

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.03.2019

DATE OF DECISION : 04.04.2019

CORAM

THE HON'BLE Mr.JUSTICE M.SUNDAR

O.P.No.245 of 2019
and
A.No.2364 of 2019

1.The Nuclear Power Corporation of India Limited,
(A Government of India Enterprise),
The Madras Atomic Power Station,
rep by its Chairman and Managing Director,
Kalpakkam-603 102.

2.The Manager (HR),
The Madras Atomic Power Station,
Nuclear Power Corporation of India Limited,
(A Government of India Enterprise),
Kalpakkam-603 102.

.. Petitioners

Vs.

K.C.Babu,
Proprietor
M/s.Meghana Enterprises,
No.22 and 23, Thendral Nagar Main Road,
Sri Vignesh Nagar,
Thirumullaivoyal,
Chennai-600 062.

.. Respondent

This original petition is filed under Section 34(2)(a)(iv) of the Arbitration and Conciliation Act, 1996 seeking to set aside the award passed in A.F.No.121 of 2015 dated 12.10.2018 (received on 05.12.2018) and consequently allow the counter claim filed by petitioners herein and pass such or other further orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case and thus render justice.

For Petitioners : Mr.V.Vijay Shankar

For Respondent : Mr.Avinash Wadhwani
for Mr.V.Raghavachari.

ORDER

Instant 'Original Petition' ('O.P' for brevity) has been filed under section 34 of 'The Arbitration and Conciliation Act, 1996' ('A and C Act' for brevity), assailing an Arbitral Award dated 12.10.2018 bearing reference A.F.No.121/2015 ('impugned award' for brevity) made by an 'Arbitral Tribunal' ('AT' for brevity) constituted by a Sole Arbitrator, who is a retired District Judge.

2 Before this Court proceeds further, it is deemed pertinent to make it clear that Section 34 of A and C Act is slotted under Chapter VII of A and C Act, which is captioned 'RECOURSE AGAINST ARBITRAL AWARD'. A reading of section 34 of A and C Act reveals that recourse to a Court against an arbitral award shall be made by an 'application'. To be noted, caption to Section 34 itself reads 'APPLICATION FOR SETTING ASIDE ARBITRAL AWARD'. However, with regard to recourse to this Court against an arbitral award, the nomenclature 'Original Petition' is being assigned to such recourses by the Registry and therefore, instant 'Original Petition' is being referred to as 'O.P' for the sake of convenience and clarity.

3 Nucleus of the instant O.P is a Work Order dated 08.05.2009 which shall hereinafter be referred to as 'said contract' for the sake of convenience and clarity. The said contract is for running of catering services, room services, front lobbying and housekeeping maintenance in a Guest House and running of catering services, room services, front lobbying and house keeping maintenance in a hostel at Atomic Energy Township, Kalpakkam. This work shall hereinafter be referred to as 'said work' for the sake of convenience and clarity.

4 In the instant O.P, there are two petitioners and a sole respondent. Two petitioners shall collectively be referred to as 'NPC' denoting 'Nuclear Power Corporation of India Limited'. The sole respondent is an individual who is carrying on business in the name and style 'Meghana Enterprises', as its sole proprietor. The sole respondent shall be referred to as 'contractor' for the sake of convenience and clarity.

5 There is no dispute or disagreement on facts before this Court that there is an arbitration clause in the said contract and that the arbitration clause in the said contract is clause 14 which reads as follows :

“14.0 SETTLEMENT OF DISPUTES

1) Except where otherwise provided in the contract, all questions and disputes relating to the meaning and interpretation of the terms of the contract and instructions hereinbefore mentioned or as to the quality and adequacy of the services so rendered and arising out of these conditions, whether during the progress of the services or after completion or abandonment or

cancellations thereof, shall be referred to the Sole Arbitration of the person to be appointed by the Chairman and Managing Director of Nuclear Power Corporation of India limited.

2)It is a term of the contract that the party who initiates arbitration proceedings shall specify the dispute to be referred for arbitration under this clause together with the amount or amounts claimed in respect of each such dispute.

3)Arbitration proceedings shall be conducted in accordance with the provisions contained in the Conciliations and Arbitration Act, 1996 or any statutory modifications or re-enactment thereof and the rules and regulations so framed there under and for the time being in force.”

6 In other words, arbitration agreement between NPC and contractor being arbitration agreement within the meaning of section 7 of A and C Act, is in the form of a clause in the said contract.

7 There is no dispute or disagreement that said work under said contract was being done and contractor was being paid by NPC from time to time for the said work. In the course of said work being done by said contractor, it is not in dispute before this Court that NPC had issued a certificate dated 11.02.2010 to the contractor inter-alia certifying that said work that is being done by the contractor is highly satisfactory and that services are professional. To be noted, this is in the form of a certificate issued by NPC, it is dated 11.02.2010 and it has been marked as Ex.C.5 before AT. It is also not in dispute on facts that said contract which was originally for one year was extended for a further one year period from

01.04.2011 to 31.03.2012 vide letter dated 05.03.2011 from NPC which was marked as Ex.C.7 before AT. NPC had also issued a completion certificate dated 01.12.2011 (Ex.C.8 before AT) wherein NPC had certified that contractor had completed said work in all respects without any deviation.

8 Under such circumstances, NPC issued a letter dated 16.03.2013 bearing reference No.MAPS/HR-ER/NPCIL GH/2012 stating that contractor is liable to pay certain sums of moneys to NPC under five different heads owing to alleged non compliance of tender conditions. Details of five heads and moneys which according to NPC are liable to be recovered from the contractor as can be culled out from a letter dated 16.03.2013 which is placed before this Court as part of case file reads as follows :

“The recoveries in gist, imposed by NPCIL for non-compliance of tender conditions are detailed below:-

S. No.	Details	Amount
1.	Amount to be recovered on account of short deployment of manpower and arrears of revision of wages	Rs.14,01,446.00
2.	Amount to be recovered on account of delayed/inadequate insurance	Rs.19,934.00
3.	Amount to be recovered on account of medical check-up as per contract conditions	Rs.10,500.00
4.	Amount to be recovered on account on non-deposition of EPF contribution	Rs.8,31,283.00
5.	Amount to be recovered on account of non-payment of bonus	Rs.3,67,500.00
	Total	Rs.26,30,663.00

It is proposed to effect the above recovery of Rs.26,30,663/-
(Rupees twenty six lakhs thirty thousand six hundred and sixty three

only) against the amount available with MAPS in respect of M/s Meghana Enterprises and the balance, if any, will be recovered from the RA bills until the entire amount is recovered from the Contractor.”

9 Out of this total amount of Rs.26,30,663.00, NPC recovered a sum of Rs.13,47,842.00 from the contractor by simply deducting it from moneys payable to the contractor for the work that has already been done by contractor, leaving a balance of Rs.12,82,821.00. Contractor contended that this alleged recovery is illegal / impermissible, moneys have been arrived at unilaterally without even giving an opportunity to contractor. It was also the stated position of the contractor that he is not liable to pay moneys claimed under aforesaid five heads, totalling Rs.26,30,663.00. This is the crux and gravamen of the lis between NPC and contractor.

10 Though arbitration clause, i.e., arbitration agreement between parties provides for appointment of an Arbitrator by Chairman and Managing Director of NPC, it is not in dispute before me that the sole arbitrator (retired District Judge), who constituted AT was appointed by this court in a petition under section 11 of A and C Act being O.P.No.667 of 2013. Though a copy of this order was not placed before this court as part of case file, both learned counsel before this Court submitted that there is no disagreement with regard to this obtaining factual position.

11 Sole arbitrator who constituted AT who, so appointed by this court, entered upon reference and conducted arbitral proceedings. Before the

sole arbitrator, contractor was the sole claimant and NPC was respondents 1 and 2. Two witnesses, namely C.W.1 and C.W.2 were examined on behalf of contractor / claimant and likewise, two witnesses were examined on behalf of NPC, namely R.W.1 and R.W.2. On behalf of contractor / claimant, as many as 39 documents were marked as Exs.C.1 to C.39. On behalf of NPC, as many as 13 documents were marked as Exs.R.1 to R.13. After full contest before AT, which included oral hearing, oral and documentary evidence, AT returned a finding holding that contractor is entitled to a sum of Rs.22,65,985.00 with interest at the rate of 12% per annum from NPC with effect from 23.12.2015 (date of AT entering reference) to date of realization. To be noted, as would be evident from the narration thus far, total sums of moneys which are allegedly liable to be paid by said contractor under five different heads is Rs.26,30,663.00 and after deducting Rs.13,47,842.00, the balance of Rs.12,82,821.00 remains. This sum of Rs.12,82,821.00 was made as counter claim before AT by NPC and this counter claim was dismissed.

12 In the aforesaid backdrop, instant O.P has been filed by NPC assailing the impugned award. As mentioned supra, instant O.P has been filed under section 34 of A and C Act.

13 Mr.V.Vijay Shankar, learned counsel for NPC and Mr.Avinash Wadhwani, learned counsel for contractor who was on caveat were before this Court.

14 This Court heard both learned counsel.

15 Mr.Vijay Shankar, learned counsel for NPC in his usual fairness submitted that challenge to impugned award is predicated on one ground only and that one ground is that impugned award dealt with disputes which are not contemplated by arbitration and impugned award dealt with disputes which do not fall within the terms of submission to arbitration and that it contained decisions on matters beyond the scope of the submission to arbitration. In terms of specific provision, it translates into section 34(2)(a)(iv) of A and C Act. To be noted, caption to instant O.P itself reads as follows :

“PETITION U/S 34(2)(a)(iv) OF THE ARBITRATION
& CONCILIATION ACT, 1996”

16 Though predicated on section 34(2)(a)(iv) of A and C Act, the primary submission of learned counsel for NPC is that impugned award has given a go-by to certain covenants in said contract and is, therefore, liable to be set aside under section 34. It is the specific and pointed case of learned counsel for NPC that clauses 3.4, 3.7, 3.16 and 3.19 of said contract have been given a go-by. In the light of this specific and pointed submission by learned counsel for NPC, this court deems it appropriate to extract aforesaid four clauses which read as follows :

“3.4 It shall also be the responsibility of the Contractor to engage and utilize the services of adequate, competent and qualified personnel for the purpose of performing the work

and rendering services so entrusted under the contract. In case the number of staff deployed are less than the number prescribed, proportionate recovery will be made. Attendance register is to be maintained & submitted to the Guest House and NTC Hostel Assistant/Officer-in-charge. The contractor shall recruit and appoint adequate number of skilled and experienced staff who are medically fit and do not suffer from any contagious/communicable disease in particular.

3.7 In case of absenteeism, Contractor will employ suitable replacement to carry out the work assigned. Contractor's personnel shall be required to work on round the clock shift and on all Sundays/Holidays. They shall be paid double the normal rate by the contractor for duty beyond 8 hours.

3.16 The Contractor shall be liable for payment of penalty for poor services, inadequate staff, poor housekeeping etc. in Guest House as per the amount specified in the tender document.

3.19 The contractor shall provide adequate number of employees i.e., Cook, Halwar, Tea Maker, dish washer, bearer, cleaning boys etc. for the proper discharge of the responsibilities of catering and housekeeping entrusted to him under this contract to cater to round the clock shifts on all days. Such employees shall possess adequate skills, experience and be able to fluently speak with the customers and shall at all times be properly and neatly dressed in uniforms prescribed. The contractor shall provide the uniform, at this own cost, on acceptance of the colour of the uniform by the Competent authority. The Contractor's personnel found without uniform are liable to be turned down from being engaged in work."

17 In support of his contention, learned counsel for NPC pressed into service two case laws. One is a judgment of a Hon'ble Division Bench of this Court in ***Sree Kamatchi Amman Constructions Vs. The Divisional Railway Manager-Works, Palghat Division*** reported in ***2007 (5) CTC 17*** and the other is a judgment of Hon'ble Supreme Court in ***Sharma and Associates Contractors Private Limited Vs. Progressive Constructions Limited*** reported in ***(2017) 5 SCC 743***.

18 Responding to the aforesaid contention of learned counsel for NPC, counsel for contractor, who was on caveat, submitted that ***Sree Kamatchi Amman Constructions*** case is one where the contractor had a contract with railways and it was mutually agreed there that rate clause and conditions in the agreement shall continue to have full effect and be binding on respective parties and there was no provision for payment of anything extra for the technical supervisor. Notwithstanding such a clause / covenant between parties in ***Sree Kamatchi Amman Constructions*** case, the Arbitral Tribunal had awarded certain sums of moneys towards overstay and extra money for technical supervisor. In other words, it was submitted that in ***Sree Kamatchi Amman Constructions*** case, arbitral tribunal there made award granting / acceding to prayers which were expressly and explicitly barred by covenants in the contract. It was, therefore, submitted that ***Sree Kamatchi Amman Constructions*** case is clearly distinguishable on facts.

19 With regard to ***Progressive constructions Limited*** case, it was submitted by learned counsel for caveator that the same is also clearly distinguishable on facts, as that was a case where upward revision of rates

was sustained on the teeth of covenants to the contrary in the contract.

20 Further responding to the submission that in the case on hand, covenants in the said contract have been given a go-by by the AT in the impugned award, particularly clauses 3.4, 3.7, 3.16 and 3.19, it was contended by learned counsel for caveator that a careful perusal of issue No.4 and discussion in the impugned award in paragraph No.12 and sub paragraphs would clearly reveal that said covenants have not been given a go-by, but have actually been discussed in terms of contents of covenants in said contract. It was submitted by learned counsel for caveator that covenants by themselves do not entitle NPC to arrive at sums of money under aforesaid five heads without giving an opportunity to the contractor and without even issuing show cause notice to the contractor, more so, after issuing certificate that the work of the contractor is satisfactory and professional, besides saying that the work had been completed without any deviation, vide Exs.C.5 and C.8 respectively. Therefore, this was put in issue as arbitrable disputes and AT embarked upon an exercise of examining the same, is the learned caveator counsel's say.

21 Aforesaid clauses do not mean that NPC is entitled to unilaterally arrive at certain sums of money on the basis of some enquiry which was said to have been conducted without giving an opportunity to contractor. Specific reference was drawn to communications prior to aforesaid 16.03.2013 communication, where the contractor had requested NPC to provide basis and details of the recovery, so that the same can be verified with legal assistance. It becomes appropriate to extract two letters preceding

to 16.03.2013 letter, namely letters dated 02.07.2012 and 09.07.2012 exchanged between NPC and contractor. The said two letters read as follows:

Letter dated 02.07.2012 :


NUCLEAR POWER CORPORATION OF INDIA LIMITED
 (भारत सरकार की अख्यतः Govt. of India Enterprise)
MADRAS ATOMIC POWER STATION
 Kalpakkam तमिलनाडु Tamil Nadu - 603 102

Ref: MAPS/HR-ESIL/S/2012/ 2/7/2012

M/s Meghana Enterprises
 Plot No.22&23
 Theendral Nagar Main Road
 Srivignesh Nagar
 Thirumohaiyoyal
 Chennai.
 Mobile No.9444479917
 Email: mmercy_kutti@rediffmail.com

Sub: Recovery from NPCIL MAPS Guest House Contractor.

Ref: Work order no. NPC/MAPS / HR/GH/ 002/2008 /R-22 dated May 8, 2009.

Consequent on the investigations conducted in 2011-12 in NPCIL MAPS Guest House contract by vigilance authorities, following are the recoveries imposed by NPCIL on M/s Meghana Enterprises, Kalpakkam:

1.	Amount to be recovered for short deployment of manpower.	Rs.11,73,669
2.	Amount to be recovered for not paying Minimum wages not paid	Rs.1,12,728
3.	Medical Checkup done by NPCIL for Contract employees	Rs.10,500
Total		Rs.12,96,897

Apart from the above amount, Workman compensation insurance has not been paid for certain period, for which the amount as well as penalties need to be recovered from M/s Meghana Enterprises, Kalpakkam.

This is issued with the approval of competent authority


 (A. Vikranth Reddy)
 Dy. Manager (HS)

Letter dated 09.07.2012 :

WEB COPY

22 It is nobody's case that materials qua proposed recovery were given to contractor. There is no explanation for Exs.C.5 and C.8 wherein NPC has certified that the work of the contractor is good and that the contractor had completed said work without any deviation.

23 This Court has carefully considered the rival submissions and has also examined the impugned award. A careful examination of impugned award leaves this Court with a view wherein this Court is unable to persuade itself to believe that impugned award has dealt with disputes not contemplated by arbitration and it contains decisions on matters beyond the scope of the submission to arbitration. The impugned award does not deal with the dispute not falling within the terms of submission to arbitration. Primary ground on which instant O.P is predicated, i.e., impugned award has given a go-by to covenants in said contract also does not hold water owing to the narrative supra.

24 Before concluding, this Court makes it clear that impugned award was examined strictly within the contours and confines of section 34 of A and C Act keeping in mind the **Fiza Developers principle**. To be noted, **Fiza Developers principle** is a reference to a judgment of Hon'ble Supreme Court in **Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited** reported in (2009) 17 SCC 796, wherein Hon'ble Supreme Court held that proceedings under section 34 are summary procedures. This

court has also reminded itself that ***Fiza Developers principle*** has been reiterated by Hon'ble Supreme Court in ***Emkay Global Financial Services Ltd. v. Girdhar Sondhi*** reported in **(2018) 9 SCC 49** and while so reiterating, Hon'ble Supreme Court held that ***Fiza Developers principle*** is a step in the right direction.

25 Arbitral proceedings commenced prior to 23.10.2015 and impugned award came to be passed on 12.10.2018 and the instant O.P has been presented in this Court on 12.02.2019. In the light of the stand taken by learned counsel for NPC that instant O.P is predicated under Section 34(2)(a)(iv) of A and C Act (to be noted, caption to the O.P itself says so as it reads 'PETITION U/S 34(2)(a)(iv) OF THE ARBITRATION & CONCILIATION ACT, 1996'), the question as to whether section 34 as it stood prior to amendment on 23.10.2015 would apply or section 34 as it stands post 23.10.2015 would apply is left open. To be noted, instant O.P is predicated solely on section 34(2)(a)(iv) of A and C Act which remains the same both pre and post 23.10.2015, i.e., pre and post amending Act being Act 3 of 2016 which amended A and C Act with effect from 23.10.2015. Therefore, the question whether pre amendment section 34 or post amendment section 34 would apply is left open, as a question which does not arise in the instant case and which, in the nature of the case, is not imperative for deciding the instant O.P.

26 Owing to all that have been set out supra, instant O.P fails and the same is dismissed. However, considering the nature of the matter and trajectory of hearing, it is deemed appropriate to leave the parties to bear their respective costs. Consequently connected application is closed.

04.04.2019

Speaking order

Index : Yes / No

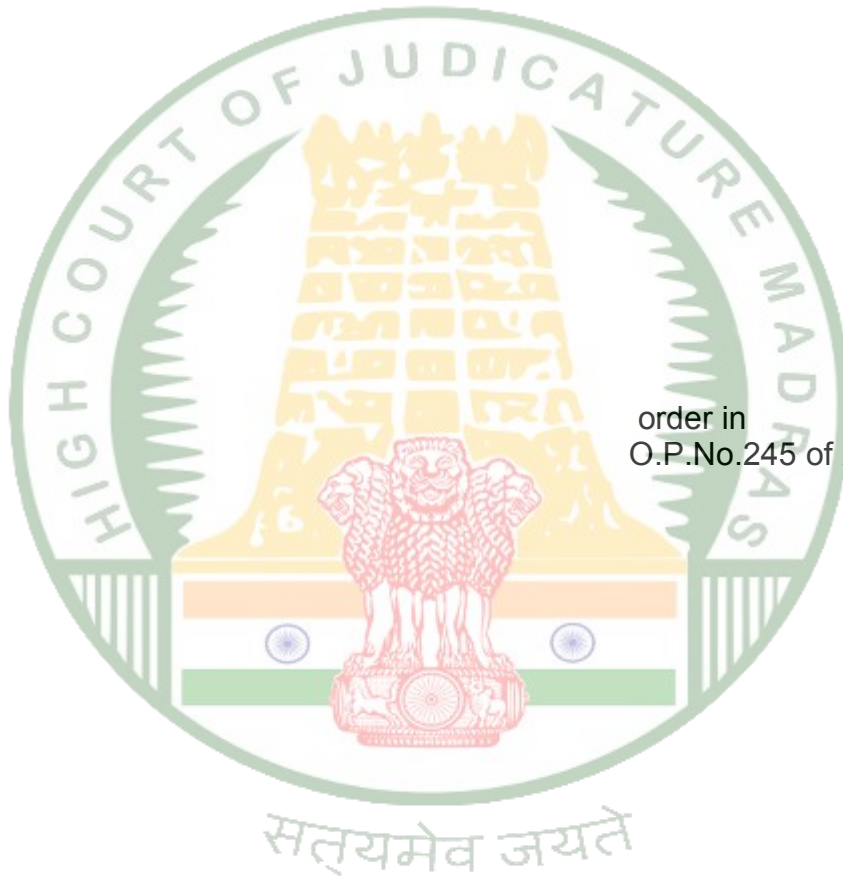
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