

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :21.03.2019

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.348 of 2004

Ennore Port Limited,
New No.15 (Old No.8)
Kasthuri Rangan Road,
Alwarpet, Chennai – 600 018.

.. Petitioner

vs.

1. HCC Van Oord ACZ Joint Venture,
Hincon House, LBS Marg
Vikhroli (W)
Mumbai – 400 083.

2. Shri. M.C.Bhide
9, Ground Floor,
Green Land Premises,
C.H.S. Raikur Marg,
Off. Sitladevi Temple Road,
Mahim (W), Mumbai – 400 016.

3. Shri O.P.Goel,
B-XI/8091,
Vasant Kunj,
New Delhi – 110 070.

4. Shri M.Velu,
36/3, Santhosh Gardens,
Mogappair East,
Chennai – 600 050.

... Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, Read with Order 14 Rule 8 of the O.S rules, pleaded to

a) set aside the Award dated 10.10.2003 passed by

Mr.M.C.Bhide and Mr.O.P.Goel, the Second and Third Respondents and allow the claim made by the Petitioner in the Statement of claim and as awarded by the Learned Arbitrator, Mr.M.Velu vide his award dated 10.10.2003;

b) order costs to the petitioner's and

c) pass such further and other orders as this Hon'ble Court may deem fit and proper and render justice.

For Petitioners : Mr.Krishna Ravindran

For Respondents : Mr. D.Balaraman

ORDER

There is a sole petitioner and there are four respondents.

2. Sole petitioner is 'Ennore Port Limited' which shall hereinafter be referred to as 'EPL' for brevity. First respondent is one 'HCC Van Oord ACZ Joint Venture' and for the sake of convenience and clarity, first respondent shall be referred to as 'Contractor'. Respondents 2 to 4 constituted the three member Arbitral Tribunal, which passed the impugned award dated 10.10.2003. 'Arbitral Tribunal' shall be referred to as 'AT' for brevity. An 'award dated 10.10.2003' made by AT, which is called in question in the instant 'Original Petition' ('OP' for brevity) shall be referred as 'impugned award. To be noted, instant OP has been filed under Section 34 of 'The Arbitration and Conciliation Act, 1996' ('A & C Act' for brevity).

3. To be noted, impugned award of AT is not a unanimous award, but has been made in a 2:1 majority.

4. Be that as it may, considering the narrow scope on which the instant OP turns, it will suffice to give a thumbnail sketch of facts.

5. Subject matter of the instant lis arises out of 'agreement No.33 of 1997 dated 22.08.1997' and 'Contract No. ECPP/C4 for breakwater construction' (hereinafter 'said contract' for the sake of brevity, clarity and convenience).

6. It is not in dispute that contractor was given said work vide said contract by EPL. It is also not in dispute that contractor has completed the said work entrusted to it by EPL vide said contract. However, certain disputes arose between the parties resulting in arbitration clause being triggered and the AT being constituted. Before the AT, contractor was the claimant and EPL was one of the respondents. To be precise, EPL was respondent No.2. To be noted, Chennai Port was respondent No.1.

7. What is of relevance is, in the aforesaid arbitral proceedings before AT, EPL made a counter claim, claiming a sum of Rs.8,72,30,963/- (In other words little over Rs.8.72 Crores).

8. Today Mr. Krishna Ravindran, learned counsel representing the counsel on record for EPL and Mr.D.Balaraman, learned counsel for Contractor are before this Court.

9. Both the learned counsel submit that with regard to the claim of the contractor, the same was disposed of vide a separate award. Elaborating on the above, it was submitted by both learned counsel that there were 20 claims made by the contractor and there are separate awards with regard to each of the claims those awards have taken different trajectories and most of them have been settled. As far as EPL is concerned, they have made two counter claims. One counter claim pertains to Liquidated Damages, which was dismissed and EPL has given a quietus to the same. The second counter claim pertains to recovery of price variation (escalation charges for rock supplied by EPL). This second claim was disposed of vide a separate award, which is the impugned award in the instant OP.

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10. In the aforesaid backdrop, from the submissions made, it comes to light that the entire lis turns on Clauses 60.1 and 70.1 to 70.3 of the said contract, which read as follows:

'Sub-Clause 60.1 - Monthly statements

The Contractor shall submit a statement in 4 copies to the

Engineer at the end of each month, in a tabulated form approved by the Engineer, showing the amounts to which the Contractor considers himself to be entitled. The statement shall include the following items, as applicable which shall be taken into account in the sequence listed.

a) the estimated contract value of the Temporary and Permanent works executed upto the end of the month in question at base unit rates and prices and in local currency.

b) the actual value certified for payment for the Temporary and permanent works executed upto the end of the previous month, at base unit rates and prices and in local currency.

c) The estimated contract value at base unit rates and prices of the temporary and permanent works for the month in question, in local currency, obtained by deducting (b) from (a).

d) the equivalent of the amount set forth in (c), expressed in the various currencies in which the contract price is payable, and calculated by applying the proportions and the exchange rates set forth in the Appendix to Bid to the amount set forth in (c).

e) the value of any variations executed upto the end of the month in question, less the amount certified in the previous interim payment certificate, expressed in the relevant amounts of foreign and local currencies, pursuant to Clause 52.

f) amounts approved in respect of Day work executed up to the end of the month in question, less the amount for Day work certified in the previous interim Payment Certificate, indicating the amounts of foreign and local currencies as determined from the Day Work Schedule of the Bill of Quantities.

g) amounts reflecting changes in cost and legislation to

Clause 70, expressed in the relevant amounts of foreign and local currencies.

h) any credit or debit for the month in question in respect of materials and plant for the Permanent Works, in the relevant amounts, in foreign and local currencies, and under the conditions set forth in Sub-Clause 60.3.

i) any amount to be withheld under the retention provision of Sub-Clause 60.5. determined by applying the percentage set forth in Sub-Clause 60.5 to the amounts in foreign and local currencies due under paragraphs 60.1(d), (e), (f) and (g);

j) any amount to be deducted as repayment of the Advance under the provision of Sub-Clause 60.7 and

k) any other sum expressed in the applicable currency or currencies, to which the contractor may be entitled or the Employer may be entitled to deduct, under the Contract:

l) any other sum, expressed in the applicable currency or currencies, to which the contractor may be entitled or the Employer may be entitled to deduct, under the contract:

m) the amount to be deducted towards the advance income tax, which shall be at the rate of 2 percent, and the advance works contract tax at the rate of zero percent, from the amounts due to the contractor. However, the Contractor remains responsible for payment of advance works contract tax in accordance with Sub Clause 73.2 and is deemed to have allowed for such within his rates and prices.

Sub-Clause 70.1 - Price Adjustment

The amounts payable in local currency to the Contractor and valued at base rates and prices pursuant to Sub-Clause 60.1 (d) (e) and (f) shall be adjusted in respect of the rise or fall in the cost of labour material and other inputs to the works, by the addition or subtraction of the amounts

determined by the formula prescribed in this Clause.

Sub-Clause 70.2 - Other changes in cost

The extent that full compensation for any rise or fall in costs to the Contractor is not covered by the provisions of this or other Clauses in the Contract, the unit rates and prices included in the Contract shall be deemed to include amounts to cover the contingency of such other rise or fall of costs.

Sub-Clause 70.3 - Adjustment Formulas

The amount to be added to or deducted from the interim payment certificate in respect of changes in cost and legislation shall be determined from a formula applicable to all work to be performed. The formula will be of the following general type

$$P_n = a + b \frac{L_n}{L_o} + c \frac{M_n}{M_o} + d \frac{E_n}{E_o} + atc$$

Where

“P_n” is the adjustment factor to be applied to the estimated value of the work carried out in month “n”, determined in accordance with Sub-Clause 60.1 (d), (e) & (f);

“a” is a fixed coefficient, specified in the Appendix to Bid, representing the non adjustable portion in contractual payments.

“b”, “c” etc are coefficients representing the estimated proportion of each cost element (labour, materials, etc) in the works, net of Provisional sums as specified in the Appendix to Bid.

“L_n”, “M_n”, “E_n” etc are the current cost indices or reference prices for month “n” determined pursuant to Sub-Clause 70.5, applicable to each cost element; and

“L_o”, “M_o”, “E_o”, etc are the base cost indices or reference prices corresponding to the above cost elements at the date specified in Sub-Clause 70.5.’

11. A perusal of Clauses 60.1 and 70.1 to 70.3 will reveal that the entire computation is highly technical.

12. With regard to the instant OP, it is submitted by learned counsel for EPL that this OP is predicated primarily on the ground that it has not been tested in accordance with the terms of the contract. In other words, it is the pointed submission of learned counsel for EPL that the impugned award is not in accordance with the aforesaid clauses i.e., Clauses 60.1 and 70.1 to 70.3 of said contract.

13. Submitting that this is in violation of sub-clause (3) of Section 28 of A & C Act, learned counsel submitted that he is entitled to have the impugned award set aside under Section 34 of A & C Act in this regard.

14. According to learned counsel, if an impugned award has been made without being in accordance with the terms of the contract, it is in conflict with public policy owing to being in contravention with fundamental policy of Indian law.

15. With regard to public policy, without going into any debate or dispute about public policy as occurring in Section 34 prior to

23.10.2015 and post 23.10.2015, one can safely rely on the Western Geco [**ONGC Ltd. v. Western Geco International Ltd.**, reported in 2014 (9) SCC 263] and Associate Builders case [**Associate Builders Vs. Delhi Development Authority** reported in **(2015) 3 SCC 49**]. Three distinct juristic principles were culled out in Western Geco and reiterated in Associate Builders case with regard to fundamental policy of Indian law, which is one of the facets of public policy and these three distinct juristic principles are judicial approach, principles of natural justice and perversity/irrationality.

16. With regard to these three distinct juristic principles, the tests for the same have also been laid down by Hon'ble Supreme Court. The tests are fidelity in judicial approach, *audi alteram partem* and wednesbury principle of reasonableness in that order. In other words, for judicial approach, the test is fidelity in judicial approach, for principles of natural justice, the test is *audi alteram partem* and of course reasons being given and with regard to irrationality/perversity, the test is the time honoured Wednesbury principle of reasonableness. In the instant case, in the light of the submissions made, the third juristic principle i.e., perversity/irrationality is the lone plank on which instant OP gets predicated. For this, if the time honoured test of Wednesbury

principle of reasonableness is applied to test the impugned award, the Tribunal ought to have arrived at a conclusion, which no reasonable person will arrive at on the basis of material which has been placed before the AT. In this view of the matter a careful perusal of the impugned award leaves this Court with the considered opinion that it certainly qualifies as one which will not get disqualified for not passing the muster of wednesbury test of reasonableness.

17. However, what is of utmost importance is there is no dispute or disagreement before this Court that there was another contract between EPL and Hindustan Construction Limited and that contract, this Court is informed, is ECPP 01. This Court is informed that ECPP stands for Ennore Coal Port Project. ECPP 01 was for Transportation and Stockpiling of rocks. The instant OP arises out of said contract, which is ECPP 04 and which is for break water construction.

18. There is no dispute or disagreement about the position that the aforesaid clauses, namely 60.1 & 70.1 to 70.3 are the same in the said contract as well as the ECPP 04 or in other words same in ECPP 01 and ECCP 04 . This Court is informed that with regard to ECPP 01 arbitrable dispute arose. A three member Arbitral Tribunal was constituted and a similar 2:1 majority award came to be passed. That award is dated 03.08.2004 and that award dated

03.08.2004 which is relatable to ECPP 01 was called in question in this Court by way of petition under Section 34 of A & C Act and that OP is O.P.No.427 of 2005. O.P.No.427 of 2005 came to be dismissed by another Hon'ble Judge vide a detailed order dated 09.02.2017. There is no dispute or disagreement before this Court as alluded to supra that the aforesaid clauses, namely Clauses 60.1 & 70.1 to 70.3 are adverbatim the same in ECPP 01 and ECPP 04. In other words, clauses which were subject matter of aforesaid O.P.No.427 of 2005 and the instant OP are the same. Attention of this Court was drawn to that part of the order dated 09.02.2017 in O.P.No.427 of 2005 which reads as follows:

'3.....As per the terms of the contract, base unit rates and prices quoted by the bidder in the Bill of Quantities are subject to price adjustment during the performance of the contract. Such price adjustment has been referred to in sub-clause 16.1 of the Conditions of Particular Application read with sub-clause 70.1 to 70.3 of the contract. The claimant, during the currency of the contract, has been submitting periodic monthly statements, which were verified and certified by the Engineer and payments were released.....'

18. In the light of the view taken by another Hon'ble Judge with regard to the interpretation of the same clauses in similar circumstances / factual matrix, which are adverbatim the same between EPL and another contractor with regard to the same

project, this Court deems it appropriate to hold that what applies to ECPP 01 vide order dated 09.02.2017 will apply to the instant case also.

19. Before concluding, this Court deems it appropriate to add that this Court has reminded itself of Fiza Developers case (**Fiza Developers & Inter - Trade (P) Ltd. Vs. AMCI (India) (P) Ltd.** reported in **(2009) 17 SCC 796**) wherein the Hon'ble Supreme Court has held that proceedings under Section 34 of A & C Act are one issue summary procedure and this Fiza Developers principle has been reiterated by Hon'ble Supreme Court in **Emkay Global case [Emkay Global Financial Services Limited Vs. Girdhar Sondhi** reported in **(2018) 9 SCC 49]** and while so reiterating, Hon'ble Supreme Court held that Fiza Developers is a step in the right direction for expeditious disposal of proceedings under Section 34. Therefore, it is made clear that the test of Wednesbury principle of reasonableness qua perversity/irrationality ground has also been applied by this Court by reminding itself that it has to be within the contours and confines of Section 34 of A & C Act.

In the light of the narrative supra, this Court has no hesitation in holding that there is no ground for judicial intervention qua impugned award owing to which instant OP fails and the same is

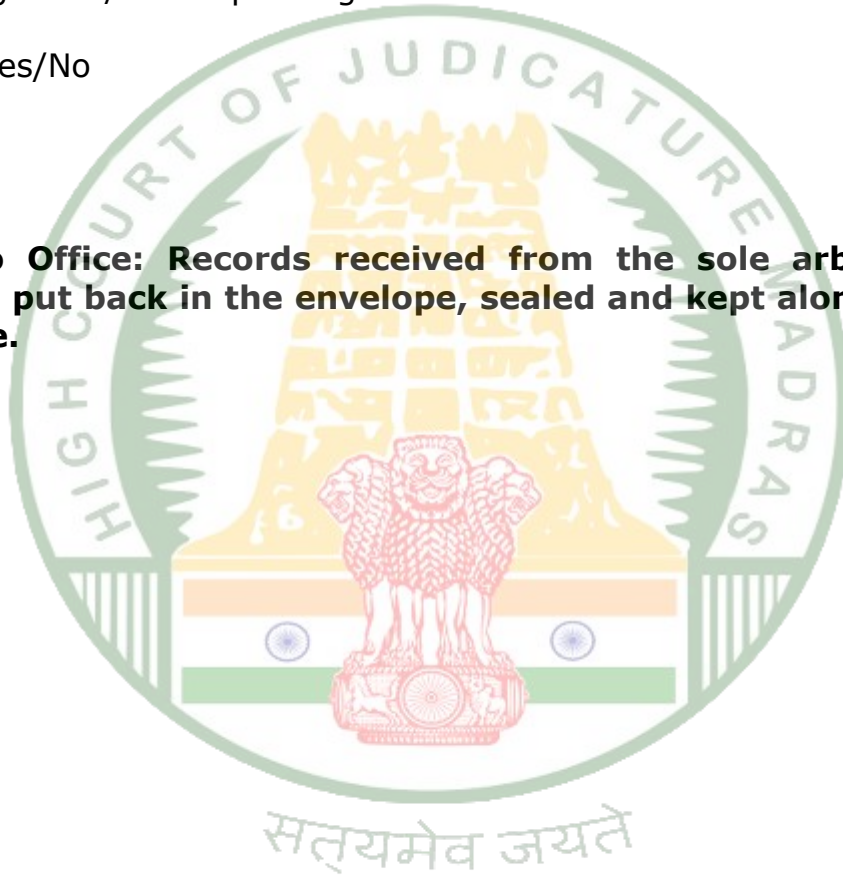
dismissed. Considering the nature of submissions and trajectory of the hearing, parties are left to bear their respective costs.

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Speaking order/ Non-Speaking order

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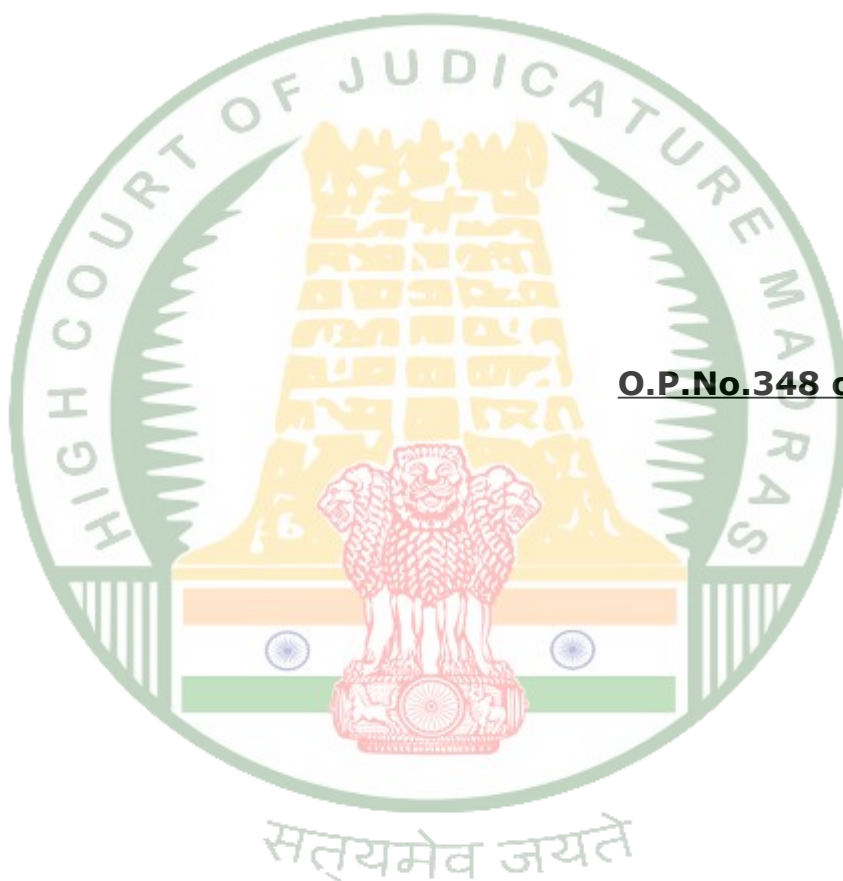
Note to Office: Records received from the sole arbitrator shall be put back in the envelope, sealed and kept along with case file.



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M.SUNDAR.J.,

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