

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :27.03.2019

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.Nos.378 of 2009 and 252 of 2010

M/s.K.Appachi Gounder and Sons,
Represented by its Partner

Cum Power of Attorney Holder,
Mr.A.Swaminathan, son of K.Appachi Gounder,
Vavikadai, K.s.Palayam,
Perundurai Taluk, Erode District

.. Petitioner in
OP.No.378 of 2009

1. The Union of India, represented by
The General Manager,
Southern Railway,
Chennai - 600 003.

2. Chief Engineer /Construction/West,
Construction office,
Southern Railway,
Poonamallee High Road,
Egmore, Chennai - 600 003.

.. Petitioners in
OP.No.252 of 2010

vs.

1. The Union of India, represented by
The General Manager,
Southern Railway,
Chennai - 600 003.

2. The Chief Engineer /Construction
Office of the Chief Administrative Officer [Construction],
Southern Railway,
Egmore, Chennai - 600 008.

3. Mr.D.Venkatachalam [Presiding Arbitrator]
The Deputy Chief Signal and
Telecommunication Engineer,
Construction/Drawings Branch,
Southern Railway, Egmore, Chennai - 8.

4. Ms.Bhuvaneshwari [Arbitrator],
The Deputy Chief Vigilance Officer [Accounts],
Southern Railway, Head Quarters Office,
Park Town, Chennai - 3.

5. Mr.G.Paneerselvam [Arbitrator],
The Deputy Chief Engineer [Carriage Works],
Southern Railway, Perumbur,
Madras - 600 023.

... Respondents in
OP.No.378 of 2009

1. M/s.K.Appachi Gounder and Sons,
Represented by its Partner
Cum Power of Attorney Holder,
Mr.A.Swaminathan, son of K.Appachi Gounder,
Vavikadai, K.s.Palayam,
Perundurai Taluk, Erode District

2. Shri.D.Venkatachalam [Presiding Arbitrator]
The Deputy Chief Signal and
Telecommunication Engineer,
Construction/Drawings Branch,
Southern Railway, Egmore, Chennai - 8.

3. Smt.Bhuvaneshwari [Arbitrator],
The Deputy Chief Vigilance Officer [Accounts],
Southern Railway, Head Quarters Office,
Park Town, Chennai - 3.

4. Shri.G.Paneerselvam [Arbitrator],
The Deputy Chief Engineer [Carriage Works],
Southern Railway, Perumbur,
Madras - 600 023.

... Respondents in OP.No.252 of 2010

Prayer in O.P.No.378 of 2009: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, that this Court may be pleased to set-aside the award dated 30/03/2009 passed by the Arbitral Tribunal, comprising of the Respondents 3 to 5 and pass a fresh Award allowing all the claims of the petitioner.

Prayer in O.P.No.252 of 2010: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, that this Court may be pleased to set-aside the arbitral award of respondents 2 to 4 dated 30/03/2009 made in relation to disputes arising out of Agreement dated 21.06.2000 bearing Agreement No.130/CN/2000 between the 2nd petitioner and the 1st Respondent in so far as claim Nos. 3 and 10 are concerned and thus render justice.

For Petitioner
in OP.No.378/2009 : Mr.Amalaraj S.Penikilapatti

For Respondents
in OP.No.378/2009 : Mr.P.T.Ram Kumar for R1 & R2
R3 to R5- Arbitrators

For Petitioners
in OP.No.252/2010 : Mr.P.T.Ram Kumar

For Respondents
in OP.No.252/2010 : Mr.Amalaraj S.Penikilapatti for R1
R2 to R4- Arbitrators

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COMMON ORDER

'Original Petition' shall be referred to as 'OP' and when the reference is in plural i.e., when the reference is to 'Original Petitions', the same shall be referred to as 'OPs'.

2. 'OP.No.378 of 2009' shall be referred to as 'senior OP' and 'OP.No.252 of 2010' shall be referred to as 'junior OP'.

3. In senior OP i.e., OP.No.378 of 2009, one 'M/s.K.Appachi Gounder and Sons', which this Court is informed is a partnership firm, is the sole petitioner and the same shall be referred to as 'contractor' and 'respondents 1 and 2' shall be collectively referred to as 'Southern Railways' for the sake of convenience and clarity. Respondents 3, 4 and 5 in the senior OP are the three individuals, who constituted the three member Arbitral Tribunal, which passed the arbitral award which has been called in question in the instant OPs.

4. In junior OP, Southern Railways are the two petitioners, contractor is the first respondent and the three individuals, who constituted the 'Arbitral Tribunal' ('AT' for brevity), which made the award that has been called in question in the instant OPs have been arrayed as respondents 2, 3 and 4.

5. AT, made an arbitral award dated 30.03.2009, which has been called in question in both the instant OPs viz., senior and junior OPs.

6. Before AT, contractor was the claimant and Southern Railways were respondents 1 and 2.

7. After full contest, AT passed an award dated 30.03.2009 which has been called in question in the instant OPs and therefore this arbitral award shall be referred to as 'impugned award'.

8. While, senior OP has been filed by the contractor assailing the impugned award, junior OP has been filed by the Southern Railways assailing the impugned award.

9. The two OPs are in the nature of and akin to cross suits and therefore, it would be appropriate and apposite to refer to instant OPs as cross OPs.

10. Therefore, both OPs have been tagged together and listed before this Court. This common order will dispose of both the instant OPs.

11. Mr.Amalaraj S.Penikilapatti, learned counsel on record for contractor and Mr.P.T.Ram Kumar, learned standing counsel for Southern Railways were before this Court.

12. Before I take up the submissions for discussion, it is to be noted, that the contract, out of which instant OPs arise, is of the year 2000, work

itself was completed in 2002, arbitral proceedings commenced sometime in 2004 and the impugned award came to be passed in 2009. Instant OPs i.e., senior and junior OPs have been presented in this Court on 23.06.2009 and 29.07.2009 respectively. Therefore, instant OPs themselves are nearly a decade old in this Court. Considering that the contract is of the year 2000, coupled with the fact that instant OPs are in the anvil of completing a decade old in this Court, in the light of the fundamental sublime philosophy underlining 'Alternate Dispute Resolution Mechanism' ('ADR Mechanism' for brevity) i.e., expeditious disposal, it would be appropriate and apposite to describe these OPs as vintage and the contract/arbitral proceedings may be even an ancient.

13. With the aforesaid prefatory note, this Court embarks upon the exercise of examining bare minimum facts of the case that are necessary for appreciating this order and the grounds on which the impugned award was assailed. Discussion of the same forms part of such examination.

14. Considering that instant OPs are under Section 34 of 'The Arbitration and Conciliation Act, 1996' ('A & C Act' for brevity), it would suffice to give a thumb nail sketch of facts or in other words, the bare necessary facts, which are imperative for appreciating this order sans other

details and particulars.

15. As can be culled out from the impugned award, the contract, out of which, the instant lis arises which has been described as an agreement, is 'Agreement No.130/CN/2000 dated 21.06.2000' (which shall hereinafter referred to as 'said contract' for the sake of brevity, convenience and clarity) and description of the work entrusted to contractor vide the said contract, as can be culled out from the impugned award, reads as follows:

'Contract for Gauge conversion from Quilon-Tenkasi - Tirunelveli-Tiruchendur and Tenkasi - Virudhunagar: Virudhunagar - Tenkasi section - Earthwork in forming Bank/cutting for widening the existing MG formation to BG standard between Rajapalayam (excel) and Sankarankovil (incl) stations - Agreement No.130/CN/2000 dated 21.06.2000 entrusted to M/s.Appachi Gounder & Sons, Perundurai.'

16. It is not in dispute that originally the work which was entrusted to the contractor had to be completed within 7 months, that did not happen, there were extensions and ultimately the work was completed only on 30.04.2002.

17. That the work was completed and monies due in accordance with the bills raised have been paid, is not in dispute.

18. However post completion of work, contractor raised arbitral

disputes and made claims under 11 heads.

19. As can be culled out from the claim statement, the 11 heads of claims are as follows:

Sl. No.	DESCRIPTION OF CLAIM HEADS	AMOUNT
1.	Refund of the final bill Amount	Rs. 12,534.34
2.	Refund of security deposit and EMD	Rs. 2,08,734/-
3.	Extra rates for quantity of work executed in extended period of contract	Rs. 6,52,374/-
4.	Damages on account of the idling of machinery, tools and plants	Rs. 7,50,000/-
5.	Idling establishment charges and additional establishment charges suffered on account of the inordinate extension of contract	Rs. 4,59,000/-
6.	Damages on account of idling of labour	Rs. 8,76,000/-
7.	The losses suffered by the claimant towards the loss of anticipated profits due to the reduced operation and the non-operation of the various agreement items of works	Rs. 6,00,000/-
8.	Damages due to the depreciation of tools and plants and the forced inability to harness the machinery, tools and plants to other projects due to the Railways mismanagement of the instant project.	Rs. 21,25,000/-
9.	Damages on account of the forced inability to participate in other tenders	Rs. 10,00,000/-
10.	The Cost of Double Handling of the Earth	Rs. 5,00,000/-
11.	Damages for illegal retention of the aforementioned claim amounts and Costs of Arbitral proceedings, Legal and Technical Counsel.	To be quantified during payment.
	TOTAL AMOUNT [WITHOUT CLAIM NO:11]	Rs. 71,83,643/-

20. To be noted, the aforesaid tabulation is, as culled out from the

claim statement of the contractor, dated 18.04.2008.

21. Southern Railways filed a counter statement dated 25.07.2008, where each of the 11 claims were disputed.

22. A bare perusal of the claims and the manner in which the same have been refuted by Southern Railways reveals that the matter turns heavily on facts.

23. Be that as it may, suffice to say that AT has entered upon reference, conducted arbitral proceedings and ultimately passed the impugned award.

24. The summary of claims under various heads, the amounts claimed and the amount actually awarded vide the impugned award have been given in the form of a summary and this summary, as can be culled out from the impugned award, reads as follows:

'SUMMARY OF CLAIMANT'S CLAIMS AND AWARD AMOUNT:

<i>Sl.No.</i>	<i>Description</i>	<i>Amount Claimed</i>	<i>Amount awarded</i>
1.	<i>Refund of the final bill Amount</i>	<i>Rs.12,534/-</i>	<i>Rs.12,534/-</i>
2.	<i>Refund of security deposit and EMD</i>	<i>Rs.2,08,734/-</i>	<i>Rs.2,08,734/-</i>
3.	<i>Extra rates for quantity of work</i>	<i>Rs.6,52,374/-</i>	<i>Rs.37,091/-</i>

Sl.No.	Description	Amount Claimed	Amount awarded
	<i>executed in extended period of contract</i>		
4.	<i>Damages due to idling of machinery, tools & plants</i>	<i>Rs.7,50,000/-</i>	<i>-nil-</i>
5.	<i>Idling establishment and additional establishment charges suffered on account of the inordinate extension of contract</i>	<i>Rs.4,59,000/-</i>	<i>-nil-</i>
6.	<i>Damages on account of idling of labour</i>	<i>Rs.8,76,000/-</i>	<i>-nil-</i>
7.	<i>Losses suffered by the contractor towards the loss of anticipated profits due to the reduced operation and the non-operation of the various agreement items of works</i>	<i>Rs.6,00,000/-</i>	<i>-nil-</i>
8.	<i>Damages for depreciation of tools & plants and forced inability to use the machinery, tools and plants to other projects due to Railway's mismanagement of contract.</i>	<i>Rs.23,95,400/-</i>	<i>-nil-</i>
9.	<i>Damages on account of the forced inability to participate in other tenders</i>	<i>Rs.10,00,000/-</i>	<i>-nil-</i>
10.	<i>The Cost of Double Handling of the Earth</i>	<i>Rs.5,00,000/-</i>	<i>Rs.3,00,000/-</i>
11.	<i>Damages for illegal retention of the aforementioned claim amounts.</i>	<i>To be quantified</i>	<i>-nil-</i>
12.	<i>Costs of arbitral proceedings and counsel</i>	<i>To be quantified</i>	<i>-nil-</i>

25. As mentioned supra, contractor made claims under 11 heads, but the aforesaid summary contains 12 heads. To be noted, 12th head is costs of

arbitral proceedings and counsel fee.

26. Reverting to the instant OPs before this Court, while senior OP has been filed by the contractor assailing those portions of the impugned award, wherein contractor's claims have been rejected, junior OP, which has been filed by the Southern Railways pertains only to two heads of claims namely serial Nos.3 and 10 in the summary supra. In other words, junior OP filed by Southern Railways pertains to extra rates for quantity of work executed in extended period of contract and the cost of double handling of the earth, which were partly allowed (as can be seen from the summary supra).

27. With regard to the senior OP, learned counsel for contractor submitted that the moment there is extension of time, it cannot be gain said that time is essence of contract and therefore Section 55 of the Indian Contract Act, 1872 has been misapplied. On this basis, it was argued that impugned award is contrary to Fundamental Policy of Indian Law. Refuting this submission, learned counsel for Southern Railways, adverting to the counter statement, submitted that said contract itself clearly provides that there is no increase in rates owing to extensions. This is articulated in the counter statement of Southern Railways and the relevant portion reads as follows:

'The claimant has not been made any advance request for the enhanced rate of excess quantity executed by the claimant.'

The Claimants have submitted the currency extension requisition stating that they agreed to execute the terms and conditions of the agreement during the extended period. The competent authority i.e., Chief Engineer, Construction, Madras has also sanctioned the currency period subject to the condition that “No increase in rates on account of this extension will be payable to you”. The claimants have accepted this conditions and rider agreements thereon were executed by them. If they have not willing to execute the work after November 2000 they might have inform the Railway Administration at that time only.’

28. To be noted, said contract has not been placed before this Court as part of the case file.

29. A further careful analysis of the impugned award reveals that with regard to idling establishment and additional establishment charges claimed by the contractor, on facts, AT has come to a conclusion and returned a finding that the contractor's machinery and establishment were not idling. This is a factual finding returned by AT and therefore there cannot be a rehearing with regard to these factual findings which have been returned by AT.

30. This Court reminded itself that instant OPs are under Section 34 of A & C Act and therefore are not appeals assailing impugned award. It is a mere challenge to impugned award and the challenge to impugned award itself is

strictly within the contours and confines of Section 34 of A & C Act. This Court also reminded itself of judgment of Hon'ble Supreme Court in **Fiza Developers & Inter - Trade (P) Ltd. Vs. AMCI (India) (P) Ltd.** reported in (2009) 17 SCC 796, wherein Hon'ble Supreme Court held that proceedings under Section 34 of A & C Act are summary procedures. Also to be noted, Hon'ble Supreme Court has reiterated Fiza Developers principle in **Emkay Global Financial Services Limited Vs. Girdhar Sondhi** reported in (2018) 9 SCC 49 and while so reiterating, Hon'ble Supreme Court has held that Fiza Developers principle is a step in the right direction in the light of objectives which A & C Act in general and Section 34 in particular seek to achieve.

31. It is also to be noted, that there is cogent examination of material before it by AT for returning aforesaid factual findings and it is nobody's case that sufficient opportunity has not been given or that it is a case of no evidence. Therefore, if these factual findings cannot be interfered with, it follows as an inevitable sequitur that the arguments predicated on Section 55 of Indian Contract Act, 1872 pales into insignificance.

32. As far as Southern Railways is concerned, thrust of the submission was that there is no document to show that there was costs of double handling of earth. This is again purely on facts. As rightly pointed out by learned counsel

for contractor, these are matters where preponderance of probability prevail and therefore in the light of this not being a case of no evidence, these aspects cannot be revisited in a Section 34 petition.

33. Owing to all that have been set out supra, this Court is of the considered view that both OPs i.e., senior and junior OPs have not made out any case warranting judicial intervention qua impugned award under Section 34 of A & C Act. This Court also reminded itself that minimum judicial intervention is one of the pillars of ADR Mechanism.

34. In the light of the narrative supra, both instant OPs fail and the same are dismissed. Considering the nature of the matter and the trajectory which the matter is taken, this Court deems it appropriate to leave the parties to bear their respective costs.

27.03.2019

Speaking order/ Non-Speaking order

Index : Yes/No

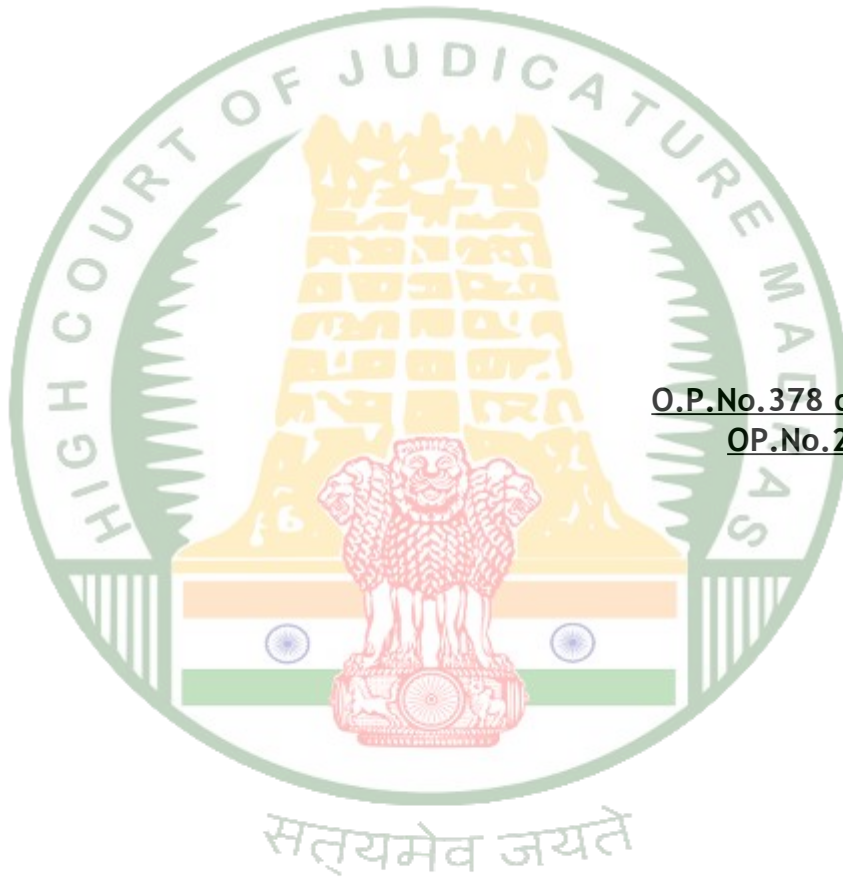
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