

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 06.07.2018

DELIVERED ON: 12.07.2018

CORAM:

THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE

OP No.2 of 2011

The Superintending Engineer,
Highways, Villupuram Circle,
Villupuram.

...Petitioner

vs.

1.Metro Road Construction (Madras) Pvt. Ltd.,
Plot No.1798, 2nd Street, I-Block,
Anna Nagar West,
Chennai – 600 040.

2.The Hon'ble Mr.Justice K.Sampath (Retd.)
Sole Arbitrator,
No.11, Second Street,
Jagadambal Colony,
Royapettah, Chennai – 600 014.

...Respondents

Prayer: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the impugned Award dated 24.11.2008 passed by the 2nd respondent the Sole Arbitrator herein.

For Petitioner : Ms.Madhu Mathi
Additional Government Pleader (CS)

For Respondents : No appearance

ORDER

The instant petition has been filed by the petitioner under Section 34 of the Arbitration and Conciliation Act, challenging the Arbitral Award dated 24.11.2008, passed against the petitioner.

2.Despite service of notice on the first respondent none appears on the side of the first respondent.

3.The petitioner awarded a contract to the first respondent/claimant for permanently restoring the flood affected Cuddalore – Chittoor Road for a total contract value of Rs.3,85,00,000/-, under a contract dated 08.08.1997.

4.Their arose disputes under the contract and the first respondent/claimant made a claim of Rs.1,44,24,154/-, against the petitioner and the Arbitration clause was invoked and OP No.141 of 2002 was filed before this Court under Section 11 of the Arbitration and Conciliation Act, 1996 for the appointment of the Arbitrator. The Hon'ble Chief Justice by his order dated 30.06.2005, appointed the second respondent as the Arbitrator. The Hon'ble Chief Justice by his order also permitted the petitioner to raise all the objections as to the

jurisdiction of the Arbitral Tribunal under Section 16 of the Arbitration and Conciliation Act.

5.The second respondent/Arbitrator acted upon the reference and after issuing notices to both the parties to the dispute and after considering the materials available on record and after hearing the submissions of the parties, passed the following Award in favour of the first respondent/claimant against the petitioner.

<i>Claim No.</i>	<i>Description of the claim</i>	<i>Amount claimed (Rs.)</i>	<i>Award amount by the majority of the arbitrators (Rs.)</i>
1	Excess collection of interest on mobilization advance to be refunded	6,30,723/-	3,15,223/-
2	Profile Correction Course	30,60,000/-	30,60,000/-
3	Extra haulage on metal due to non production at specified quarries quantified	9,48,672/-	9,48,672/-
4	Hike in prices due to prolongation of the nine months contract to 33 months		12,92,380/-
5	Loss of profits and loss of account of overheads	72,00,000/-	20,00,000/-
6	Interest on delayed payment	12%	18.5%

6.Aggrieved by the Arbitral Award dated 08.08.1997, the instant petition has been filed by the petitioner.

7. According to the petitioner, the first respondent/claimant should have completed the work awarded to him within a period of nine months from the date of handing over the site. According to him, the site was handed over on 10.08.1997. Therefore, the first respondent/claimant ought to have completed the work within nine months i.e. on or before 03.05.1998. However, according to the petitioner, the first respondent/claimant dragged the work for 33 months.

8. According to the petitioner, it is only the first respondent/claimant who has committed the breach of contract and not the petitioner. The entire claim made by the first respondent/claimant is a damage claim to which they are not entitled to. According to the petitioner, no breach of contract was committed by the petitioner.

9. The learned Counsel for the petitioner then drew the attention of this Court to clause 53 of the contract, which is the Arbitration clause and it reads as follows:

"53 Resolution of Disputes, Settlement of claims by arbitration."

All disputes of differences in respect of which the decision is not final and conclusive, if the claims monetary value is less than Rs.2.00 lakhs (Rupee Two Lakhs only) shall be referred for arbitration to a sole Arbitrator. The Superintending Engineer (H) Viluppuram circle or his successor in his office.

The arbitration shall be conducted in accordance with the provisions of Indian Arbitration and Conciliation Act 1996 of any statutory modifications thereon. The decision of the Sole Arbitrator shall be final and binds on the parties thereto. The Arbitrator shall determine the amount of arbitration to be awarded to either parties.

Performance under the contract shall continue during arbitration proceedings and payments due to the contractor by the owner shall not be withheld, unless they are the subject matter of the arbitration proceedings.

All awards shall be in writing and such awards shall state reasons for the amounts awarded.

Neither party is entitled to bring a claim to arbitration if the Arbitrator has not been appointed before the expiration of thirty days after deficit liquidity period.

If the claims exceed monetary value of more than Rs.2.00 Lakhs (Rupees Two Lakhs) the same shall be referred to the Civil Court having jurisdiction for decision."

10. According to the learned Counsel for the petitioner, since the claim made by the first respondent/claimant was for a sum of Rs.1,44,24,154/-, no Arbitration is maintainable as per the Arbitration

clause since the claim has exceeded Rs.2.00 lakhs. Therefore, only a Civil Court will have the jurisdiction to decide the dispute.

11. Even though, the petitioner had raised grounds on accounts of breach of contract committed by the first respondent/claimant, the learned Counsel for the petitioner restricted her arguments only with regard to the maintainability of the Arbitral dispute when the claim amount exceeds Rs.2.00 lakhs.

12. This Court has perused the Arbitral Award dated 24.11.2008. After elaborately analysing the evidence available on record, the second respondent/Arbitrator has given a categorical finding that the delay in the execution of the project has been properly explained by the first respondent/claimant and cause for the delay, in the execution of the project cannot be placed at the doors of the first respondent/claimant, but only with the petitioner who was responsible for the delay.

13. While awarding a sum of Rs.3,15,223/- in favour of the first respondent/claimant towards the refund of excess collection of interest on mobilization advance, the reasons given by the second respondent/Arbitrator for coming to the said conclusion are as follows:

"It is to be noted that as pointed out on behalf of the department, the contractor had the benefit of the mobilization advance ever since 17.10.97 till the completion of the project and the department is entitled to interest on the said amount. However the question is whether the interest should be worked out at the rate of 18.5% as stipulated in the contract for the entire period of 33 months. In my view, a strict construction of the terms of the contract for mulcting the contractor with interest at the rate set out in the agreement would be inequitable and unjust for the following reasons. The mobilization advance was paid to the contractor only on 17.10.97 by which time the rainy season had arrived and it is history that it was one of the worst in the recent decades. Extension was applied for, giving various reasons: rains from the first week of October 97 till the end of December 97, delay in the supply of blue metal, non-availability of bitumen, sand gravel asphalt and patchwork and repairs by the department which took nearly two months. Extension was granted on eight occasions without demur. Sub-clause 47 providing for levy of L.D as damage for failing to achieve completion of the works within the stipulated time was not invoked nor was sub-clause 46 providing for termination of the contract resorted to. The claimant was allowed to go ahead with the works and complete the same by 05.05.2000. Inasmuch as there was justification on the part of the contractor in seeking extensions and such extensions were also granted, the liability of the contractor to pay interest on mobilization advance can be fixed at

18½ % per annum from 17.10.97 for 9 months and at 9% for the rest of the period. The department has recovered the mobilization advance with 18½ % interest from 17/10/97 till 05/05/2K."

14. While awarding a sum of Rs.30,60,000/- towards profile correction course, the reasons given by the second respondent/ Arbitrator for awarding that amount are as follows:

"As per MOST 501-2-4 profile corrective course is to be laid as one with the uniform thickness of Bitumen if its (profile corrective course) average thickness is less than 40 mm. Under 501-6-3, 'profile corrective course' shall be measured as volume compacted in cubic meters as specified in contract; the volume shall be worked out by plotting the exact profile of PCC as built up and superimposed on the existing pavement profile 501.7.2 provides that the contract unit rate shall be payment in full for carrying out the work in full. The stand of the claimant is that payment was made only for 50mm thick. Under Ex.C7 dt. 19.09.2007 the claimant had addressed the Divisional Engineer stating that spot levels had been taken in the presence of departmental representatives and were under computation through computers that in case of patchwork they had to be paid separately; that the soil through which the road ran was clayey to black cotton that it was likely to be damaged by the ensuing monsoon that this had to be accounted for besides the computed quantity; that it was likely that the additional items under

leveling course after the computation of levels might exceed Rs.3 lakhs that it should be ensured that the claimant was paid for the full work done so that progress was not affected. I have already referred to Ex.C8 and Ex.C17 and also to the department not responding to those letters. It has therefore to be taken that the department had accepted the case of the claimant or in any event not disputed the claimant's stand. The amount claimed under this head is also not disputed. The claim has therefore to be allowed.

A tabular statement giving the quantity for leveling course has been appended to claim 2. The total quantity given is 1800.32 Cu.M. The rate claimed is stated to be as in BOQ item No.9 Rs.1700/Cu.M. and the total comes to Rs.30,60,000/-. Since I have found that the claimant had done profile corrective course, and the quantum is not disputed by the department, I hold that the claimant is entitled to the amount."

15.While awarding a sum of Rs.9,48,672/- on account of extra haulage on metal due to non production at specified quarries quantified, the reasons given by the second respondent/Arbitrator are as follows:

"It is represented that the claim under this head is only for the difference in cost due to extra haulage only. The quantum is not disputed though the genuineness of Ex.C73 series is disputed. According to Mr.Srikanth

Ex.C73 series has been concocted for the purpose of the claim. This contention appears to be far fetched particularly when in the claim itself it is mentioned that 'the trip sheets as evidences are available for verification; they are tabulated and will be furnished for easy appreciation and award.' Further, according to the claimant, Ex.C73 series have been filed only to show that the claimant had procured metal from sources other than the quarries approved by the department. I am not replying on Ex.C73 to quantify the amount. As already noted the claimant has not disputed the quantum. In such circumstances, even as per clause 106.02, the claimant is entitled to the amount spent for the increase in the length of haul, I allow the claim.

16. While awarding a sum of Rs.12,92,380/-, towards hike in prices due to prolongation of the nine months contract to 33 months, the reasons given by the second respondent/Arbitrator for awarding that amount are as follows:

"It has been held by the Supreme Court in P.M.PAUL-Vs-UNION OF INDIA {AIR 1989 SC 1034} that where there was no express prohibition to the giving of escalation, but there was mere absence of escalation clause and the Government was at fault causing delay in the completion of the contract, the award by the arbitrator of 20% escalation in price to the contractor is not improper considering the fact that escalation is a normal incident in

inflationary age and the Government (employer) was responsible for all consequences of delay including increase in prices. See also HIMACHAL PRADESH NAGAR VIKAS PRADHIKASAN-Vs-AGARWAL & CO., {AIR 1997 SC 1027}. In HYDERABAD MUNICIPAL CORPORATION-Vs-M.KRISHNASWAMI MUDALIAR & ANR {AIR 1985 SC 607} where under the terms of the contract the work was to be completed by the contractor within a period of one year but due to financial difficulties – less budget having been provided for in the said year the contractor was requested by the authorities to spread over the work for two years more but the contractor was agreeable to spread over the work for two years more as suggested on condition that extra payment will have to be made to him in view of increasing rates of either material or wages and the Government did not intimate to the contractor that no extra payment on account of increased rates would be paid to him or that he would have to complete the work on the basis of original rates and only when after completion of work the contractor submitted his final bill claiming 20 per cent extra over and above the rates originally agreed upon between the parties the Government stated that he was entitled to increased rates, it was held that both in equity and in law the contractor was entitled to receive extra payment.

The persistent stand of the department is that the claimant alone was responsible for the delay which I have found against. The rates given are not disputed. However, I am of the view that allowing 50% of the claim will be fair

*and reasonable in the facts and circumstances of the case.
It works out to Rs.12,92,380/-."*

17.While awarding a sum of Rs.20,00,000/- overheads and loss profits, the reasons given by the second respondent/Arbitrator for awarding the said amount are as follows:

"Claim No.5 relates to loss on account of overheads and loss of profit. According to the claimant, they had planned for overheads for 9 months at the rate of Rs.2 lakhs/month but had incurred overheads to the time of Rs.54 lakhs, as the work prolonged for 33 months and had lost profit @ 5% on the total of Rs.360 lakhs which works out to Rs.2 lakhs every month for 9 months but the work had prolonged for 33 months and in the process they had lost Rs.48 lakhs and at the rate of 1.50 lakhs per month and they would be entitled to Rs.36 lakhs. The total amount claimed under this head is Rs.72 lakhs.

The defence is the same as for other claims – only the claimant was at fault for the delay – the contract provided only for time compensation.

In my view, the claimant is entitled to loss on account of overheads though not at the figure mentioned. So far as profits are concerned under claim 4, increased rates having been given, this part of the claim has to be rejected. Under claim 5 in my view a sum of Rs.20 lakhs

would be fair and reasonable. The claim is allowed to this limited extent."

18.While awarding the interest at rate of the 12% per annum of the total amount quantified to be paid by the petitioner, the reasons given by the second respondent/Arbitrator are as follows:

The 6th and last claim relates to interest on the total amount quantified to be paid. In my view, 12% p.a. interest would be fair and reasonable on the total amount from the date of completion of work till the date of award and thereafter at 18.5% till payment.

19.The Arbitral Award is a well reasoned and well considered Award. Each and every defence raised by the petitioner has been duly considered by the Arbitrator in accordance with the terms of the contract and in accordance with law. The maintainability of the Arbitral dispute was also duly considered by the second respondent/Arbitrator in paragraph Nos.14 to 18 of the Arbitral Award which reads as follows:

"14.The clause in the Bid Document incorporating the above has already extracted. In my view, the words 'be referred to court' means referred to the Court for appointment of the arbitrator where the value of contract is more than Rs.2 lakhs. That appears to be the logical thing. The Government have not issued any clarificatory

G.O. as in the case decided by the Supreme Court, that for claims over Rs.2 lakhs, there has to be a regular civil suit.

15.After I had taken the decision, the learned counsel for the Department brought to my notice a ruling by the Madras High Court in RAJANA ENGINEERING CONTRACTORS-Vs-THE STATE OF TAMIL NADU [2006(1)CTC 769] wherein a contrary view has been taken. It has however come to my further notice that in SLP (C)No.10479/06 against the order in RAJANA ENGINEERING CONTRACTORS, the Supreme Court on 21.07.2008 passed the following order 'Having regard to the facts and circumstances of the case, we appoint Justice E.Padmanabhan, retired Judge of the Madras High Court as an Arbitrator to go into all the questions and resolve the dispute between the parties.....All the questions of law and facts are left open to be decided by the Arbitrator.' Further, the High Court dismissed O.P.No.294 of 2006 praying for termination of the mandate given to the arbitral tribunal vide order dt.30.06.2005 by the High Court in O.P.No.141/2002 and A.No.1983 of 06 for stay of further proceedings with regard to resolution of dispute arising out of agreement dated 08.08.1997 pending before the Arbitral Tribunal on 23.06.2006.

16.One other aspect to be noticed in this connection is whether the order by the Hon'ble Chief Justice appointing arbitrator is an administrative order or a judicial order.

17.In KONKAN RAILWAY CORPORATION LTD., &

ANR-Vs-RANI CONSTRUCTION PVT. LTD., {2002 (2) SCC 388}, a Constitution Bench of the Supreme Court has held that the appointment of arbitrator by the Chief Justice or his designate is not a judicial function resulting in an adjudicatory order and the reason for Section 11 in the Arbitration and Conciliation Act, 1996, is to ensure that the appointment is made by a person occupying a high judicial office who would naturally act with due care and caution to make certain that a competent, independent and impartial arbitrator is appointed. However a Bench of six Judge of the Supreme Court in S.B.P & COMPANY-Vs-PATEL ENGINEERING LTD., & ANR {2005(5) CTC 302} has overruled the decision in KONKAN RAILWAY CORPORATION case and held that order of Chief Justice appointing an arbitrator cannot be called merely administrative order but that it is a judicial order, that the mere fact that power is conferred on Chief Justice and not court presided over by him is not sufficient to hold that such power is administrative power and not judicial power. The Supreme Court has further observed that the decision of Chief Justice on issue or jurisdiction or existence of valid arbitration agreement would be binding on parties when the matter goes to arbitral tribunal and subsequent stages of proceedings except in appeal in Supreme Court. Further, where the Chief Justice passes order under Section 11(6) jurisdictional issues are also decided before reference is made and Section 16 cannot empower tribunal to ignore decision of Chief Justice while referring matter before arbitral tribunal.

18. Mere competence to decide does not enable arbitral tribunal to get over finality conferred on order passed prior to its entering upon reference by very Statute that creates it. The order of the Chief Justice under Section has reached finality and cannot be reopened before the Arbitral Tribunal. In the above background, I hold that the arbitration proceedings are maintainable."

20. The learned Counsel for the petitioner has also not placed before this Court any precedent to show that any claim exceeding Rs.2 lakhs under the contract will have to necessarily be claimed under a civil suit and not through Arbitration.

21. The Hon'ble Supreme Court in a Catena of decisions starting 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*** has held only under the following grounds the Arbitral Award can be challenged under Section 34 of the Arbitration and Conciliation Act:

- (a) Procedure contemplated under Arbitration and Conciliation Act was not followed by the Arbitrator.*
- (b) The Arbitral Award is a non speaking Award.*
- (c) The Arbitrator has transgressed his jurisdiction.*

(d) The Arbitral 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) Insofar the "patent illegality" has to go to the root of the matter. Trivial illegalities are 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.

22. Therefore, this Court does not find any perversity or patent illegality in the Arbitral Award which is under challenge in the instant petition and the petitioner has not satisfied any of the grounds mentioned above to interfere with the Award dated 24.11.2008.

23. Accordingly, the Original Petition shall stand dismissed. However, there shall be no order as to costs.

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Internet: Yes

Index: Yes

Speaking order

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ABDUL QUDDHOSE, J.

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Pre-delivery order in
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