BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 26.06.2018

Pronounced on : 09.07.2018

CORAM

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU
AND
THE HONOURABLE MRS.JUSTICE T.KRISHNAVALLI

C.M.A.(MD)No.302 of 2014
and
M.P(MD)No.2 of 2014

The Superintending Engineer,
WRO/PWD,
Thambaraparani Basin Circle,
Tirunelveli - 2. .. Appellant

Vs.

1.S.Karuppaiah,
Contractor,
10A, Singarayar Colony,
North Street,
Madurai.

2.S.Ramachandran
Sole Arbitrator,
Sole Arbitratral Tribunal,
Chennai. ..Respondents

PRAYER: Appeal filed under Section 37(1) of Arbitration and Conciliation Act, 1996, to set aside the order dated 12.04.2010 in Ar.O.P.No.30 of 2005, on the file of the Principal District Judge, Thoothukudi.

For Appellant : Mr.V.R.Shanmuganathan
Spl. Govt. Pleader

For Respondents : Mr.K.Govindarajan for
for Mr.K.Prabhu for R1

No appearance for R2

JUDGMENT

[Judgment of the Court was delivered by K.RAVICHANDRABAABU, J.]

This civil miscellaneous appeal is filed challenging the order of the Principal District Judge, Thoothukudi, passed in AROP No.30 of 2005, dated 12.04.2010.

2.The appellant herein is the employer and the first respondent herein is the Contractor. The Arbitration O.P filed under Section 34 of the Arbitration and Conciliation Act, 1996 by the employer, challenging the award passed by the second respondent herein in favour of the first respondent, was dismissed by the Principal District Court, Thoothukudi. Now, the present appeal is filed before this Court under Section 37 of the said Act.

3.<u>The facts and circumstances, which culminated into filing of this appeal, are as follows</u>:-

The appellant and the first respondent entered into an agreement on 24.12.1998 for doing the civil work in rehabilitation and modernization of south main channel under Thamirabarani system. The period of agreement was fixed as 18 months, from the date of handing over of the site to the first respondent. The contract period was subsequently extended twice, one on 23.05.2000 for six months and another on 09.03.2001 for twelve months. Finally, the work was completed and final measurement was taken on 31.08.2001. The appellant made the payment towards the work done by the first respondent on 11.01.2002. However, the first respondent claimed more money towards loss due to escalation in cost of material, extra labour, wastage of material, smooth finish instead of normal finish done based on the oral instruction, extra expenditure spent on account of frequent letting out of water in the channel, compensation for wastage of materials on account of flow of water, maintaining the key personnel on account of delay in completion of the project and towards interest on over draft facilities from bank. Therefore, an Adjudicator was appointed by the appellant as provided under Clause 24 of the Conditions of Contract to adjudicate the issue. The said Adjudicator through proceedings, dated 27.03.2002, found that there was a breach of contract on the part of the Department in releasing the water continuously and hence, the contractor has to be reasonably compensated as indicated in his proceedings.

4.Not being satisfied with the findings rendered by the Adjudicator, the appellant herein referred the matter to an Arbitrator appointed by the Chief Engineer, PWD/WRO, Madurai Region. The sole Arbitrator, a retired Superintending Engineer of the same Department, heard both parties, considered the respective claims and the evidence let in by them and thereafter, passed an award on 20.10.2003 awarding a sum of Rs.61,67,561/- with interest at the rate of 10% per annum from the date of the award. The Arbitrator awarded the said sum in total under different heads as follows:-

"Claim I (item 1)	Loss incurred due to escalation of Cost of the materials	Rs. 4,28,939
Claim I (item 2)	Variation in lining works (Additional Expenditure)	Rs.10,16,652
Claim I (item 3)	Smooth finishing	Rs.15,51,920
Claim I (item 4)	Conveyance of Materials	Rs. 7,56,625
Claim II (item 1)	Extra quality of earth & graval (wastage)	Rs. 5,60,000
Claim II(item 2)	Extra expenditure for maintaining Establishment	Rs. 8,40,000
Claim II(item 3)	Interest from the date of final payment to the date of award	Rs.10,13,425
Total		Rs.61,67,561"

The appellant herein filed Arbitration O.P under Section 34 of the said Act before the Principal District Judge, Thoothukudi, in AROP No.30 of 2005. The learned Principal District Judge, after considering all the facts and circumstances and also the scope of interference under Section 34, dismissed the O.P as devoid of merits. Thus, the present appeal is filed by the employer against the order passed under Section 34 of the said Act.

5.The crux of the contentions raised by the appellant in this appeal is as follows:-

The first respondent has not completed the work within the stipulated time. Even though two extension of time were granted, it was on a condition that the first respondent has to work on the same rate as per the agreement. Therefore, he is not entitled for more amount as per his claim. As per clause 16.1 of the Conditions of Contract, flow of water in the channel has to be managed by the Contractor himself by diversion and by forming temporary bunds at his cost. Therefore, non-completion of the work in time on account of flow of water, cannot be a reason to claim more money. The appellant never agreed to stop the flow of water in the channel. The first respondent has accepted the full and final settlement of payment on 11.01.2002. Therefore, the present claim made by him subsequently on 04.03.2002 is an after thought. There was no breach of term as well as no delay on the part of the Department. All the vouchers and bill books are fabricated for the purpose of the extra claim. There was no agreement for the payment of interest. Even otherwise, no interest could be awarded for extended period.

6.Mr.V.R.Shanmuganathan, learned Special Government Pleader appearing for the appellant further submitted that a question of law is involved in this case for consideration under Section 37 of the said Act, as both the authorities below have gone beyond the terms of the contract and therefore, the Arbitrator is erred in law in granting the relief by considering certain facts, which are not covered under the terms of the contract. In other words, it is his contention that the Arbitrator made the award contrary to or beyond the terms of the contract and thus, he acted beyond his jurisdiction. Therefore, he contended that this question of law gives raise a cause of action for the appellant to maintain the present appeal before this Court. In support of such contention, the learned Special Government Pleader relied on a decision of the Hon'ble Supreme Court reported in (2010)8 SCC 563 [Rashtriya Chemicals and fertilizers Ltd. vs. Chowgule Brothers].

7.Per contra, the learned counsel for the first respondent Mr.K.Govindarajan submitted as follows:-

(i) Immediately after completion of the work on 30.06.2000, the first respondent made repeated requests for payment towards extra expenditure on 19.06.2000, 28.10.2000 and 19.09.2001, before receiving the final bill. Therefore, the claim made by the first respondent was not an after-thought. The first respondent never received payment from the appellant on 11.01.2002 by agreeing that it was a full and final settlement, since his request for paying extra expenditure amount was still pending with the appellant at that time. Since no decision was taken on his request for extra expenditure payment, the matter went before the Adjudicator, who in-turn held in favour of the first respondent. Thereafter, it is only the appellant, who referred the matter to the Arbitrator, who also, in-turn, has passed the award in favour of the first respondent. Challenge made under Section 34 of the Act against the said award also resulted against the appellant. Thus all the three forums concurrently decided against the appellant by considering all the facts and circumstances and therefore, there is no scope for interfering with such factual findings rendered by those fact finding authorities concurrently against the appellant. No question of law is involved in this case as projected by the appellant.

ii) Even on merits, it is to be noted that an impossibility of performance was thrusted on the first respondent to complete the work within the stipulated time. If the water is continuously flowing in the channel, the appellant cannot expect the first respondent to divert the water from the channel by digging any parallel channel at his own cost, in order to complete the repair work in the subject matter channel. The water was flowing in the channel continuously for agricultural purpose and therefore, it was very difficult for the first respondent to complete the work within stipulated time. In view of continuous flow of water, the first respondent had incurred multiple expenditure on the same work, as the construction put up in the channel was washed away on several occasions.

iii) Clause 44.2 of the terms of the contract provides for price increase, while extending the period of contract. Though the appellant extended the time twice at the request of the first respondent, he failed to increase the cost as provided under Clause 44.2 of the agreement. Non-increasing of the cost was against the terms of the contract. Therefore, it is a dispute referable to the Adjudicator. Accordingly, the Adjudicator as well as Arbitrator found in favour of the first respondent. Both the authorities have gone into the factual aspects of the matter and appreciated the evidence let in by the parties and thereafter, came to the conclusion in favour of the first respondent. The findings rendered by those authorities were further confirmed by the Court under Section 34 of the said Act. Therefore, re-appreciation of evidence once again by this Court that too under Section 37 of the Act is not possible as held in 2010(1) SCC 409 [Ravindra Kumar Gupta and Company vs. Union of India]. The authorities should have stopped the water and made the site in a workable condition. Three times the entire work was washed away due to flow of water.

8.The learned Special Government Pleader by way of reply submitted that as per Clause 24.1, the dispute should have been raised and referred to the Adjudicator within 14 days, whereas the first respondent raised the same after considerable delay. Therefore, there is no bone fide on the claim of the first respondent. When the very claim was not made within the time stipulated, the first respondent is not entitled to rely upon Clause 44.2. The channel was closed for nearly eight months and therefore, at that time, the first respondent ought to have completed the work.

9. Heard the learned Special Government Pleader for the appellant, the learned counsel for the first respondent and perused the materials placed before us.

10.The point for consideration in this appeal is as to whether the order passed by the Court below under Section 34 of the said Act, confirming the award passed by the Arbitrator, is liable to be interfered with by this Court by exercising jurisdiction under Section 37 of the Arbitration and Conciliation Act, 1996?

11.This appeal is filed under Section 37(i) of the Arbitration and Conciliation Act, 1996. Thus, before going into the merits of the matter, it is better to understand the scope and ambit of the above provision of law empowering this Court to entertain and decide the appeal arising out of the order passed by the Court below under Section 34 of the said Act.

12.Perusal of Section 37(1)(c) would show that an appeal is maintainable as against the order of the Court passed under Section 34 either setting aside or refusing to set aside an arbitral award. In this case, the Court below refused to set aside the arbitral award in a petition filed by the appellant herein under Section 34 of the said Act. Thus, before we decide as to whether the Court below is justified or not in refusing to set aside the award, it is better to note, as to under what circumstances, the arbitral award may be set aside by the court exercising the jurisdiction under Section 34 of the said Act. Straightaway, we could refer to the relevant provision of law namely, Section 34, which reads as follows:-

"34 Application for setting aside arbitral award. —

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation. —Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the fact of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:
Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6)An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon other party."

13.Perusal of the above provision of law would make it clear that only under the circumstances referred to therein, which also are properly pleaded and proved, the Court may set aside the arbitral award. The only objection raised by the appellant herein against the award is that the Arbitrator travelled beyond the terms of agreement, while awarding the disputed sum under different heads and thus, the Arbitrator had dealt with a dispute which does not fall within the terms of the contract, as contemplated under Section 34(2)(iv) of the said Act. In other words, the award is not questioned on any other ground provided under Section 34 of the said Act.

14.The learned Special Government Pleader for the appellant contended before us that in the absence of any specific Clause to stop inflow of water in the channel, the respondent contractor ought to have taken all steps to divert the water through other source or course at his own expenditure, in order to carry out the repair work in the main channel continuously. He further contended that though two extensions were granted, it was only with a condition that the contractor has to complete the work on the same rates. Therefore, he submitted that the respondent is not entitled to any amount other than the one agreed upon between the parties under the agreement. Thus, he contended that awarding the excess amount to the contractor was not in accordance with the terms of the contract and on the other hand, it is out side the scope of contract.

15.We remained ourself, at this juncture that we are not dealing with an application filed under Section 34 and on the other hand, an appeal filed under Section 37 of the said Act. Therefore, we need to satisfy ourselves only with a question as to whether, the Court below has given convincing and justifiable reasons for not interfering with the award passed by the Arbitrator.

16.It is a matter of fact that before the dispute was referred to the Arbitrator by the employer/appellant, the said issue was first placed before the Adjudicator appointed by the very same employer, who in turn, by proceedings dated 27.03.2002, after hearing both parties, found that there was a breach of contract on the part of the employer in releasing the water continuously and hence, the contractor has to be reasonably compensated, as indicated in his proceedings. Not being satisfied with the Adjudicator's findings, the employer referred the matter to the Arbitrator, who in turn passed a detailed award by considering all the facts and circumstances and evidence let in by the parties. When the said award was put to challenge under Section 34 of the said Act, the Court below considered the issue in detail and refused to interfere with the award. The Court below pointed out certain factual aspects, as found by the Adjudicator as well as the Arbitrator, in support of its conclusion, the crux of the same reads as follows:-

(a) the south main channel of Srivaikundam in Thoothukudi District receives water from Papanasam Dam through the Thamiraparani river with the capacity of carrying discharge of 1350 cusees and that channel was used to feed 5317 hectares of Ayacut and runs for a length of 8.677 kms.

(b) with the existing height of lining in 5.5 feet, any discharge over and above 800 cusees led to frequent erosion of river banks and therefore, it was decided to raise the height of lining to 7.5 feet with the help of concrete.

(c) for executing such work, the appellant and the respondent entered into a contract. The period of contract was fixed at 18 months.

(d) the contractor suffered financial loss on various heads due to the extended period of contract that was mainly attributable to the appellant for having not given proper instruction to the officers to stop flow of water on the channel so as to facilitate early completion of contract.

(e) Because of the extended period of contract, the contractor had incurred additional expenditure by way of additional labour due to flow of water, cost escalation, maintaining extra force and machinery etc.,

(f)the award under challenge was not challenged by the employee under misconduct of the Arbitrator.

(g) The Arbitrator has substantiated his findings that water was released in channel whenever water was available in Dam and therefore, there was no guarantee of uninterrupted stop of water enabling the contractor to carry out the work.

(h)The contractor is not expected to draw a parallel channel adjacent to the one existing to pass flow of water and thereafter to undergo lining works in the existing channel that too for the length of more than 8 kms.

(i) The fixing of contractual period appears arbitrary since the nature of work and the condition of the work spot were not properly analyzed and assessed by the contracting parties.

(j) The employer has failed to produce any material as to how additional bills were raised by the contractor, after signing of final bill cheque. On the other hand, the contractor has made his claim on 19.06.2000 and on 19.09.2001 i.e., before receiving the final bill.

17.Based on the above factual findings, the Court below dismissed the petition filed under Section 34 of the said Act.

18.Perusal of the award and the order passed by the Court below would indicate that the contention of the appellant before us is not well founded. First of all, we are not in a position to appreciate the contention of the employer/appellant that the repair work of the entire channel running to more than 8 kms has to be carried out by the respondent, without any guarantee of stopping the flow of water for a particular period. In other words, admittedly there was an uncertainty as to when the water would be stopped in the channel, as it is not in dispute that the water was let into the channel from the Dam for irrigating 5317 hectares of lands. Thus it is evident that when the flow of water in the channel was a routine and an usual course of affair, stoppage of the same was an exception, that too without any uncertainty of the period of such stoppage. When there was uncertainty with regard to the stoppage of water, which act was well within the domain of the employer, the contractor cannot be found fault in not executing the work within the time stipulated in the contract, since such execution within the said time, appears to be an impossibility of performance, in view of the continuous flow of water in the channel, which damaged the construction already put up on more than two occasions, as found by the authorities below.

19.The learned Special Government Pleader mainly contended that there is no condition agreed upon to stop the water in the channel. True, there is no such specific condition. But at the same time, it is neither conceivable nor comprehensible that the construction work in the channel could be carried out, even during the time of continuous flow of water in the channel. Therefore, the absence of a particular clause, namely to stop the water in the channel during a particular period, cannot be found in favour of the employer and on the other hand, such Clause even in its absence, has to be read into the terms of the contract, as an implied one, owing to the nature of work to be carried out by the contractor and the counter obligation of the employer. Otherwise, it would amount in expecting the contractor to perform an impossibility. This aspect has been rightly considered and decided by the Court below in detail with which, we find no reason to interfere.

20.No doubt, the appellant contended that in view of Clause 16.1 of the special conditions of contract, the Contractor is not entitled to claim excess payment. The said Clause 16.1 reads as follows:-

> "16.1 All charges and cost of dewatering by baling and / or by pumping and / or by diversion will be borne by the contractor. The surface flow of water should be diverted from the work spot by forming temporary bunds at the contractor's own cost."

21.The Arbitrator considered the objection raised by the employer based on the above Clause 16.1 and found as follows:-

> "2.Further irrespective of the fact whether the petitioner is aware of the flow in the channel or not, there must be a possibility to carry out the work. The flow pattern is not a constant one but variable considering the demand of the ayacutdar and availability of water in the dam. The specification of forming bank and lining with cast in site concrete could not be economically done within a short period, when the channel carries flow. Further clause 16.1 of condition specifies dewatering and diversion of surface flow at contractor's own cost. Dewatering mentioned in this clause relates to the balling out the water come across at the time of excavation of foundation etc., "Diversion of surface flow of water" mentioned in this clause is applicable only for the occasional flow due to rain. The contractor vide this clause should form temporary fund to protect the work site and to continue the execution without break. The work spot is not a confined specific location such as a bridge or regulator etc., It stretches over in linear direction for a length of more than 8.00 km. It is not possible for the petitioner to excavate a channel parallel to the existing one on both sides for diverting the flow, for maintaining water supply for irrigating the needy ayacut. The incorporation and referring the above clause has been done without application of mind and irrelevant condition. Insisting a person to carry out things which is not at all possible is against the natural justice."

22.Perusal of the above discussion and findings of the Arbitrator, while dealing with Clause 16.1 and the reasoning given by him to reject the contention of the employer would show that the view taken by the Arbitrator in that aspect is just and proper and cannot be substituted by any other view, even assuming such alternative view is possible.

23.A conclusion arrived by the Arbitrator based on the appreciation of the facts and circumstances, if satisfies the logical scrutiny, the same cannot be replaced by another view, at the instance of any party to the agreement, since such exercise would amount to sitting in the chair of the Arbitrator and deciding the matter afresh. This exercise is neither contemplated nor made available under Section 34 or 37 of the said Act.

24.Absence of a required clause which in effect, would ultimately result in impossibility of performance of the contract, should be construed and read into the terms of the contract. Likewise, a particular clause expressly stated in the contract, if resultantly become an unworkable one and the presence of such clause would lead to an impossibility of performance of the contract, such clause, even if expressly stated, has to be ignored as an unworkable clause leading to an impossibility of performance of the contract itself. Needless to state that the parties enter into a contract only with an intention to achieve the object sought under such agreement and not to defeat the very performance of the contract itself by any of the parties, when a particular clause stairs as an obstacle for either performing the contract as a whole or effectively performing the same as well.

25.The next contention raised by the learned Special Government Pleader is that while granting two extensions, it was specifically stated that the contractor has to perform and complete the work during the extended period at the same rate as agreed between the parties in the original agreement. It is true that the terms of the proceedings extending the contract period stipulated that the contractor should perform the work during the extensions period at the same rate agreed between the parties earlier. Whether such condition can be stipulated by the employer is the question that became the dispute between the parties leading to the order passed by the Adjudicator and the award by the Arbitrator, in view of Clause 44.2.

26.A careful perusal of the terms of the contract, more particularly, the Clause 44.1(f) and 44.2, we find that the above contention of the employer has been rightly rejected by all the forums below. The relevant conditions 44.1(f) and 44.2 read as follows:-

> 44.Compensation Events
>
> 44.1 The following are Compensation Events unless they are caused by the Contractor:
>
> "44.1(f). Ground conditions are substantially more adverse than could reasonably have been assumed before issuance of Letter of Acceptance from the information issued to Bidders (including the Site Investigation Reports), from information available publicly and from a visual inspection of the Site.
>
> 44.2. If a Compensation Event would cause additional cost or would prevent the work being completed before the Intended Completion Date, the Contract Price shall be increased and/or the Intended Completion Date is extended.

The Engineer shall decide whether any by how much the Contract Price shall be increased and whether and by how much the Intended Completion Date shall be extended."

27.As rightly pointed out by the learned counsel for the respondent, a careful reading of the Clause 44.2 would clearly indicate that a scope for the contractor to claim additional cost by way of compensation is certainly contemplated therein, while extending the period of contract. The said clause not only gives scope for extending the period of contract and also for increasing the contract price as well in the event of such extension not due to the fault of the contractor. The word used therein "shall" makes it mandatory and not obligatory.

28.At this juncture, it is relevant to look into the extension orders issued by the employer, one on 23.05.2000 and another on 09.03.2001. They read as follows:-

"From

Er.S.Ganesan, M.E.,
Executive Engineer, PWD/WRO,
Thambraparani Basin Division,
Tirunelveli-2.

To

Thiru.S.Karuppiah,
Civil Engineering Contractor,
10 G, Singarayar Colony,
North St.
Madurai - 625 002.

<u>Lr.No./D3/C.239/357M/Dt.23.05.2000</u>

Sir,

Sub: TNWRCP- Rehabilitation and Modernization of South Main Channel of Thambraparani System in Thoothukudi District TAM - MC-5- Extension of Time Requested by the Contractor - Reg.

Ref: 1.Thiru S.Karuppiah, Civil Engineering Contractor, 10 G, Singarayar Colony, North St. Madurai - 625 002 Lr.No.Nil/Dt.03.01.2009.

In view of the fact that the water is let out in the South Main Channel for Advance Kar and the work cannot be proceeded now as per clause 9.2 of the Special Conditions of Contract, Extension of time is here by granted a period from 27.06.2000 to 26.12.2000 for completing the work without liquidated damages, as requested for in your letter cited.

Kindly Note that the Extension of time is granted only to keep the agreement inforce and the quoted rates in the rates shall prevail during extensional period.

Executive Engineer, PWD/WRO.,
Thambraparani Basin Division,
Tirunelveli.

"From

Er.R.Palanivelu, B.E.,
Executive Engineer, PWD/WRO,
Thambraparani Basin Division,
Tirunelveli-2.

To

Thiru.S.Karuppiah,
Civil Engineering Contractor,
10 G, Singarayar Colony,
North St.
Madurai - 625 002.

Lr.No./D3/C.239/165M/Dt.09.03.2001

Sir,

Sub: TNWRCP- Rehabilitation and Modernization of South Main Channel of Thambraparani System in Thoothukudi District TAM - MC-5- Extension of Time Requested by the Contractor - Reg.

Ref: Your Lr.No.Nil/Dt.09.03.2001.

In view of the fact that terrain of the South Main Channel in Lower than that of the Marudur Melakkal Ayacuts, the field drains of Vellur and Thenkarai tanks have been infall of the Right bank of South main channel which causes hindrance to the progress work, as per clause 9.2 of the Special Conditions of Contract, Extension of time is here by granted for a period of 12 Months from 27.12.2000 to 26.12.2001 for completing the work without liquidated damages, as requested for in your letter cited.

Kindly Note that the Extension of time is granted only to keep the agreement inforce and the quoted rates in the agreement shall prevail during the extension period.

Executive Engineer, PWD/WRO.,
Thambraparani Basin Division,
Tirunelveli."

29.A very reading of the above referred two proceedings would indicate that extension of time was granted not due to the fault of the contractor on any account and on the other hand, it was due to the fact that the water let into the channel caused hindrance to the progress of the work and consequently, the contractor could not proceed with the work. When such being the admission made by the employer himself, we failed to understand as to how such extension of contract period will not fall under the purview of Clause 44.2 of the contract as extracted supra, to deny the price increase to the contractor. At the risk of repetition, we reiterate that Clause 44.2 empowers not only the extension of time when a compensation event had taken place, in this case, as the one falling under clause 44(f) as referred supra, but also the entitlement of the contractor to get increase of the contract price, since the word "shall" is used in 44.2 and not "may". No doubt, the learned

Special Government Pleader sought to rely upon one of the special provisions of the contract, namely Clause 9 to contend that the contractor has to pay liquidated damages as per contract for the extended period and that the contractor shall not be paid extra rate or revised rate due to extension of time.

30.A careful perusal of the said Clause 9 would show that if the delay was only due to the failure attributable to the contractor, then the Engineer shall have powers to grant extension and under such circumstances, the contractor shall not be paid any revised rate. In this case, as we have already pointed out, the relevant clause applicable to the facts and circumstances of this case is clause 44(f) and 44.2 and not clause 9, especially when such application of those clauses are also justified in view of the tenure of the proceedings of the employer themselves, namely the two extensions orders dated 23.05.2000 and 09.03.2001, as extracted supra.

31.One more contention is raised by the learned Special Government Pleader that the Contractor had raised the dispute before the Adjudicator belatedly, which, otherwise, ought to have been raised within 14 days of the notification of the Engineer's decision. Therefore, it is contended that the very claim was initiated belatedly. We are unable to appreciate the said contention for the simple reason that it is only the appellant-Department appointed the Adjudicator based on the request made by the Contractor dated 04.03.2002. If really such claim for appointing an Adjudicator was beyond the time limit as prescribed under Clause 24(1), nothing prevented the appellant from refusing to refer the matter to the Adjudicator by stating that it was time barred. It is not done so. On the other hand, the fact remains that the claim of the respondent-Contractor was referred to the Adjudicator by the appellant-Department itself and therefore, it is to be construed that the appellant has not only raised such objection at the initial stage and also submitted to the jurisdiction of the Adjudicator and contested the matter on merits. Therefore, now such issue cannot be raised before this Court by the appellant. Therefore, we reject such objection raised by the learned Special Government Pleader.

32.The learned Special Government Pleader sought to rely upon a decision of the Apex Court reported in (2010)8 SCC 563 [Rashtria Chemicals and Fertilizers Ltd., vs. Chowgule Brothers and others] to contend that when the Arbitrator has passed an award against the specific terms of the contract executed between the parties, this Court can interfere. There is no quarrel about the said proposition. But the facts and circumstances, in this case, are totally different, as discussed supra, more particularly in view of the clause 44(f) and 44(2). A combined reading of those two clauses would show that the Arbitrator has not exceeded the terms of the contract in awarding the disputed amount to the contractor, as contemplated by the appellant.

33.Even otherwise, it is well settled that scope of interference against the award of the Arbitrator is very limited as the Arbitrator appointed by the parties is the final Judge of the case. It is also well settled that even assuming two views are possible, one view taken by the Arbitrator cannot be assailed. Court will not substitute the other possible view in the place of the view already taken by the Arbitrator. Neither the power conferred under Section 34, nor under Section 37 can be construed as if the Court under those provision is to exercise the power as a regular court of appeal, so as to re-appreciate the entire evidence and give its own findings.

34.At this juncture, it is useful to refer the following decisions of the Apex Court:

(i) In 2015(5) SCC 739 [Swan Gold Mining Ltd., vs. Hindustan Copper Ltd.] at paragraphs 11 and 12, it has been observed as follows:-

> 11. Section 34 of the Arbitration and Conciliation Act, 1996 corresponds to Section 30 of the Arbitration Act, 1940 making a provision for setting aside the arbitral award. In terms of sub-section (2) of Section 34 of the Act, an arbitral award may be set aside only if one of the conditions specified therein is satisfied. The Arbitrator’s decision is generally considered binding between the parties and therefore, the power of the Court to set aside the award would 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.
>
> 12. 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.

(ii) In (2009)10 SCC 63 [Steel Authority of India Ltd., vs. Gupta Brother Steel Tubes Ltd] at paragraphs 18 and 29, it has been observed as follows:-

> 18. It is not necessary to multiply the references. Suffice it to say that the legal position that emerges from the decisions of this Court can be summarised thus:
>
> (i) In a case where an arbitrator travels beyond the contract, the award would be without jurisdiction and would amount to legal misconduct and because of which

the award would become amenable for being set aside by a Court.

(ii) An error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award.

(1989) 2 SCC 38 (1991)4 SCC 93 (1990) 4 SCC 740

(iii) If a specific question of law is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law does not make the award bad on its face.

(iv) An award contrary to substantive provision of law or against the terms of contract would be patently illegal.

(v) Where the parties have deliberately specified the amount of compensation in express terms, the party who has suffered by such breach can only claim the sum specified in the contract and not in excess thereof. In other words, no award of compensation in case of breach of contract, if named or specified in the contract, could be awarded in excess thereof.

(vi) If the conclusion of the arbitrator is based on a possible view of the matter, the court should not interfere with the award.

(vii) It is not permissible to a court to examine the correctness of the findings of the arbitrator, as if it were sitting in appeal over his findings.

29.The legal position is no more res integra that the arbitrator having been made the final arbiter of resolution of disputes between the parties, the award is not open to challenge on the ground that arbitrator has reached at a wrong conclusion. The courts do not interfere with the conclusion of the arbitrator even with regard to conclusion of a contract, if it is a possible view of the matter. The word “no award shall be set aside” in Section 30 mandate the courts not to set aside the award on the ground other than those specified in Section 30. In a case such as this, where the arbitrator has given elaborate reasons that compensation Clause 7.2 is not attracted for the breaches for which the compensation has been claimed by the respondent and such view of the arbitrator is a possible view, we are afraid in the circumstances, award is not amendable to correction by the court.

(iii) In (2010)11 SCC 296 [Sumitomo Heavy Industries Ltd vs. Oil and Natural Gas Corporation Ltd.,], the Apex Court observed as to what could be termed as a perverse finding. Paragraph 42 of the decision reads as follows:-

> 42.Can the findings and the award in the present case be described as perverse? This Court has already laid down as to which finding would be called perverse. It is a finding which is not only against the weight of evidence but altogether against the evidence. This court has held in Triveni Rubber & Plastics vs. CCE AIR 1994 SC 1341 that a perverse finding is one which is based on no evidence or one that no reasonable person would have arrived at. Unless it is found that some relevant evidence has not been considered or that certain inadmissible material has been taken into consideration the finding cannot be said to be perverse. The legal position in this behalf has been recently reiterated in Arulvelu and Another vs. State Represented by the Public Prosecutor and Another (2009) 10 SCC 206.

(iv) In (2012)5 SCC 306 [Rashtriya Ispat Nigam Ltd. vs. Devan Chand Ram Saran], the Supreme Court observed at paragraphs 43, 44 and 45 as follows:-

> 43.In any case, assuming that clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.
>
> 44.The legal position in this behalf has been summarized in paragaph 18 of the judgment of this court in SAIL vs. Gupta Brother Steel Tubes Ltd. (supra) and which has been referred to above. Similar view has been taken later in Sumitomo Heavy Industries Ltd. vs. ONGC Ltd. reported in [2010 (11) SCC 296] to which one of us (Gokhale J.) was a party.
>
> 45.The observations in paragraph 43 thereof are instructive in this behalf. This paragraph 43 reads as follows:
>
>> "43. ………The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in Kwality Mfg. Corpn. v. Central

Warehousing Corpn*. The Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding.” *[2009 (5) SCC 142]

(v) In 2010(1) SCC 409 [Ravindra Kumar Gupta and Company vs. Union of India], the Apex Court observed at paragraphs 8 to 14 as follows:-

11. We are of the considered opinion that the High Court committed a serious error in re-appreciating the evidence led by the parties before the arbitrator. This evidence was duly scrutinized and evaluated by the arbitrator. With regard to claim No.5, the arbitrator has given elaborate reasons. Therefore, finding recorded by the arbitrator cannot said to be either perverse or based on no evidence. A firm finding has been recorded that under claim No.5 there was default and delay on the part of Union of India with respect to:

(i)The payment of RARs final bill.
(ii)Delay in appointing agency for ATT.
(iii)Delay in giving decision.
(iv)Increase in height of Tent plinth (given late).

This conclusion has been erroneously substituted by the High Court with its own opinion on appreciation of the evidence. Such a course was not permissible to the High Court while examining objections to the award under Section 30 of the Arbitration Act, 1940.

9. The law with regard to scope and ambit of the jurisdiction of the courts to interfere with an arbitration award has been settled in a catena of judgments of this Court. We may make a reference here only to some of the judgments. In the case of State of Rajasthan vs. Puri Construction Company Limited. and Anothers. (1994) 6 SCC 485, this Court observed as follows:

"26.The arbitrator is the final arbiter for the dispute between the parties and it is not open to challenge the award on the ground that the arbitrator has drawn his own conclusion or has failed to appreciate the facts. In Sudarsan Trading Co. v. Govt.

of Kerala 1989 Indlaw SC 463 it has been held by this Court that there is a distinction between disputes as to the jurisdiction of the arbitrator and the disputes as to in what way that jurisdiction should be exercised. There may be a conflict as to the power of the arbitrator to grant a particular remedy. One has to determine the distinction between an error within the jurisdiction and an error in excess of the jurisdiction. Court cannot substitute its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties (emphasis in original) Whether a particular amount was liable to be paid is a decision within the competency of the arbitrator. By purporting to construe the contract the court cannot take upon itself the burden of saying that this was contrary to the contract and as such beyond jurisdiction. If on a view taken of a contract, the decision of the arbitrator on certain amounts awarded is a possible view though perhaps not the only correct view, the award cannot be examined by the court. Where the reasons have been given by the arbitrator in making the award the court cannot examine the reasonableness of the reasons. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisement of evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the court to take upon itself the task of being a judge on the evidence before the arbitrator.

27.In the case of Municipal Corpn. Of Delhi v. Jagan Nath Ashok Kumar 1987(4) SCC 497, it has been held by this Court that appraisement of evidence by the arbitrator is ordinarily never a matter which the court questions and considers. It may be possible that on the same evidence the court may arrive at a different conclusion than the one arrived at by the arbitrator but that by itself is no ground for setting aside the award. It has also been held in the said decision that it is difficult to give an exact definition of the word `reasonable'. Reason varies in its conclusions according to the idiosyncrasies of the individual and the time and circumstances in which thinks. In cases not covered by authority, the verdict of a jury or the decision of a judge sitting as a jury usually determines what is `reasonable' in each particular case. The word reasonable has in law prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably knows or ought to know. An arbitrator acting as a judge has to exercise a discretion informed by tradition, methodized by analogy disciplined by system and subordinated to the primordial necessity or order in the social life. Therefore, where reasons germane and relevant for the arbitrator to hold in the manner he did, have been indicated, it cannot be said that the reasons are unreasonable."

10. In the case of Arosan Enterprises Ltd. vs. Union of India, (1999) 9 SCC 449, this Court upon analysis of numerous earlier decisions, held as follows:

"36.Be it noted that by reasons of a long catena of cases, it is now a well-settled principle of law that re-appraisal of evidence by the court is not permissible and as a matter of fact exercise of power by the court to reappraise the evidence is unknown to proceedings undersection 30 of the Arbitration Act. In the event of there being no reasons in the award, question of interference of the court would not arise at all. In the event, however, there are reasons, the interference would still be not available within the jurisdiction of the Court unless of course, there exist a total perversity in the award or the judgment is based on a wrong proposition of law. In the event however two views are possible on a question of law as well, the court would not be justified in interfering with the award.

37.The common phraseology "error apparent on the face of the record" does not itself, however, mean and imply closer scrutiny of the merits of documents and materials on record. The Court as a matter of fact cannot substitute its evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. If the view of the arbitrator is a possible view the award or the reasoning contained therein cannot be examined.........".

11. This view has been reiterated by this Court in the case of Oil & Natural Gas Corporation Ltd. vs. SAW Pipes Ltd. as follows:

"53.In the light of the aforesaid decisions, in our view, there is much force in the contention raised by the learned counsel for the appellant. However, the learned senior counsel Mr. Dave submitted that even if the award passed by the arbitral tribunal is erroneous, it is settled law that when two views are possible with regard to interpretation of statutory provisions and or facts, the Court would refuse to interfere with such award.

54.It is true that if the arbitral tribunal has committed mere error of fact law in reaching its conclusion on the disputed question submitted to it for adjudication then the Court would have no jurisdiction to interfere with the award. But, this would depend upon reference made to the arbitrator : (a) if there is a general reference for deciding the contractual dispute between the parties and if the award is based on erroneous legal proposition, the Court could interfere; (b) It is also settled law that in a case of reasoned award, the Court can set aside the same if it is, on the face of it, erroneous on the provision of law or its application; (c) If a specific question of law is submitted to the arbitrator, erroneous decision in point of law does not make the award bad, so as to permit of its being set aside, unless the Court is satisfied that the arbitrator had proceeded illegally."

12. In the M/s. Kwality Manufacturing Corporation vs. Central Warehousing Corporation it was held:

"10.At the outset, it should be noted that the scope of interference by courts in regard to arbitral awards is limited. A court considering an application under Section 30 or 33 of the Act, does not sit in appeal over the findings and decision of the arbitrator. Nor can it re-assess or re-appreciate evidence or examine the sufficiency or otherwise of the evidence. The award of the arbitrator is final and the only grounds on which it can be challenged are those mentioned in Sections 30 and 33 of the Act. Therefore, on the contentions urged, the only question that arose for consideration before the High court was, whether there was any error apparent on the face of the award and whether the arbitrator misconducted himself or the proceedings."

13. Again it is reiterated in the judgment of Madhya Pradesh Housing Board vs. Progressive Writers and Publishers (2009) 5 SCC as follows:

"28.The finding arrived at by the arbitrator in this regard is not even challenged by the Board in the proceedings initiated by it under Section 30 of the Act. It is fairly well settled and needs no restatement that the award of the arbitrator is ordinarily final and the courts hearing applications under Section 30 of the Act do not exercise any appellate jurisdiction. Reappraisal of evidence by the court is impermissible."

14. In this case, the Supreme Court notice the earlier judgment in the case of Ispat Engineering & Foundry Works, B.S. City, Bokaro vs. Steel Authority of India, B.S. City, Bokaro [(2001) 6 SCC 347] wherein it was held as follows:

> "4. Needless to record that there exists a long catena of cases through which the law seems to be rather well settled that the reappraisal of evidence by the court is not permissible. This Court in one of its latest decisions [Arosan Enterprises Ltd. v. Union of India (1999) 9 SCC 449] upon consideration of decisions in Champsey Bhara & Co. v. Jivraj Balloo Spg. & Wvg. Co. Ltd. [Air 1923 PC 66], Union of India v.Bungo Steel Furniture (P) Ltd. [1967 1 SCR 324], N. Chellappan v. Secy., Kerala SEB [(1975) 1 SCC 289], Sudarshan Trading Co. v. Govt. of Kerala [(1989) 2 SCC 38], State of Rajasthan v. Puri Construction Co. Ltd. [(1994) 6 SCC 485] as also in Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan [(1999) 5 SCC 651] has stated that reappraisal of evidence by the court is not permissible and as a matter of fact, exercise of power to reappraise the evidence is unknown to a proceeding under Section 30 of the Arbitration Act, 1940. This court in Arosan Enterprises categorically stated that in the event of there being no reason in the award, question of interference of the court would not arise at all. In the event, however, there are reasons, interference would still be not available unless of course, there exist a total perversity in the award or the judgment is based on a wrong proposition of law. This Court went on to record that in the event, however, two views are possible on a question of law, the court would not be justified in interfering with the award of the arbitrator if the view taken recourse to is a possible view. The observations of Lord Dunedin in Champsey Bhara stand accepted and adopted by this Court in Bungo Steel Furniture to the effect that the court had no jurisdiction to investigate into the merits of the case or to examine the documentary and oral evidence in the record for the purposes of finding out whether or not the arbitrator has committed an error of law. The court as a matter of fact, cannot substitute its own evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties."

(vi) The recent decision reported in (2018)3 MLJ 1 [Chettinad International Coal Terminal Pvt. Ltd., vs. Kamarajar Port Ltd.], the Division Bench of this Court has observed that an award can only be set aside on the ground that it is against the public policy, thus if it is contrary to the fundamental policy of Indian Law, or the interest of India or justice or morality, or is patently illegal. After holding so, it is observed therein at paragraphs 13 and 14 as follows:-

> "13. It is well settled that when a case involves interpretation of a clause or some clauses of an agreement and the Arbitral Tribunal gives an interpretation which is plausible, the Court would not substitute that interpretation for its own interpretation only because the Court takes a different view or feels that the other interpretation is a better interpretation. This view is fortified by the decisions of the Supreme Court in State of Rajasthan v. Nav Bharat Construction Co., reported in (2010) 2 SCC 182: LNIND 2010 SC 32: (2010)2 MLJ 959 and P.R.Shah, supra.
>
> 14. There can be no question of interference with an interpretation of the agreement made by an Arbitral Tribunal, unless the interpretation is so perverse, unreasonable and fanciful that no body of persons instructed in law and acting reasonably could have interpreted the contractual provision in the manner that has been done."

(vii) In another decision, the Division Bench of this Court reported in (2018)4 MLJ 385 [C.C.T.Pvt. Ltd., v. Board of Trustees of Chennai Port Trust] has observed at paragraphs 50, 51 and 54 as follows:-

> "50. With the greatest of respect, the learned Single Bench, in our view, failed to appreciate the law relating to the setting aside of an arbitral award under Section 34 of the 1996 Act. While the learned Single Bench took note of the fact that the conduct of the parties, correspondence exchanged between them were required to be considered for the purpose of a contract, the learned Single Judge ignored the fact that interpretation of a contract was a matter for the Arbitrator to determine even if it gives rise to determination of a question of law and that once it was held that the Arbitrator had the jurisdiction, no further question was to be raised and the Court would not exercise its jurisdiction unless it found that there existed any bar on the face of the Award.
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> 51. In Rashtriya Ispat Nigam Limited v. Dewan Chand Ram Saran, reported in (2012) 5 SCC 306, the Supreme Court held as under:
>
>> 43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the

arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

54. The Supreme Court in P.R. Shah, Shares & Stock Brokers (P) Ltd. vs. B.H.H. Securities (P) Ltd. reported in : (2012) 1 SCC 594, held that "A Court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in section 34(2) of the Act..... Therefore, in the absence of any ground under section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."

35. Perusal of the above decisions of the Apex Court and the Division Bench decisions of this Court would undoubtedly indicate that none of the grounds raised by the appellant would justify for an interference against the order made by the Court below under Section 34 of the said Act. We also find that there is no question of law involved in this case much less the one as projected by the appellant, warranting such interference, more particularly when we also find no infirmity or irregularity or perversity in the findings rendered by the Court below.

36.Thus, the Civil Miscellaneous Appeal fails and the same is dismissed. No costs. Consequently, connected miscellaneous petition is also dismissed.

Sd/-
Assistant Registrar(T&P)

/True copy/

Sub Assistant Registrar

To

The Principal District Judge,
Thoothukudi.

+1cc to Mr.V.R.Shanmuganathan, Advocate, SR.No.72390.
+1cc to Mr.K.Prabhu, Advocate, SR.No.72082.

Judgment made in
C.M.A.(MD)No.302 of 2014
and
M.P(MD)No.2 of 2014
09.07.2018

skn
RAM/SKN RSK/SAR 2/19.07.2018/24P/4C