

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 29.10.2018

DELIVERED ON : 15.11.2018

CORAM:

THE HON'BLE MR. JUSTICE M.SATHYANARAYANAN
AND
THE HON'BLE MR.JUSTICE N.SESHASAYEE

O.S.A.No.394 of 2018

Marg Limited,
Rep. by its Managing Director,
Shri G.R.K.Reddy,
having its registered office at
No.4/318, Rajiv Gandhi Salai,
Kottivakkam, Chennai-600 041

... Appellant/Petitioner

Vs.

- 1.Van Oord Dredging and Marine
Contractors BV,
Indian Project Office,
VI Floor, Shanghvi Udayan,
B-18, Vaikunthlal Mehta Road,
J.V.P.D. Scheme, Mumbai-600 049.
- 2.Hon'ble Shri.Justice D.Raju,
Presiding Arbitrator,
Old No.39, New No.20, Pooram Prakasam Road,
Balaji Nagar, Royapettah,
Chennai-600 014.
- 3.Hon'ble Shri Justice B.N.Shrikrishna,
Member Arbitrator,
46, "Shyamala" Lotlikar Marg,
Behind Don Bosco High School,
Mathunga, Mumbai-400 019.
- 4.Hon'ble Shri Justice K.Sampath,
Member Arbitrator,
New No.11, 11 Street, Jagadambal Colony,
Royapettah, Chennai-600 014.

..Respondents/ Respondents

Prayer: Original Side Appeal filed under Order XXXVI Rule 1 of Original Side Rules read with Clause 15 of the Letters Patent against the order dated 02.02.2018 made in O.P.No.650 of 2013. filed against the a ward dated:14/04/2013

For Appellant : Mr.N.Murali Kumaran
for M/s.Akhil R.Bhansali

For Respondents : Mr.P.Giridharan

JUDGMENT

M.SATHYANARAYANAN, J.

The appellant is the petitioner in O.P.No.650 of 2013. The said Original Petition was filed under Section 34 of the Arbitration and Conciliation Act, 1996 [in short "Arbitration Act"] to set aside the Award dated 14.04.2013 passed by the respondents 2 to 4 and after contest, it came to be dismissed, vide order dated 02.02.2018 and challenging the impugned order dismissing the said Original Petition, the present appeal is filed.

2. Facts leading to the present litigation had been narrated in detail and in extenso in the impugned order, which is the subject matter of challenge, as well as in the earlier round of litigation, which culminated in the order dated 20.11.2009 passed in O.A.No.1085 of 2009, between the very same parties arising out of the Contract and two Addendums and therefore, it is unnecessary to restate the facts once again.

2.1. The appellant/petitioner in O.P.No.650 of 2013 had entered into an agreement with the first respondent on 24.02.2009 for dredging of soft to medium dense sand in the access channels and harbour areas of the Karaikal Port. Subsequently, certain modifications came into being initially by way of Addendum-I dated 20.07.2009 and Addendum-II dated 04.08.2009. During the course of execution of the said work, dispute arose between the parties and it was the claim of the first respondent that though a major portion of the work has been completed, remaining portion of the work could not be completed on account of hard soil and rocks found on the sea bed and it was the stand of the first respondent that utilization of Trailer Suction Hopper Dredger could not break the hard soil and rocks and for that purpose, Cutter Suction Dredger may have to be employed. The first respondent, on account of taking such a stand, also took a decision to demobilize the vessel, namely "The Sagar Manthan". Thus, the stand of the first respondent was that with Suction Hopper Dredge, it is impossible for them to carry on the dredging work and if they still persist, the vessel worth about Rs.400 crores would come to the state of disuse.

2.2. The appellant herein filed O.A.No.1085 of 2009 on the file of this Court under Section 9 of the Arbitration Act, praying for an order of ad-interim injunction restraining the first respondent, its men, servants or any other person claiming through or under them from in any manner varying or modifying the existing contractual obligations as set out in the initial Contract dated 21.05.2009, its addenda dated 20.07.2009 and 04.08.2009 respectively and consequently to direct the respondents to detain, preserve and deploy its dredgers to complete dredging of the channels of Karaikal Port, to achieve the agreed depths and widths on existing terms and conditions, pending the commencement and culmination of the arbitration proceedings.

2.3. The said application was taken out by the appellant on the ground that in utter violation of the Agreement and Addendum, the first respondent effected complete U-turn and stated that they are encountering physical obstructions and conditions in remaining hard patches in the site. It was the stand of the appellant in the said Original Application that the first respondent is duty-bound to honour its contractual obligations and therefore, they should have deferred the demobilization of its dredger "Sagar Manthan", as proposed to be effected on 08.10.2009. It was also contended that the first respondent, being a multi-national dredging company, still persisting in arm-twisting tactics and adopting unfair and restrictive trade practice by completely stipulating new terms and conditions de hors the existing binding contractual agreement and seeking to profiteer out of a day charter basis for deployment of its dredgers or if the applicant/appellant fail to comply, they threaten to suspend its subsisting contractual scope of work and also to redeploy the dredgers.

2.4. The first respondent, upon entering appearance, has filed a counter statement denying the averments and took a stand that even at the time of entering into agreement, it was made clear that the vessel could not dredge and remove stiff marine clay and dense hard and cemented soil and after commencing the dredging work, it was found that sub-soil condition was not even in the area and there was hard soil/rocks in some portions, especially between Kilometer Point 0 to Kilometer Point 2500 and in the light of the fact that sub-soil position was harder, 2 dredgers worked for about 16 days each, during which the productivity was very low. It was also pointed out by the first respondent that the only effective dredger for such operation would be Cutter Suction Dredger and it cannot ordinarily be deployed and they can be effectively deployed with maximum results in calm weather conditions between January and March and the appellant, however refused to acknowledge the expert advise of the respondent.

2.5. The respondent, vide communication dated 07.10.2009, offered to carry out joint soil investigation to determine the site soil conditions, however, the appellant refused to participate. The first respondent further contended that even the certified amount has not been paid and a sum of Rs.20,31,01,546/- remained as outstanding despite several reminders and certification for payment presented was also not certified by the appellant/applicant in the original application and also stated that as per Clause 12.2 of the General Terms and Conditions of the Contract, the appellant/applicant has to make the outstanding payments within 7 days of notice, failing which the respondent has no other option except to suspend the execution of the contract till the payments are effected.

2.6. It was also pointed out by the first respondent that though they are willing to refer the matter for arbitration, the appellant has all along resisted the same and the cost incurred per day for the vessels "Volvox Olympia" and "Sagar Manthan" are Rs.38,00,000/- and Rs.10,00,000/- respectively and also the daily standing cost of these vessels are Rs.22,00,000/- and Rs.7,00,000/- respectively and one of the vessel, namely "Sagar Manthan" remained idle every since 06.10.2009. The first respondent also took a stand that they are ready to refer the matter for arbitration and therefore, prayed for dismissal of the Original Application.

2.7. An interim order of direction dated 02.11.2009 came to be passed in O.A.No.1085 of 2009 and it is useful to extract the relevant portions of the said order:

"7. Taking into account the extreme positions that both parties have taken with regard to this, an interim order to the following effect is passed, without prejudice to the rights of both parties, solely for the purpose of ensuring that the completion of a public project on time is not hampered:

(a) The respondent shall continue the dredging operations under the supervision of the designated Engineer up to 15.11.2009.

(b) The payments for the dredging operations shall be on day charter basis from today, without prejudice to the claim of the applicant that such charges are not payable.

(c) Out of the amount of Rs.46 Crores allegedly certified already for payment, the applicant shall make payment of a sum of Rs.10 Crores on or before 5.11.2009 and the applicant shall also furnish an unconditional bank guarantee for the balance amount of Rs.36 Crores, which can only be revoked by the orders of this Court. The payment made under this clause and the guarantee executed as per this clause shall also be without

prejudice to the rights of the applicant. The respondent shall not invoke or encash the guarantee until further orders of this Court.

(d) There is no impediment for the respondent to take away the smaller vessel viz., M.V.SAGAR MANTHAN which is not required for this purpose.

8. The above order is passed only as a stop-gap arrangement, for the purpose of finding out whether the project could be completed, without termination on either side.

Post on 16.11.2009 for further orders."

2.8. The said Original Application was again listed and the learned Judge has taken note of the stand of the applicant/appellant and the respondent, especially, the possibility of removing the hard soil cannot be done without Cutter Suction Dredger, has observed that the first respondent cannot be compelled to carry on the execution of work in the light of his inability to continue to execute the work and such a person, cannot by an interim order, be directed to execute a contract of such a magnitude and serious consequences. The learned Judge further observed that by directing the first respondent to do so would amount to grant of an interim decree for specific performance, which is neither advisable nor feasible in the given circumstances.

2.9. The learned Judge, in paragraph No.13 of the said order, has taken note of the fact that despite certification for payment and the order of interim direction issued to the appellant herein to make payment of Rs.10 Crores and to execute Bank Guarantee for the remaining amount, it was not done and therefore, the applicant/appellant is not entitled to the equitable relief of interim mandatory injunction and accordingly, dismissed the said Original Application, vide order dated 20.11.2009.

2.10. Subsequently, Arbitration Clause was invoked and Hon'ble Mr.Justice B.N.Shrikrishna, a retired judge of the Hon'ble Supreme Court and Hon'ble Mr.Justice K.Sampath, former Judge of this Court were nominated as Arbitrators. Hon'ble Mr.Justice Shivaraj Patil, former Judge of the Supreme Court was nominated as the Presiding Arbitrator and since the learned Judge expressed some difficulty, Hon'ble Mr.Justice D.Raju, former Judge of this Court, was nominated as the Presiding Arbitrator.

2.11. The Arbitral Tribunal, consisting of the Hon'ble Judges, had framed necessary issues and on going through the

materials in the form of documentary evidence and also considering the claim and counterclaim made by the appellant herein, has passed the impugned Award dated 14.04.2013. The appellant, aggrieved by the said Award, had filed O.P.No.650 of 2013 on the file of this Court.

2.12. The learned Single Judge, on appreciation of relevant materials, observed that the question relating to lump sum contract has never been raised and it is agreed that only TSHD dredge alone has been used and the Arbitral Tribunal rendered its Award based on factual findings and as such, no ground is available to invoke Section 34 of the Arbitration Act. The learned Judge has also gone to the certification of the bills and though technical objections were raised, those objections are liable to be rejected as unsustainable and further gone into the question as to the nature of the contract and found that it is not a lump sum one and the interpretation of a contract lies within the domain of the Tribunal and when such an interpretation is a possible and plausible view, the same cannot be substituted by this Court. The learned Judge has also gone into Addendum No.II and found that termination of the contract, by placing reliance upon Clause 12.2 and 12.4. of the contract, was found to be justified and taking note of the limited scope of jurisdiction available in the light of the decision of the Hon'ble Apex Court in Associate Builders v. Delhi Development Authority [(2015) 3 SCC 49], found that no ground was made out to interfere and accordingly, dismissed the Original Petition and challenging the legality of the same, the present Original Side Appeal is filed.

3. Mr.N.Murali Kumaran, learned counsel appearing for the appellant/petitioner in O.P.No.650 of 2013, made the following submissions:

(i) The Arbitral Tribunal has framed as nearly as 16 issues but, failed to give any finding on crucial issues, namely Issue Nos.7, 8 and 10.

(ii) The alleged certification done by the site engineer cannot be termed as valid certification and since the first respondent had failed to adhere to the terms and conditions of the main agreement as well as 2 addendums, there is every justification on the part of the appellant herein not to make payment, unless the first respondent carried out its obligations in terms of the agreement and 2 addendums.

(iii) There were overwhelming materials made available before the Arbitral Tribunal to probablise/sustain the case of the appellant, but the first respondent,

despite admitting his signature in the main agreement and two addendums, had willfully and deliberately failed to perform their part of obligation.

(iv) Despite overwhelming materials available before the Arbitral Tribunal and in spite of framing specific issues viz., Issue Nos.7, 8 and 10, the Arbitral Tribunal has failed to give findings on those issues, which is an error patent on the face of the record and non-recording of findings on those issues would also amount to perversity and the learned Judge ought to have interfered with the Award or at least could have remanded the matter to the Arbitral Tribunal to have specific findings on those issues and therefore, prayed for interference.

4. Per contra, Mr.P.Giridharan, learned counsel appearing for the first respondent has invited the attention of this Court to the order dated 20.11.2009 made in O.A.No.1085 of 2009 and would submit that the conduct of the appellant was very much evident from the said order and it is the appellant, who is guilty of non-adherence to the terms of the contract and also suppression of relevant material information. The learned counsel appearing for the first respondent by drawing the attention of this Court to Clauses 9.2 and 11.5 of the agreement and would submit that as per the said Clauses, "capital dredging of soft to medium dense sand (max STP 30) in the inner access channel and Harbour areas to a maximum depth of 13.5 m CD slopes at their natural angle or 1:5. Base Estimated Production is based on maximum sailing distance to Dumping area of < 3 nm is limited as per vessel's loaded draft restrictions and the agreement does not include for removal of stiff marine clay, dense, hard and cemented soils which are not dredgeable by TSHB" alone has been undertaken and when the actual work commenced, it was found that type of surface/sea bed sought to be dredged was not the type agreed as per the terms of the contract and though a communication was sent for joint investigation, the appellant, refused to participate and further pointed out that for dredging hard surface, different typed of dredger is required and it can be used during calm weather conditions during January and March and despite the above said material facts brought to the knowledge of the appellant, still they are very adamant and left with no other option, the contract came to be terminated and it cannot be found fault with.

5. It is further contended by the learned counsel appearing for the first respondent that insofar as non-payment is concerned, admittedly, the site engineer has certified the

payments and despite that, the said amounts have not been paid by the appellant by taking unsustainable and hyper-technical reasons. Insofar as non-recording of findings to Issue Nos.7, 8 and 10 is concerned, the learned counsel appearing for the first respondent has invited the attention of this Court to paragraph No.16 of the Arbitral Award and would submit that specific findings have been recorded in respect of those orders. On the legal plea, the learned counsel appearing for the first respondent would submit that neither the Arbitral Tribunal nor this Court, in exercise of its jurisdiction under Section 34 of the Arbitration Act, cannot rewrite or interpret the terms of the contract and the learned Judge has correctly taken note of the legal plea in the light of the authoritative pronouncement of the Hon'ble Supreme Court in the decision in Associate Builders case (cited supra) and rightly dismissed the original petition and prays for dismissal of this Original Side Appeal.

6. This Court paid it's best attention to the rival submissions and also perused the entire materials placed before it.

7. A perusal of the Award passed by the Arbitral Tribunal would indicate that the appellant had also filed it's statement of counterclaim prescribing a sum of Rs.540,536,948.93 as Principal and a sum of Rs.56,334,316.54 towards Interest, @ 12% per annum from the date of suspension and abandonment of the works till 31.10.2010 and thereafter, till payment/realisation.

8. Issue No.1 pertains to whether the statement of claim as framed and filed by the appellant is maintainable in the eyes of law? The Arbitral Tribunal has given a categorical finding that the said objection appears to be not only stale and unacceptable but also devoid of merit.

9. The Arbitral Tribunal has gone into Issue Nos.2 and 5 with regard to certification and found that Captain Rajasekhar/RW1 was the site engineer of the appellant, who verified and also confirmed that the invoices of the claimant were certified by way of Inter-Office memo and that the invoices were never revisited and reassessed for payment and that the issuance of an Inter-Office memo was always a standard document for payment of invoices. The Arbitral Tribunal further found that some invoices came to be certified partly and in paragraph No.12 of the Award recorded a finding that the appellant herein was in possession of the best material to prove the factum of certification and they cannot take an unjust stand, even when the copies said to have been given to the first respondent have been produced and in the very same paragraph, the Arbitral Tribunal has recorded a finding that admittedly, the claim as per certification have not been released in favour of the first respondent.

10. In paragraph No.15 of the Award, while dealing with Issue Nos.4, 6 and 7, the Arbitral Tribunal recorded a finding that the callous manner in which the claimants (first respondent) have been treated by the respondent/appellant herein is wholly unjust and further recorded a finding that the appellant herein cannot evade payment of substantial sums of money for works executed and the conduct and course of action of the appellant in this regard constitute contravention, violation and breach of the terms of the contract.

11. In paragraph No.16 of the Arbitral Award, the Tribunal had considered the issue whether the claimant/first respondent was in breach of the contract on account of non-deployment of a dredger other than TSHD dredger or by an abandonment of the work? and also taken into consideration addendum No.II also. The Arbitral Tribunal, after considering all the documentary evidence, found that despite addendum No.II, it cannot be said that the work had undergone any basic/fundamental change and therefore, the stand taken by the appellant herein does not merit acceptance and further recorded a finding that the first respondent said to have either abandoned the obligations under the contract or unlawfully terminated the contract.

12. The primordial submission made by the learned counsel appearing for the appellant is that the Arbitral Tribunal failed to record any specific finding in respect of Issue Nos.7, 8 and 10 and in the considered opinion of the Court, the said submission totally lacks merit and substance. A perusal of paragraph No.16 of the Arbitral Award would indicate that those issues have been dealt with and factual findings have been recorded by the Arbitral Tribunal by appreciating the claim statement, reply and statement of counterclaim as well as documentary evidence and in paragraph 17 of the Award, counter-statement made by the appellant was also dealt with and a finding came to be recorded that there cannot be an award of damages on hypothetical grounds of grievances and even in respect of alleged balance of work, there has been no abandonment of work by the first respondent and when the termination of the contract was justified, the question of awarding any sum to be required for executing the alleged balance of work does not arise.

13. The learned counsel appearing for the appellant, under the guise of advancing arguments, also require this Court to rewrite the terms of the contract as per their interpretation and re-appreciate the materials, which were considered by the Arbitral Tribunal.

14. In Associate Builders v. Delhi Development Authority [(2015) 3 SCC 49], the scope of interference under Section 37 of the Arbitration Act came up for consideration and the Hon'ble Supreme Court, after considering the grounds available for interference in the said award as well as the scope for setting aside the Arbitral Award under Section 34 of the Arbitration Act, held that the Arbitral Award passed by the Arbitrators not called for any interference.

15. In Swan Gold Mining Limited v. Hindustan Copper Limited [(2015) 5 SCC 739], Sections 34(2)(b)(ii) and 28(3) of the Arbitration Act came up for consideration and it is relevant to extract the following paragraphs of the said decision:

"The arbitrator's decision is generally considered binding between the parties and therefore, the power of the Court to set aside the award could be exercised only in cases where the Court finds that the arbitral award is on the fact of it erroneous or patently illegal or in contravention of the provisions of the Act. It is a well-settled proposition that the Court shall not ordinarily substitute its interpretation for that of the arbitrator. Similarly, when the parties have arrived at a concluded contract and acted on the basis of those terms and conditions of the contract then substituting new terms in the contract by the arbitrator or by the court would be erroneous or illegal. The interpretation of the contract is matter of the arbitrator who is a Judge chosen by the parties to determine and decide the dispute. The Court is precluded from re-appreciating the evidence and to arrive at different conclusion by holding that the arbitral award is against the public policy.

It is equally well settled that the arbitrator appointed by the parties is the final Judge of the facts. The finding of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him.

In the present case, the parties have entered into concluded contract, agreeing upon the terms and conditions of the said contract, which was finally acted upon. In such a case, the parties to the said contract cannot back out and challenge the award on the ground that the same is against the public policy. Even assuming the ground available to the appellant, the award cannot be set aside because it is not contrary to the fundamental policy of Indian Law or

against the interest of India or on the ground of patent illegality."

16. It is to be remembered at this juncture that Arbitration Clause incorporated in the agreement was the outcome of understanding of the terms of the contract and the parties, on their own volition, thought fit to refer any dispute arose out of the contract for arbitration and as a natural corollary, the decision rendered by the Arbitrator is binding on them, unless the Arbitral Award is vitiated on account of erroneous, patent illegality or contravention of the provisions of the said Act, it cannot be interfered with.

17. It is also a well-settled position of law that terms and conditions of the contract cannot be substituted by new terms and since it is in the nature of judicial review, the findings rendered by the Arbitrator Tribunal, unless vitiated on account of patent illegality, perversity or contravention of any of the provisions of the Act or against public policy, it cannot be interfered with. The scope of interference in the award passed by the Arbitrator under Section 34 and more particularly, under Section 37 of the Arbitration Act, is very very limited.

18. This Court, while dealing with the Arbitral Award, had found that the respondents 2 to 4 - Presiding Arbitrator as well as the Arbitrators had framed appropriate issues and on thorough consideration of the averments made in the claim statement, counter and counterclaim and on appreciation of documentary evidences, had rightly concluded that the first respondent/claimant is entitled to the Award. The learned Single Judge had also correctly taken note of the well-settled legal position as enunciated in Associate Builders case (cited supra) and rightly dismissed the Original Petition filed under Section 34 of the Arbitration Act.

19. This Court, on an independent application of mind to the entire materials placed, is of the considered view that there is no error apparent on the face of the record or patent illegality or perversity or violation of public policy for interfering with the award passed by the Arbitral Tribunal and finds no merit in this Original Side Appeal.

20. In the result, the Original Side Appeal is dismissed, confirming the order dated 02.02.2018 made in O.P.No.650 of 2013. No costs.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

jvm

To

1.The Sub Assistant Registrar,
Original Side Section,
High Court, Madras.

+1cc to Mr.P.Giridharan, Advocate, S.R.No.77941

+2cc to Mr.Akhil R.Bhansali, Advocate, S.R.No.77899

O.S.A.No.394 of 2018

RSI (CO)
GSP (07/12/2018)



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