

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

THURSDAY, THE 05th DAY OF APRIL 2018

THE HON'BLE MR. JUSTICE C.V.KARTHIKEYAN

A. No.24 of 2018
in
O.P. No.131 of 2016

In the matter of Arbitration
and Conciliation Act
and

In the matter of the Arbitral
Award dated 16.10.2015
relating to Agreement
No.26/CN/2013

Deputy Chief Engineer/Construction,
Construction Office,
Southern Railway,
Podanur-641 023.

... Applicant/Petitioner

-Versus-

1. Shri M.P.Rajendran,
Flat E-2nd Floor, Sigma Park,
No.801, Park Road,
Anna Nagar West Extension,
Chennai-600 101.
2. Shri D.R.Shyamasundar,
Chief General Engineer,
Southern Railway,
Headquarters Office, Works Branch,
Chennai-600 003
(Presiding Arbitrator)
3. Shri H.Sultan Mushathick,
Financial Adviser and Chief Accounts Officer,
Integral Coach Factory,
Perambur, Chennai-600 038.
(Arbitrator)

4. Shri Shrikant Singh,
 Chief Signal Engineer,
 Headquarters Office,
 Southern Railway,
 Chennai-600 003.
 (Arbitrator)

... Respondents/Respondents

Application praying that this Hon'ble Court be pleased to permit the applicant/petitioner to raise additional grounds in O.P. No.131 of 2016 against the respondents herein.

This application coming on this day before this court for hearing the court made the following order:-

OP.No.131 of 2016 had been filed by the Deputy Chief Engineer/Construction, Construction Office, Southern Railway, against (1) M.P.Rajendran, (2) D.R.Shyamasundar, Chief General Manager, Southern Railway, (3) H.Sultan Mushathick, Financial Adviser and Chief Accounts Officer, ICF, Chennai and (4) Shrikant Singh, Chief Signal Engineer, Southern Railway, Chennai.

2. The 2nd, 3rd and 4th Respondents were the Principal Arbitrator and Arbitrators. The said OP had been filed under Section 34 of the Arbitration and Conciliation Act. By order dated 27.7.2014, the Respondents 2, 3 and 4 had been deleted from the array of parties. The Petitioner was directed to file an amended memorandum of parties by next hearing date, namely, 26.8.2016. There is no evidence to show that the Petitioner had complied with the directions of this Court. The Plaintiff had challenged the arbitral award dated

16.10.2015, relating to agreement no.26/CN/2013.

3. By the award dated 16.10.2015, the Arbitral Tribunal namely, the Respondents 2 to 4, who had been directed by the Court to be deleted, but the Petitioner had not chosen to so delete, had passed an award, directing the Petitioner to pay to the 1st Respondent, who was the claimant before the Tribunal, a sum of Rs.33,94,331/- and also release the performance guarantee of Rs.52,12,842/- and the security deposit of Rs.24,23,663/- and price variation clause amount of Rs.6,42,572/-, within one month from the date of the award, failing which, the 1st Respondent/claimant was entitled to payment of simple interest at 18% p.a. with effect from 16.10.2015. The 1st Respondent/Contractor however filed A.No.1736 of 2016, seeking the following reliefs:-

"to adjourn the above proceedings for a period of time to be determined by this Hon'ble Court and to give the Arbitral Tribunal namely the Respondents 2 to 4 an opportunity to resume the arbitral proceedings or to take such other action in the opinion of Arbitral Tribunal which will eliminate the grounds for setting aside the arbitral with reference to the refund of (a) performance guarantee amounting to Rs.52,12,842/-, (b) security deposit amounting to Rs.24,23,663/- and (c) price variation clause amount of Rs.6,42,572/- and pass such other orders."

4. This Court Court, after hearing both the parties, had passed the following order on 25.10.2016:-

"7.1 I am inclined to grant the relief sought

for by the Applicant. The rationale that in the award, there are no discernible reasons set out for issuance of directions with respect to the aspects referred to in the prayer clause. Therefore, in exercise of powers under Section 34 (4) of the 1996 Act, the Arbitral Tribunal is directed to resume its proceedings and hear the parties once again, with respect to aspects referred to in the prayer clause. After hearing the parties, the Arbitral Tribunal will supply reasons in respect of the directions issued qua release of performance guarantee, refund of security deposit and payment of moneys qua price variation."

5. After the matter had been, thus, remitted back to the Arbitral Tribunal, a further award was passed on 6.1.2017. In the said award, reasons had been given with respect to the three issues, namely, performance guarantee, security deposit and price variation clause. Challenging the said reasons, the Petitioner in OP.No.131 of 2016 had filed A.No.24 of 2018, seeking to raise additional grounds.

6. This Court had, during the course of hearing, held that arguments can be advanced and shall be heard in both A.No.24 of 2018 and OP.No.131 of 2016. This Court heard the arguments advanced by Mr.P.T.Ramkumar, learned standing counsel for the Petitioner in OP.No.131 of 2016 and the Applicant in A.No.24 of 2018 and also by Mr.Bijai Sundar, the learned counsel for the Respondent in OP.No.131 of 2016 and in A.No.24 of 2018.

7. The learned counsel for the Respondent has raised a preliminary objection, stating that additional grounds had

been raised well beyond the period of limitation prescribed to raise such grounds. It was stated that the Petitioner was challenging the award dated 6.1.2017 by raising additional grounds in A.No.24 of 2018.

8. It was stated that under Section 34 of the Arbitration and Conciliation Act, three months time was provided. It has been stated that A.No.24 of 2018 had been filed well after the prescribed period only on 16.11.2017 and consequently, this Court cannot take into account the reasons advanced.

9. A brief perusal of the facts of the case reveals that an open tender was invited for the work of gauge conversion between Pollachi and Palghat - pro-re-modelling of Pollachi yard, reconstruction of minor bridges, earth work in forming bank, transportation of permanent way, linking of track, PPF shelter, etc. and the said work was awarded by a letter of acceptance dated 4/5.2.2013 to the Respondent to a total value of Rs.10,42,56,833/-. The completion period was stipulated at six months. A subsequent agreement was entered into on 1.4.2013 and the period was extended up to 31.1.2014. However, it was stated that due to poor progress of work, steps were taken to terminate the contract and 7 days notice was issued on 21.10.2013.

10. The Respondent filed OA.No.825 of 2013 before this Court, seeking injunction, restraining termination of

work and also restraining invoking performance guarantee and for a direction to the Railways to foreclose the agreement. An interim order was initially granted. However, by order dated 3.12.2013, the interim order was vacated. Thereafter, a further notice was issued on 4.12.2013 and the contract was terminated on 7.12.2013. An Arbitral Tribunal was constituted and a reference was also made on 13.1.2014. The Respondent raised 10 claims during the arbitral proceedings. The Petitioner raised one counter claim.

11. By award dated, 16.10.2015, the Arbitral Tribunal allowed only the third claim of the Respondent, namely, payment of new items and items to be operated under the agreement. As against the claim of Rs.99,75,540/-, a sum of Rs.33,94,331/- was awarded. The Petitioner was also directed to refund the performance guarantee, security deposit and price variation clause amount.

12. As stated above, the award was challenged and it was brought to the notice of this Court by the Respondent that reasons were not assigned for refund of performance guarantee, security deposit and price variation clause amount.

13. With respect to the arbitral award, dated 16.10.2015, challenging which OP.No.131 of 2016 had been filed, it is seen that the Arbitral Tribunal had observed that the Respondent, who is the Claimant herein and the

Petitioner had joined issue with respect to claim no.3, namely, payment of new items and items to be operated under the agreement. The Arbitral Tribunal had examined the said issue under five different heads, namely,

1. Earthwork in excavation
2. Leading of earth
3. Making payment over and above 22,000 cum of earth work
4. Mechanical compaction of earthwork
5. Payment for all works upto plinth level.

14. The Arbitral Tribunal had examined each item and had negatived the claim (1) for earth work in excavation. The Arbitral Tribunal had awarded an amount of Rs.19,16,010/- with respect to claim (2) by taking into account the difference between the accepted rate for earth work for M/s.Selliamman Construction Private Limited and the negotiated rate for earth work. With respect to claim (3), the Arbitral Tribunal had granted Rs.10,50,618/- and also given reasons for the same. With respect to claim (4), namely, mechanical compaction of earth work, the Arbitral Tribunal had granted Rs.4,27,703/-. The Arbitral Tribunal negatived the claim with respect to the 5th item.

15. The Arbitral Tribunal had given their own reasons for granting the award. The competency of the Tribunal has not been questioned. The Tribunal consisted of senior officials of the Railways. They are competent persons. They had examined the quantity under the earth work claim.

They had also examined the cutting of earth work and and payment made towards the same, the responsibility of the Contractor, the element of transportation charges, the total earth work carried out by the Contractor and also the usable cut spoils. The reasons given by the Arbitral Tribunal does not shock the conscience of the court. I find no reason to interfere with them.

16. The Honourable Supreme Court in **2003 5 SCC 705 (ONGC Ltd. v. Saw Pipes Limited)** held that a court can set aside an award under Section 34(2)(b)(ii) of the Act, if it is being in conflict with the public policy of India, if it is (a) contrary to the fundamental policy of Indian law; or (b) contrary to the interests of India; or (c) contrary to justice or morality; or (d) patently illegal. The Honourable Supreme Court explained that to hold an award to be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. It also observed that an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court, as then it would be opposed to public policy.

17. However, what had earlier shocked the conscience of this Court was that reasons were not given with respect to three further awards, namely, release of performance guarantee, security deposit and price variation clause amount. It is for that reasons that the Arbitral Tribunal,

once again, was convened under the directions of the Court and further award was passed on 6.1.2017. This additional award is the subject matter of A.No.24 of 2018. In the said award, again, reasons had been given.

18. It was specifically observed that a reasonable opportunity was not given to the Respondent to complete the works and the contract was terminated arbitrarily. It was, therefore, found that the action of the Petitioner in forfeiting the security deposit and encashing the performance guarantee are not in order. With respect to the price variation clause amount, it was specifically found that the value form part of pending payments due to the Respondent/ Contractor. It was also stated that the payment of price variation clause amount, according to the contract agreement, was in order. Since sufficient reasons had been given, again, the subsequent or additional award of the Arbitral Tribunal does not shock the conscience of this Court. It is not against the public policy. The award has been examined though challenge to the same was time barred. I am unable to convince myself to interfere with the award or additional award of the Arbitral Tribunal.

19. The learned counsel on either side relied on **2010 4 SCC 518 (State of Maharashtra Vs. Hindustan Construction Company Limited)** . The learned counsel for the Applicant relied on paragraph 29 of the said judgement and

the learned counsel for the Respondent relied on paragraph 36 of the said judgement. In paragraphs 29 and 36, it was held as under:-

29. There is no doubt that the application for setting aside an arbitral award under Section 34 of the 1996 Act has to be made within the time prescribed under sub-section (3) i.e. within three months and a further period of thirty days on sufficient cause being shown and not thereafter. Whether incorporation of additional grounds by way of amendment in the application under Section 34 tantamounts to filing a fresh application in all situations and circumstances. If that were to be treated so, it would follow that no amendment in the application for setting

"36. As noticed above, in the application for setting aside the award, the appellant set up only five grounds viz. waiver, acquiescence, delay, laches and res judicata. The grounds sought to be added in the memorandum of arbitration appeal by way of amendment are absolutely new grounds for which there is no foundation in the application for setting aside the award. Obviously, such new grounds containing new material/facts could not have been introduced for the first time in an appeal when admittedly these grounds were not originally raised in the arbitration petition for setting aside the award. Moreover, no prayer was made by the appellant for amendment in the petition under Section 34 before the court concerned or at the appellate stage.

aside the award howsoever material or relevant it may be for consideration by the court can be added nor existing ground amended after the prescribed period of limitation has expired although the application for setting aside the arbitral award has been made in time. This is not and could not have been the intention of the legislature while enacting Section 34."

20. In the present case, it is seen that A.No.1736 of 2016 had been filed only by the Respondent, who himself

brought to the notice of this Court that the reasons had not been given with respect to grant of release of performance guarantee, security deposit and price variation clause amount. These were not the grounds which were raised by the Petitioner. Consequently, the Petitioner cannot now turn around and raise additional grounds. I hold that the both the application and the OP are to be dismissed.

21. In the result, A.No.24 of 2018 and OP.No.131 of 2016 are dismissed. No costs.

Sd/.C.V.K.J

05.04.2018

//Certified to be a true copy//

Dated this the day of 2018.

COURT OFFICER

jj 10/04/18

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