015) 3 SCC 49 has also followed the decision rendered in Oil & Natural Gas Corporation Ltd., vs Saw Pipes Limited reported in (2003) 5 SCC 705 and McDermott International Tnc., Vs Burn

Standard Co., Ltd and others reported in (2006) 11 SCC 181.

23. The Division Bench of the Delhi High Court in its recent decision dated 25.09.2017 in the case of Ogene Systems India Pvt., Ltd., Vs Technology Development Board reported in 2017 SCC Online DL 11136 delineated the following propositions after considering all the decisions of the Hon'ble Supreme Court relating to the scope of Section 34 of the Arbitration and Conciliation Act right from Renusagar Power Company Ltd vs. General Electric Company 1994 Supp (1) SCC 644 to the recent Associated Builders Vs DDA (2015) 3 SCC 49.

(i) The four reasons motivating the legislation of the Act, in 1996, were:-

- (a) to provide for a fair and efficient arbitral procedure,
- (b) to provide for the passing of reasoned awards,
- (c) to ensure that the arbitrator does not transgress his jurisdiction, and
- (d) to minimize supervision, by courts, in the arbitral process.

(ii) The merits of the award are required to be examined only in certain specified circumstances, for examining whether the award is in conflict with the public policy of India.

(iii) An award would be regarded as conflicting with the public policy of India if:-

- (a) it is contrary to the fundamental policy of Indian law, or
- (b) it is contrary to the interests of India,
- (c) it is contrary to justice or morality,
- (d) it is patently illegal, or
- (e) it is so perverse, irrational, unfair or unreasonable that it shocks the conscience of the court.

(iv) An award would be liable to be regarded as contrary to the fundamental policy of Indian law, for example, if

- (a) it disregards orders passed by superior courts, or the binding effect thereof, or
- (b) it is patently violative of statutory provisions, or
- (c) it is not in public interest, or
- (d) the arbitrator has not adopted a "judicial approach", i.e. has not acted in a fair, reasonable and objective approach, or has acted arbitrarily, capriciously or

whimsically, or

(e) the arbitrator has failed to draw an inference which, on the face of the facts, ought to have been drawn, or

(f) the arbitrator has drawn an inference, from the facts, which, on the face of it, is unreasonable, or

(g) the principles of natural justice have been violated.

(v) The "patent illegality" has to go to the root of the matter. Trivial illegalities were inconsequential.

(vi) Additionally, an award could be set aside if

(a) either party was under some incapacity, or

(b) the arbitration agreement is invalid under the law,

Or

(c) the applicant was not given proper notice of appointment of the arbitrator, or of the arbitral proceedings, or was otherwise unable to present his case, or

(d) the award deals with a dispute not submitted to arbitration, or decides issues outside the scope of the dispute submitted to arbitration, or

(e) the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or

(f) the arbitral procedure was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or

(g) the award contravenes the Act, or

(h) the award is contrary to the contract between the parties.

(vii) "Perversity", as a ground for setting aside an arbitral award, has to be examined on the touchstone of the Wednesbury principle of reasonableness. It would include a case in which

(a) the findings, in the award, are based on no evidence, or

(b) the Arbitral Tribunal takes into account something irrelevant to the decision arrived at, or

(c) the Arbitral Tribunal ignores vital evidence in arriving at its decision.

(viii) At the same time,

(a) a decision which is founded on some evidence, which could be relied upon, howsoever compendious, cannot be treated as "perverse",

(b) if the view adopted by the arbitrator is a plausible view, it has to pass muster,

(c) neither quantity, nor quality, of evidence is open to re-assessment in judicial review over the award.

(ix) "Morality" would imply enforceability, of the agreement, given the prevailing mores of the day. "Immorality", however, can constitute a ground for interfering with an arbitral award only if it shocks the judicial conscience.

(x) For examining the above aspects, the pleadings of the parties and materials brought on record would be relevant.

24. The Arbitrator has considered each and every objection raised by the Appellant and only thereafter the Award has been passed in favour of the first respondent.

25. The Arbitrator has passed a reasoned and detailed Award. The learned Single Judge has also considered all the grounds of challenge raised by the Appellant under Section 34 of the Arbitration and Conciliation Act, 1996 in accordance with law and has rightly come to the conclusion that there is no scope for interference under Section 34 of the Act. We are in agreement with the decision of the learned Single Judge and hold that no ground has been made out by the Appellant to challenge the Arbitration Award dated 30.04.2011.

26. In the result, this appeal shall stand dismissed. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is also closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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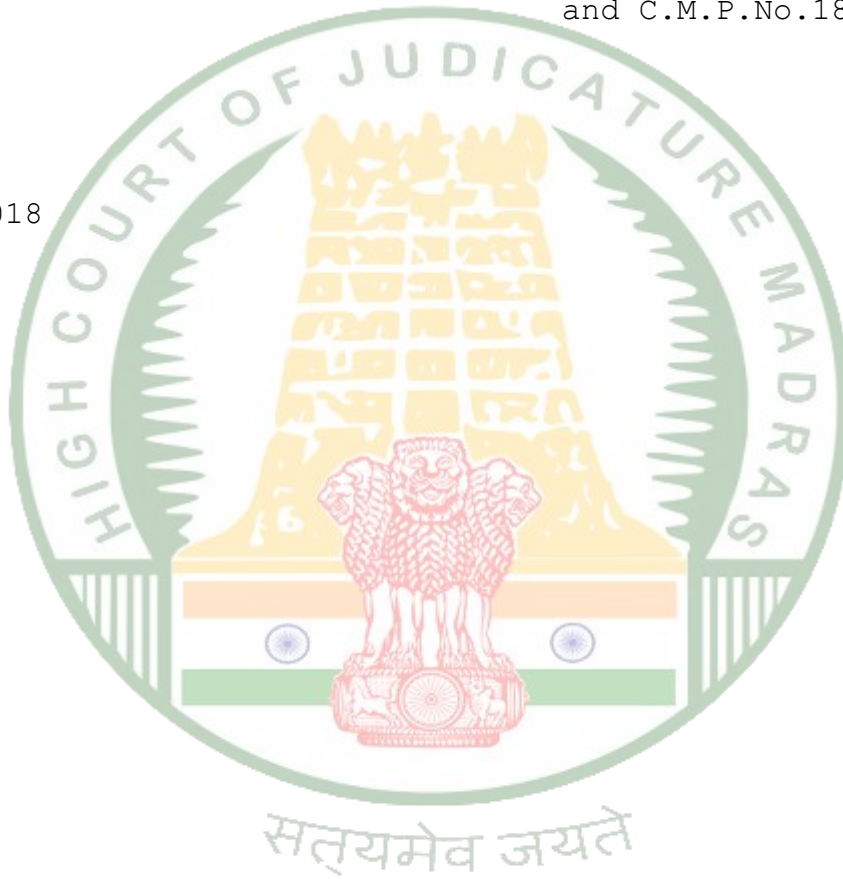
To

The Sub Assistant Registrar
Original Side
High Court, Madras

+1 cc to Mr.Prasad Vijayakumar Advocate sr 10389
+1 cc to the Special Govt pleader (CS) High Court,
Madras sr 10162

O.S.A.No.301 of 2017
and C.M.P.No.18730 of 2017

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