

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 21.03.2019

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THE HONOURABLE Mr.JUSTICE M.SUNDAR

O.P.No.358 of 2002

AND

O.P.No.215 of 2003O.P.No.358 of 2002

M/s.Nirdosh & Ajay Engineers (P) Ltd.,
Rep. by its Chairman & Managing Director,
No.113, Arcot Road,
Alwarthirunagar, Chennai - 87.

... Petitioner

Vs.

1.General Manager,
Southern Railways,
Chennai - 3.

2.The Chief Project Manager,
Metropolitan Transport Project (Railways),
Periyar E.V.R. High Road, Egmore,
Chennai - 3.

3.Mr.Justice T.Somasundaram,
Sole Arbitrator,
No.1686, 15th Street, H-Block,
Anna Nagar, Chennai - 40.

... Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 23.07.2001 and subsequent award dated 17.11.2001 made under Section 33 of the Arbitration and Conciliation Act, 1996 holding that in a concluded contract where there is a *consensus ad idem* the mutually agreed terms and conditions of tender No.MTP/C/2/94 cannot be altered unilaterally by the 2nd respondent and that the monetary relief arrived at in the Award for the support services rendered from April

1995 should not be adjusted towards the license fee of an uncommenced license for advertisement space at Chintadripet and Chepauk MRTS Railway Stations.

For Petitioner : Ms.A.Sushma Harini
 For R1 and R2 : Mr.M.T.Arunan
 Standing Counsel
 assisted by Ms.P.Sobana Devi

O.P.No.215 of 2003

The General Manager,
 Southern Railway,
 Chennai - 3.

Rep. by the Chief Project Manager,
 Metropolitan Transport Project (Railways),
 Periyar E.V.R. High Road, Egmore,
 Chennai - 8.

... Petitioner

Vs.

1.M/s.Nirdosh & Ajay Engineers (P) Ltd.,
 Rep. by its Chairman & Managing Director,
 R.Shyamsundarlal,
 No.1232/7, 1st Main Road, Anna Nagar,
 Chennai - 40.

2.Hon'ble Justice Thiru.T.Somasundaram (Retd.),
 Sole Arbitrator,
 New No.1, H-Block,
 Anna Nagar, Chennai - 40.

... Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 23.07.2001 passed by the 2nd respondent herein in the arbitration disputes between the petitioners and the 1st respondent with reference to issues 3 to 6 and direct the 1st respondent to pay the petitioners Rs.65,19,207.02 together with interest at 15% p.a. from the date of the award.

For Petitioner : Mr.M.T.Arunan
 Standing Counsel
 assisted by Ms.P.Sobana Devi
 For 1st Respondent : Ms.A.Sushma Harini

COMMON ORDER

This Common Order will dispose of both these instant 'Original Petitions' ('OPs' for brevity). 'Original Petition' in singular shall be referred to as 'OP'. OP.No.358 of 2002 shall be referred to as senior OP and O.P.No.215 of 2003 shall be referred to as junior OP (based on the numbers assigned by the Registry) for the sake of convenience and clarity. In the senior OP, there is one petitioner which is a private limited company i.e. a juristic company which goes by the name Nirdosh & Ajay Engineers (P) Ltd. There are three respondents in senior OP. Respondents No.1 and 2 shall be collectively referred to as 'Southern Railway' for the sake of convenience and clarity. To be noted, a Hon'ble retired Judge of this Court who constituted the Arbitral Tribunal ('AT' for brevity) has been arrayed as respondent No.3.

2.With regard to junior OP, there are two petitioners i.e. Southern Railway. First respondent is Nirdosh & Ajay Engineers (P) Ltd., which is the sole petitioner in senior OP. This company shall hereinafter be referred to as 'contractor' for the sake of convenience and clarity. In junior OP, a retired Hon'ble Judge of this Court who constituted the AT as sole arbitrator has been arrayed as second respondent.

3.Both the OPs i.e., senior and junior OPs have been filed under Section 34 of 'The Arbitration and Conciliation Act, 1996' ('A & C Act' for

brevity) assailing an arbitral award dated 23.07.2001 ('impugned award' for brevity) made by AT. While senior OP has been filed by the contractor, junior OP has been filed by Southern Railway. In other words, both the OPs i.e., senior and junior OPs have been filed under Section 34 of A & C Act assailing the same impugned award. In the impugned award made by AT, contractor is the claimant and the two respondents are 'Southern Railway'. In other words, while senior OP has been filed by the claimant/contractor, junior OP has been filed Southern Railway both assailing the same impugned award. This is akin to cross suits. Therefore, it would be appropriate to refer senior and junior OPs as cross OPs.

4. Having set out the array of parties and the nature of two OPs which would be stand disposed of by this common order, it may be necessary to set out a thumbnail sketch of facts which are imperative for appreciating this order.

5. This is a petition under Section 34 of A & C Act which turns on a very narrow compass. Ms.A.Sushma Harini, counsel for contractor (petitioner in senior OP and contesting respondent in junior OP) and Mr.T.Arunan, Special Counsel for Southern Railway assisted by Ms.P.Sobana Devi on behalf of Southern Railway (respondents 1 and 2 in senior OP and petitioners in junior OP) are before this Court.

6.Both the learned counsel were heard at length.

7.Before I proceed further, it may be necessary to set out that these two OPs being under Section 34 of A & C Act, considering the scheme of A & C Act and the sublime philosophy underlying the same i.e. expeditious resolution of disputes, it would be appropriate to refer to the instant OPs as vintage and may be even ancient as this Court is informed that the date of commencement of arbitration is 04.03.1997 which itself is more than one score and two years ago. The impugned award came to be passed on 23.07.2001 more than one and a half decades ago. While senior OP was presented in this Court on 11.02.2002 and junior OP was presented (earlier) on 29.10.2001. To be noted, though the date of presentation of junior OP was earlier in point of time, it appears that the numbering process consumed some time owing to which the number assigned to junior OP is in 2003. This fact is set out only to avoid any confusion qua chronology and numbering sequence of OPs and with the objective of enhancing clarity in narration of facts.

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8.At the outset, this Court notices that the undisputed date of commencement of arbitral proceedings is 04.03.1997. In other words, arbitral proceedings commenced two decades and two years (22 years) ago. 'Arbitral award' ('impugned award') came to be passed on 23.07.2001 and the instant OPs, viz. senior OP and junior OP, assailing the impugned award came

to be filed/presented in this Court on 11.02.2002 and 29.10.2001 respectively i.e. 17 and 18 years ago, respectively. Expeditious disposal and minimum judicial intervention are two important pillars qua edifice of 'Alternate Dispute Resolution Mechanism' ('ADR' Mechanism). There can be no dispute and there can be nothing polemic to hold that further procrastination of instant OP for any reason will militate against expeditious disposal philosophy qua ADR Mechanism and do violence to this pillar of ADR Mechanism which is not only a pillar, but also a sublime philosophy and a sanctus principle.

9.Reverting to the thumbnail sketch of facts, the crux and gravamen of the entire lis is traceable to two rail stations in Chennai which are part of 'Mass Rapid Transit System' ('MRTS' for brevity). These two rail stations are Chepauk and Chintadripet. Southern Railway issued an advertisement dated 19.09.1994 inviting prospective contractors. It is submitted that the advertisement dated 19.09.1994 consists of three schemes. It is submitted that lis pertains only to first scheme. It is also submitted that the first scheme consists of two parts. It is also submitted that exclusive license for advertisement is the first part and support services is the second part.

10.Terms of agreement were drawn up on 10.01.1995 and a letter of acceptance was given on 01.03.1995.

11. Be that as it may, it is submitted that on the request of Southern Railway, contractor commenced work in aforesaid two stations (referred to as 'said rail stations' for the sake of convenience and clarity) in April 1995. In other words, the contractor started to provide support services. Thereafter, it is not in dispute that the said rail stations were inaugurated on 16.11.1995. It is submitted that the reason why the contractor commenced support service before inauguration is some beautification work was required.

12. Adverting to the aforesaid advertisement terms as well as the aforesaid letter of acceptance dated 01.03.1995 issued by Southern Railway, it is submitted that the advertisement was with regard to transit between Madras Beach and Luz. The pivotal submission is that the Luz rail station itself was inaugurated only later, to be precise, on 16.10.1997, but, that was also skeletal infrastructure. Therefore, Beach to Luz sector of MRTS was not actually operated for a very long time is the core complaint.

13. On this basis, it is submitted that while the second part of the arrangement viz., provision of support services was given by the contractor, the first part which pertains to revenue from advertisements, to be precise, exclusive license for advertisements became a non-starter as Beach to Luz sector did not become operational for a very long time.

14. On this basis, the arbitral dispute was raised, AT was constituted and before the AT, contractor is the claimant. Southern Railway which was respondent before the AT entered appearance and made a counter claim. The counter claim made by Southern Railway was essentially towards licence fee.

15. In the aforesaid rival pleadings, AT framed as many as 11 issues which read as follows :

1. Whether Clause 16 of the Tender MTP/2/6/94 Scheme-I alone prevails as contended by the Claimant or whether the defence put forward by the Railway Administration on its behalf is to be accepted ?
2. Whether the period of licence in respect of advertisement rights, etc. vide item 1 of the tender would commence only after the execution of the agreement and after completion of phase I that is from Beach to Luz in all respects as per the project report of the respondents and in the absence of providing electricity in the meantime no commercial exploitation of the scheme was made possible by the respondents resulting in the loss of revenue to the petitioner ?
3. Whether Railway Administration is under obligation to provide rent free accommodation in Chintadripet and Chepauk stations as per Annexure 2A Clause 3.4 of the tender and whether rents or security deposits could be claimed for such accommodation by the respondent ?
4. Whether the respondents committed acts which made them liable for the damages caused to the lawns, flower beds and flower pots due to film shootings, vehicular movement over the lawns, due to closure of Southern and Northern gates at MCPT ?
5. Whether the claimant is entitled to claim a sum of Rs.81.09 lakhs against various items in (ii) (a) (c) (d) and (f) of the tender No.MTP/C/2/94 Scheme I together with interest at 24% p.a. till the date of realisation ?
6. Whether the contractor has rendered requisite support services as per the

tender conditions pending execution of agreement and pending commencement of license and if so what is the amount claimable by the claimant ?

7. Whether the action on the part of the Railway administration by deleting the work envisaged under (ii) (b) being the maintenance of structure quoted in the tender justified or whether the defence of the Railway administration in this behalf is acceptable ?
8. Whether the licence in respect of Part I of the Tender will commence in the absence of the execution of the agreement as per clause 16 read with 3, 4 & 5 of the tender terms and conditions ?
9. Whether the contractor is liable to pay license fee even before the execution of the agreement and whether the Railways are entitled to claim Rs.66,88,474/- as against the claimant ?
10. Whether the Railway administration is entitled to claim a sum of Rs.3,00,000/- as and by way of damages against the claimant with interest at 18% p.a.
11. To what relief the claimant is entitled ?

16. Each of the issues were dealt with after full contest and the AT returned factual findings. Before advertng to the findings returned by AT, it is not in dispute that as many as 137 documents viz. 137 Exhibits were marked on the side of the contractor before the AT and as many as 74 documents viz. Exhibits R1 to R74 were marked on behalf of Southern Railway. One witness was examined on both sides.

17. On the basis of aforesaid which includes a counter claim made by Southern Railway, all the 11 issues were examined and answered in the light of the aforesaid oral and documentary evidence, appreciation of which is set

out under each head where each of the issues have been discussed.

18. Ultimately, AT returned findings which reads as follows :

- a) The claimant M/s.Nirdosh & Ajay Engineers (P) Ltd., is directed to pay a sum of Rs.4,27,043/- (Rupees four laksh twenty seven thousand and forty three only) to the respondents.
- b) The claimant is directed to pay to the respondents future interest on the award amount of Rs.4,27,043/- at the rate of 15% per annum from the date of award till date of payment.
- c) Both parties to this Arbitration Proceeding to bear their respective costs of this Proceedings.
- d) The claim application of the claimant dated 13.2.1998 and the counter claim made by the respondents in their counter statement dated 27.03.1998 are disposed of in the above terms.

19.As mentioned supra, the impugned award has been assailed by both the parties viz., the contractor and Southern Railway. In the hearing before this Court, it was submitted by both counsel that the challenge to the impugned award is predicated on patent illegality.

20.To be noted, as mentioned *supra*, the arbitral proceedings commenced on 04.03.1997 and the impugned award itself came to be passed on 23.07.2001. Both the learned counsel submitted that patent illegality is the ground of attack.

21.In other words, submissions were made based on patent illegality and the question with regard to applying Section 34 of A & C Act as it stood prior to 23.10.2015 or post to 23.10.2015 is left open in the instant case, in the light of the trajectory of the hearing.

22.However, to be noted patent illegality is available as a ground for challenge to an award both pre and post amendment of Section 34 of A & C Act i.e. pre and post 23.10.2015. There is no difficulty in examining the impugned award on the ground of patent illegality. Patent illegality by itself i.e. by its' very nature, as a principle is such that it should be readily and clearly seen on a mere reading of the impugned award without resorting to any inferential process. To put it differently, it should be seen and not detected. In this view of the matter, the aforesaid issues and the manner in which each of the issues have been answered clearly bring to light and focus that the aspects of the Beach to Luz sector not being in operation has been considered and AT has returned a finding, taking the view that the license fee is in fact payable as it is an independent factor. View taken by AT is the provision of services i.e. support services and license fee are not dovetailed.

In this view of the matter, the aforesaid finding was returned by AT.

23. Having set out the scope of patent illegality as a ground, this Court reminds itself that proceedings under Section 34 are summary in nature as laid down by Hon'ble Supreme Court in *Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited* reported in (2009) 17 SCC 796. This is referred to as *Fiza Developers* principle. This *Fiza Developers* principle has been subsequently reiterated by Hon'ble Supreme Court in *Emkay Global Financial Services Ltd. v. Girdhar Sondhi* reported in (2018) 9 SCC 49 and while reiterating *Fiza Developers* principle, it has held that *Fiza Developers* principle is a step in the right direction towards expeditious disposal of arbitration proceedings and proceedings in relation to arbitral proceedings.

24. This Court also reminds itself that minimum judicial intervention is a pillar of Alternate Dispute Resolution mechanism ('ADR' mechanism for brevity). No elucidation or elaboration is required to say that petitions under Section 34 are to be disposed of by way of summary procedure. The merits of the matter cannot be revisited and the appreciation of evidence done by the AT cannot be reappreciated as can be done in a regular first appeal under Section 96 of The Code of Civil Procedure.

25. Further, it is to be borne in mind that these proceedings are

virtually vintage/ancient and the arbitration proceedings itself having commenced two decades and two years ago.

26.A reading of the issues, a perusal of the issues and the answers to the same as alluded to *supra* by the AT, leaves this Court with no doubt that the view taken by the AT is clearly not only a possible view, but also a plausible view. It follow as a sequittur that no patent illegality can be seen much less, can be seen so obviously to qualify as patent illegality warranting judicial intervention. This is more so as any petition under Section 34 of A & C Act has to be tested, within the contours and confines of Section 34 of A & C Act. As this Court is unable to find patent illegality qua the impugned award due to various reasons set out *supra* both the OPs have not qualified for any judicial intervention by this Court resulting in both OP failing.

27.Both OPs are dismissed. However, considering the nature of the matter and the trajectory of the hearing, the parties are left to bear their respective costs.

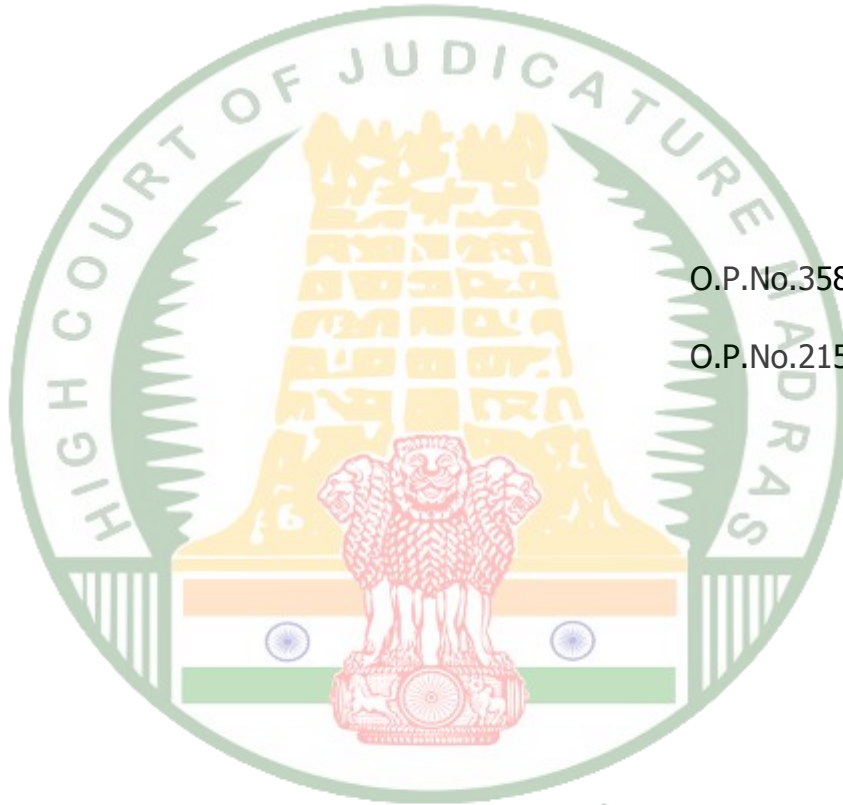
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M.SUNDAR, J.

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