

IN THE HIGH COURT OF JUDICATURE AT MADRAS

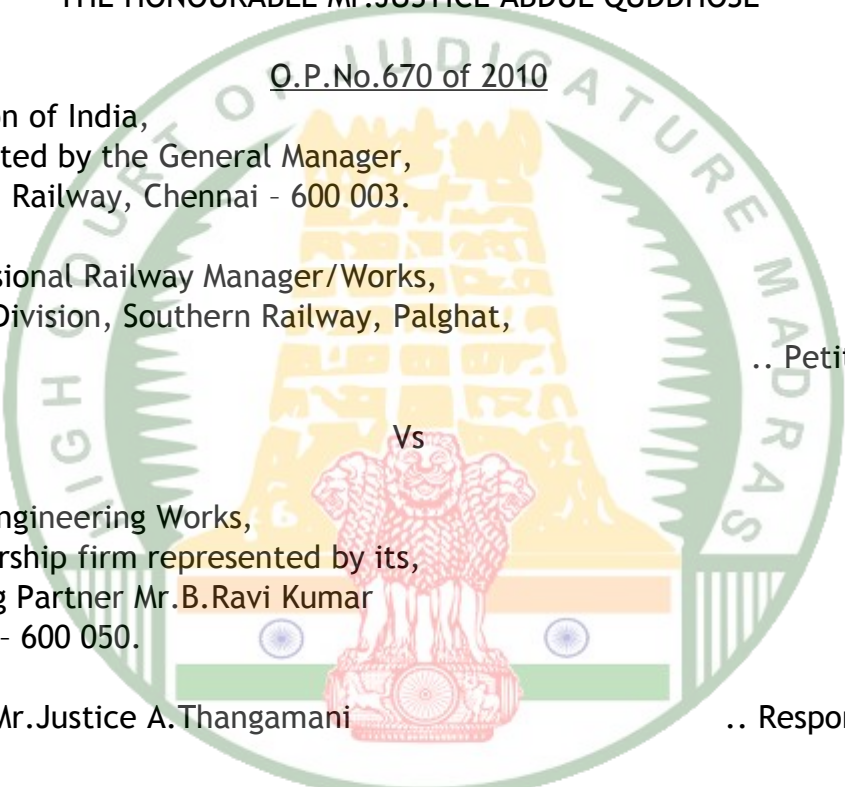
RESERVED ON : 27.06.2018

DELIVERED ON : 10.07.2018

CORAM

THE HONOURABLE Mr.JUSTICE ABDUL QUDDHOSE

Q.P.No.670 of 2010

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- 1.The Union of India,
represented by the General Manager,
Southern Railway, Chennai - 600 003.
- 2.The Divisional Railway Manager/Works,
Palghat Division, Southern Railway, Palghat,
Kerala. .. Petitioners
- Vs
- 1.Devaki Engineering Works,
A partnership firm represented by its,
Managing Partner Mr.B.Ravi Kumar
Chennai - 600 050.
- 2.Hon'ble Mr.Justice A.Thangamani .. Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the Award of the second respondent dated 18.09.2006 pertaining to disputes arising out of the agreement dated 11.04.2002 bearing J/117 entered into between the petitioners and the first respondent.

For Petitioners : Mr.S.Muthusamy,
Senior Panel Counsel

For Respondent 1 : Mr.M.R.Subramanian

ORDER

The instant Original petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 against the arbitral award dated 18.09.2006 passed by the second respondent/Arbitrator in favour of the first respondent/claimant directing the petitioner to pay the first respondent/claimant a sum of Rs.20,97,557/- together with interest at 18% per annum from the date of the Award till the date of payment.

2. The brief facts leading to the filing of the instant petition is that the petitioners being the railways awarded a works contract to the first respondent/claimant under an agreement dated 11.04.2002 for the value of Rs.1,91,21,200/-. The contract awarded to the first respondent/claimant by the petitioners was for replacement of existing bridge timbers with steel channel sleepers on bridge Nos.604/A & 2 UP & down and SRR-MAQ section BR Nos.1162, 1169, 1177 and 1233 in the Erode-Shoranur Section, Tamilnadu.

3. The case of the petitioners is that despite several extensions granted to the first respondent/claimant, the first respondent/claimant did not complete the work. Therefore, the petitioners were constrained to terminate the contract awarded to the first respondent/claimant, by their notice dated 23.02.2004. According to the petitioner, since the contract was

terminated for breach of contract, no money is due and payable by the petitioners to the first respondent/claimant.

4. The case of the first respondent/claimant is that there was a failure to release 60% of stage payment for the manufacture of sleepers by the petitioners to the first respondent/claimant, which resulted in, delay in execution of the project. According to the first respondent/claimant, the first respondent/claimant has not committed any breach of contract whereas, it is only the petitioners, who have committed breach of contract by illegally terminating the contract. There arose disputes between the petitioners and the first respondent/claimant and the dispute was referred to the Arbitration. Since there was no consensus arrived between the parties on the appointment of Arbitrator, the first respondent / claimant filed O.P.No.219 of 2004 on the file of this Court under Section 11 of the Arbitration and Conciliation Act to appoint an Arbitrator. The Hon'ble Chief Justice of this Court, by exercising powers under Section 11 of the Arbitration and Conciliation Act, 1996, appointed the second respondent as the sole Arbitrator to adjudicate the dispute between the petitioners and the first respondent/claimant on merits. The second respondent/Arbitrator acted upon the arbitral reference and after issuing notice to the petitioners as well as the first respondent/claimant and after considering the materials

available on record and after hearing the submissions of the respective parties and their counsels, passed an Arbitral Award dated 18.09.2006 in favour of the first respondent/claimant against the petitioners.

5. The claim wise details of the Arbitral Award dated 18.09.2006 passed in favour of the first respondent/claimant are as follows:

- a. Claim No.2: - Non-payment for the supply of sleepers and other items of work done as per contract terms - Rs.11,57,600/-
- b. Claim No.9 :- Refund of Security Deposit - Rs.3,00,000/-
- c. Claim No.13:- Non-payment for the work of pickling of steel channel sleepers, fittings and pad plates - Rs.4,20,976/-
- d. Claim No.14:- Damages for procuring different sizes of inner and outer clips, which was not envisaged in the contract - Rs.1,28,000/-
- e. Claim No.15:- Payment for provision of additional stiffeners in steel channel sleepers supplied - Rs.90,981/-

All put together, the petitioners were directed to pay the first respondent/claimant a sum of Rs.20,97,557/- together with interest at 18% per annum from the date of Award till the date of payment. The Second respondent/Arbitrator under the impugned Award dismissed the counter claim made by the petitioners against the first respondent/claimant on account of

- a. Risk and cost
- b. Loss sustained by Petitioners/Railways in view of the continuance of speed restrictions.
- c. Advertisement charges for calling risk tender.
- d. Excess payment made to the first respondent/claimant for the work not done
- e. Interest at 18% per annum on the payment of Rs.12,49,820/- made to the first respondent/Claimant through part bills for the period from the date of termination till the date of realisation.

6. Aggrieved by the Award dated 18.09.2006 passed by the second respondent/Arbitrator, the instant petition has been filed by the petitioners under Section 34 of the Arbitration and Conciliation Act, 1996.

7. Heard, Mr.S.Muthusamy, learned Senior Panel Counsel for the petitioners as well as Mr.M.R.Subramanian, learned counsel for the first respondent/claimant.

8. The learned Senior Panel Counsel for the petitioners submitted that the findings of the second respondent/Arbitrator that termination of the Contract awarded to the first respondent by the petitioners was not justified

and against the terms of the contract, is a perverse finding. According to him, the evidence on record would clearly indicate that the default was purely on account of the first respondent/claimant, who had committed delay in completing the project. The learned Senior Panel Counsel for the petitioners drew the attention of this Court to the various extensions sought for by the first respondent/claimant for completing the project. The learned Senior Panel Counsel for the petitioners also drew the attention of this Court to the mode of payment under the contract between the petitioners and the first respondent/claimant. According to the learned Senior Panel Counsel, the mode of payment stipulates that the fittings must be supplied along with the sleepers on the bridge site before releasing 60% of stage payment. The mode of payment clause referred to by the learned counsel for the petitioners reads as follows:

(i). Payment for supply, assembling, fabrication, transportation and galvanization of steel channel sleepers will be released at 60% of the accepted rate per each sleeper after supply/stacking of sleeper at the nominated depot/bridge site, and balance 40% will be released after fixing on the bridge.

(ii). Rate should include sales tax, octroi, excise duty, if any applicable in each state and complete.

9. According to the learned Senior Panel Counsel for the petitioners, the second respondent/Arbitrator has misread the clause by holding that the mode of payment clause, nowhere stipulates that for releasing 60% payment, fittings must be supplied along with the sleepers on the bridge site. The learned Senior Panel Counsel for the petitioners further submitted that despite the first respondent being not entitled to any payment before supplying the sleepers on the bridge site along with the fittings, the petitioners had released 36% of payment out of contract value to the first respondent/claimant, due to emergency requirement of the sleepers and its fittings by the petitioner. According to him, this was the reason for the petitioners to have prepared the bills on the basis of M.Book Ex.C.64 (internal pages 2-19) sanctioning 60% stage payment. According to the learned Senior Panel Counsel, the first respondent/claimant having not supplied the fittings along with the sleepers were not entitled for 60% payment and extensions for completion of the work were sought for, only by the first respondent/claimant and therefore, the termination of contract by the petitioners is a valid one.

10. The learned Senior Panel Counsel further submitted that all the technical specifications were furnished to the first respondent/claimant, while entrusting the work under the agreement dated 11.04.2002. Therefore,

according to the learned Senior Panel Counsel for the petitioners, there was no requirement for the first respondent/claimant to seek technical clarifications from the petitioners once again. He drew the attention to the letter written by the petitioners to the first respondent/claimant which reads as follows:

“Please note that writing letters frequently asking clarifications and stopping the work intermittently will only result the delay in doing the work.”

11. Concluding his submissions, the learned Senior Panel Counsel for the petitioners would submit that the second respondent/Arbitrator has gone beyond the terms and conditions of the Contract by awarding certain claims made by the first respondent/claimant and by rejecting the counter claims made by the petitioners.

12. Per contra, the learned counsel for the first respondent/claimant submits that the termination of contract is an illegal one. He also drew the attention of this Court to the mode of payment which, according to him stipulates that 60% stage payment will have to be made, which the petitioners failed to adhere to. According to him, the first

respondent/claimant need not supply fittings along with the steel sleepers to become eligible for receiving 60% part payment from the petitioners.

13. According to the learned counsel for the first respondent, only because of the delay in releasing 60% stage payment by the petitioners, the first respondent/claimant sought extension of time for completing the work. The learned counsel for the first respondent/claimant drew the attention of this Court to the letters dated 18.07.2003 and 01.09.2003 sent by the first respondent/claimant to the petitioners intimating them that 60% part payment has not been made to the first respondent/claimant as per the contract. According to the learned counsel, despite those reminders, the petitioners failed to pay 60% part payment to the first respondent/claimant. Only due to the breach of contract committed by the petitioners in not releasing 60% part payment, there was a delay in completion of the project.

14. Insofar as technical clarifications sought for by the first respondent/claimant from the petitioners, the learned counsel submits that it is only the railway officials, who can clarify the same as they did not form part of the contractual specifications. The learned counsel for the first respondent/claimant finally concluded by submitting that the Arbitral Award is a detailed and reasoned award which has considered the defences raised

by the petitioners in accordance with law and has rightly allowed the part of the claims made by the first respondent/claimant and has rejected the counter claim made by the petitioners against the first respondent/claimant.

15. The learned counsel for the first respondent also drew the attention of this Court to the Judgment of this Court, reported in 2017(1) CTC 807 (O.P.No.216 of 2011, dated 06.02.2017). The relevant portion in the said judgment which reads as follows:

“ 10. It has been held in several decisions that the scope of Enquiry under Section 34 of the Act, is very limited and the Court can interfere with an Award, if the person challenging the Award shows (a) he was under some incapacity; (b) there was no valid Arbitration Agreement; (c) proper Notice of appointment of Arbitrator was not given; (d) the Arbitral Award deals with dispute not contemplated by or not falling within the terms of submission to the Arbitration; (e) the composition of the Arbitral Tribunal was not in accordance with the Agreement between the parties; (f) the dispute cannot be settled by way of Arbitration; and (g) the Award is in conflict with the public policy of the country.”

16. The grounds raised for challenge in this Section 34 petition is identical to the defences raised by the petitioners before the second

respondent/Arbitrator for the claim made by the first respondent/claimant. The issue as to whether 60% payment will have to be paid only after the fittings are supplied by the first respondent/claimant has been elaborately considered by the Arbitrator with reasons and he has come to the conclusion that the mode of payment clause under the agreement nowhere stipulates that the fittings must be supplied along with the sleepers on the bridge site before release of 60% payment. The reasons given by the Arbitrator for rejecting the contentions of the petitioners that fittings will have to be supplied along with the sleepers for getting 60% payment is found at paragraph 29 of the Award which is extracted hereunder

“29. Whereas it is the stand of the contractor on the basis of the terms used under the caption “mode of payments” referred to above, what was required of him is to fabricate and assemble the steel channel sleeper and supply at the bridge site after galvanization. Fittings are loose objects which could not be stacked uncared for near each bridge site. He has to place the assembled sleepers which are very heavy on the track and then only fix the grooved plates etc. with the sleepers, “The mode of payment” nowhere states that the fittings must be supplied along with the sleepers on the bridge site before release of 60% payment. He has also pointed out that this is the reason for the Railway office to have prepared the bill on the basis of M.Book Ex.C.64 (internal pages 2 to 19)

sanctioning 60% stage payment. However, subsequently on 08.11.2003 the Superintending Engineer (Bridges) had scored out this and allowed 30% payment.”

17. The findings of the Arbitrator relating to release of 60% payment is supported by valid reasons and is also based on interpretation of the contract as well as other documents which includes “M.Book”Ex.C.64 (Internal pages 2-19).

18. With regard to the second contention of the petitioners that there was no necessity to answer for the clarifications sought for by the first respondent/claimant, the second respondent/Arbitrator has also considered and dealt with this issue elaborately in Paragraph No.33 of the Award. The second respondent/Arbitrator has held that since the first respondent/Claimant proposed to take up fabrication of steel channel sleepers required for Bridge Nos.1169 & 1177 initially, the confirmation of railways on the length of the sleepers will have to be indicated, to enable the first respondent/claimant to commence their work. Similarly, the Arbitrator in Paragraph Nos. 34, 35, 36 & 37 of the Award has given the reasons for the first respondent's/claimant's necessity to seek clarifications from the petitioners.

19. The findings of the second respondent/Arbitrator are based on the materials available on record as well as from the evidence, let in by both the parties to the dispute. The failure to release 60% stage payment to the first respondent/claimant for the sleepers staked has undoubtedly crippled the working capital and that has contributed to a large measure for the slow progress of the work. The Arbitrator has also given a finding that when two views of interpretation of the terms of Ex.C.14 of the contract are possible, the one that is favourable to the first respondent/claimant/contractor alone must be taken.

20. With regard to the third issue, whether the termination of the contract by the petitioners is valid, the second respondent/Arbitrator observed that if the delay in completion of work owed to the fault of the first respondent/claimant alone, extension of time would not have been granted by the petitioners under clause 17(2) of the general conditions of the contract. The Arbitrator has also considered the final termination notice Ex.C.47 dated 09.10.2004 and the earlier notice Ex.R39 issued under clause 62 of the general conditions of the Contract by the petitioners and held that the agreement has not been validly terminated by railways. Paragraph 60 and 61 of the Arbitrator's award along with the termination of contract is extracted hereunder.

“60. No doubt the Final termination notice Ex.C.47 dated 09.10.2004 and the earlier Ex.R.29 and R.30 have been issued under Cl.62 G.C.C. However this clause relates to matters finally determined by the Railways. Instead Cl.60 (1) G.C.C. deals with right of Railways to determine the contract.

61. As per Cl.61 (1) (vi), (vii) and (viii) of G.C.C., the Railways can rescind the contract if the contractor has abandoned the contract or persistently disregard the instructions of the Engineer in-charge or contravenes any of the provisions of the contract or failed to adhere to the agreed programme of work by a margin of 10% of the stipulated period. We have found here that the contractor has neither abandoned the contract nor contravened any of the provisions of the Agreement. The delay in progress of the work was not due to his fault. He had to modify the programme of work for reasons beyond his control. So the agreement has not been validly terminated by the Railways. These issues are answered in favour of the claimant.”

21. Therefore, as seen from the findings of the Arbitrator in paragraph Nos.60 and 61 of the Award, the contention of the learned counsel for the petitioners that only clause 62 of the general conditions of the contract is applicable for termination of the contract has been duly considered and negated with valid and sound reasons given by the second

respondent/Arbitrator. The second respondent/Arbitrator has held that only clause 60(1) of the general conditions of the contract alone deals with the right of railways to determine the contract for the case on hand.

22. This Court is of the considered view that each and every ground raised by the petitioners in this petition has been duly considered in accordance with law by the second respondent/Arbitrator. The scope for challenge under Section 34 of the Arbitration and Conciliation Act, 1996 is very limited. When the view taken by the second respondent/Arbitrator is a plausible view and is not perverse, irrational, illogical or arbitrary, this Court cannot interfere under Section 34 of the Arbitration and Conciliation Act, 1996. This Court does not find any illegality in the Arbitral Award passed in favour of the first respondent/claimant. Even though the first respondent/claimant had made many other claims, the second respondent/Arbitrator has rejected some of the claims and awarded only part of the claims in favour of the first respondent/claimant.

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23. Insofar as counter claims made by the petitioners against the first respondent/claimant before the second respondent/Arbitrator, the second respondent/Arbitrator based on the materials available on record has given a clear finding that the petitioners were not justified in terminating

Ex.C.4 agreement and therefore, the risk and cost proceedings initiated under Ex.C44 notice is eventually invalid. There is also another finding of the second respondent/Arbitrator in Paragraph 71 and 72 that the petitioners have also not shown as to how the declaration sought for regarding validity of risk and cost proceedings is beyond the powers of the Arbitrator. This Court is of the considered view that the learned Arbitrator has rightly rejected the counter claims made by the petitioners and has also rightly given a finding that the petitioners were not justified in terminating the contract awarded to the first respondent/claimant.

24. 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.

ABDUL QUDDHOSE, J.

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25. The petitioners have not satisfied any of the grounds mentioned above to interfere with the Award dated 18.09.2006. Hence, Original Petition shall stand dismissed. However, there shall be no order as to costs.

10.07.2018

Index: Yes/No
Speaking/Non-speaking orders
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