IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : **26.02.2019**

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.495 of 2011

The Chairman and Managing Director
State Industries Promotion Corporation of
Tamil Nadu
(Government of Tamil Nadu undertaking)
19A, Rukmani Lakshmipathy Road
Post Box No.7223, Egmore
Chennai – 600 008. .. Petitioner

vs.

1.Thiru P.Janakiraman
Engineering Contractor
No.2a, Govindhapillai Street
Arumugapettai
Walajabad
Kancheepuram District.

2.Thiru S.P.Krishnamoorthy
Chief Engineer (H), Retired
E-2 Adyar Apartments
Kotturpuram, Chennai – 600 085. ... Respondents

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Original Petition filed under Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996, to set aside the award dated 25.04.2011 passed by the 2nd respondent in proceedings No.ARB/2010-10 and to allow all the counter claims filed by the petitioner.

For Petitioner : Mr.M.Sriram
for Mr.Ramesh Venkatachalapathy

For respondents : Mr.V.Srikanth for R1

ORDER

There is a sole petitioner and there are two respondents in the instant 'Original Petition' (hereinafter 'OP' for brevity).

2. Mr.M.Sriram, learned counsel representing Mr.Ramesh Venkatachalapathy, counsel on record for sole petitioner and Mr.V.Srikanth, learned counsel on record for the first respondent are before this Court.

3. To be noted, second respondent is the sole Arbitrator, who constituted the Arbitral Tribunal and passed an Arbitral award dated 25.04.2011, against which challenge has been laid in the instant OP. This Arbitral award dated 25.04.2011, made by second respondent, constituting the Arbitral Tribunal as a sole Arbitrator shall hereinafter be referred to as 'impugned Arbitral award' for the sake of convenience and clarity.

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4. The impugned Arbitral award is more than 7 years old. In two months from now, the impugned Arbitral award will turn 8.

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5. Be that as it may, a perusal of the case file placed before me, in the light of submissions made by learned counsel for petitioner and contesting first respondent (to be noted, counsel for 1st respondent is before me on notice being issued regarding admission) reveals that the entire matter pertains to a contract dated 03.08.2005. This contract is styled 'Contract Agreement' No.26/SE/2005-06 dated 03.08.2005 and the caption for the same is 'Formation of Additional Roads, Storm Water Drain, RC Box Culvert and Pipe Culvert at Junction 2 to 4, 13 to 5 and Extension, 12 to 6, 54, 14 to 3 and upto Plots B 44-45, Extension of Junction 53 to Xansa road upto end of Navaloor lake boundary'. This Contract Agreement dated 03.08.2005 between the petitioner 'State Industries Promotion Corporation of Tamil Nadu' (hereinafter 'SIPCOT' for brevity) and the first respondent contractor shall hereinafter be referred to as 'said contract' and said contract is the nucleus of this OP and epicentre of this lis.

6. It is not in dispute that the work which has been described in the caption to said contract itself was awarded to first respondent contractor and it was originally for a period of 10 months.

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7. Subsequently, certain disputes arose between the contractor and SIPCOT leading to invocation of arbitration agreement between the parties which is admittedly in the form of a Clause in said contract. On arbitration

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Clause being invoked, the second respondent before me constituted the Arbitral Tribunal i.e., a sole Arbitrator as mentioned supra.

8. Arbitral Tribunal entered reference and the parties contested issues arising out of the arbitral disputes.

9. To be noted, contractor is the claimant before the Arbitral Tribunal and the contractor made as many as nine claims. SIPCOT made as many as four counter claims. Nine cliams made by the contractor and the four counter claims made by SIPCOT are as follows:

'__CLAIMS MADE BY THE CONTRACTOR:__

***Claim No.1**: Seeking declaration that the agreement bearing No.26/SE/2005-2006 determined by the Respondent on 22.08.2006 is illegal and treat the above contract has been pre-closed as on 31.07.2006.*

***Claim No.2**: Consequent on the illegal determination of contract, refund of EMD, FSD, Additional Security, with held amount and payment of the value of work done.*

***Claim No.3**: Refund of amount imposed as fine.*

***Claim No.4**: Refund of amount imposed as compensation for the delay.*

***Claim No.5**: Payment of difference in cost spent by the Claimant due to abnormal price hike between agreement rate and market rate during execution.*

***Claim No.6**: Payment for the profit earnings prevented by the Respondent due to the illegal determination.*

***Claim No.7**: Payment towards profit and over heads due to*

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prolongation of contract.

Claim No.8*: payment of interest on the payments due.*

Claim No.9*: Payment of the cost of the arbitration proceedings.'*

<u>COUNTER CLAIMS MADE BY SIPCOT:</u>

*'**Counter Claim No.1**: The Respondent states that the determination order is legally valid and the Claimant is liable to pay the assessed excess cost with reference to 2007-08 schedule of rates for the completion of the balance work. The amount claimed is Rs.1,00,53,265.19.*

Counter Claim No.2*: The Respondent states that the incompletion of the road work has tarnished the image of SIPCOT and consequently the balance 25 acres of vacant land are yet to be sold. The loss of business interest suffered is vast to be measured. A minimum of Rs.5.0 crores is claimed as compensation for the loss sustained by SIPCOT.*

Counter Claim No.3*. The Respondent claims interest at 18% p.a on the counter claims from the next day of 23.08.06, the date of determination of contract till the date of realization.*

Counter Claim No.4*. The Respondent states that the Claimant has resorted to unnecessary arbitration dispute resulting in loss of time and energy and hence the cost of arbitration as may be claimed after conclusion of hearing may be awarded to the Respondent.'*

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10. A perusal of the impugned arbitral award reveals that there was full contest between the parties qua issues arising out of the nine claims made by the contractor and the four counter claims made by SIPCOT. Extensively

several technical details have been raised and all have been alluded to in the impugned Arbitral award.

11. Considering that this is a petition under Section 34 of 'The Arbitration and Conciliation Act, 1996' (hereinafter A & C Act for brevity), which is not in the nature of an appeal i.e., it is not in the nature of a rehearing in complete contradistinction qua a regular first appeal under Section 96 of 'The Code of Civil Procedure' ('CPC' for brevity), suffice to say that the crux and gravamen of the dispute before me in Section 34 petition is whether termination of said contract by SIPCOT is valid. To be precise, it is not in dispute that said contract was terminated by SIPCOT on 22.08.2006 saying that the same stands pre-closed on and with effect from 31.07.2006. This was contested by the contractor by saying that such termination is invalid. To be noted, this is claim No.1, as would be clear from the adumbration of the nine claims and four counter claims in the case file placed before me which have been extracted and reproduced supra.

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12. This claim No.1 has been extensively dealt with in the impugned Arbitral award in paragraph 4.2.

13. To be noted, paragraph 4.2.1, to be precise.

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14. Thereafter, when it comes to conclusion, the same has been very pithily set out in the impugned Arbitral award, *inter alia* in paragraphs 25.29 and 25.32, which read as follows:

> *'25.29. It is patent that an authority who is not vested with authority under the terms of contract has terminated the contract when the contract was no longer in subsistence after 31.07.06. The provisions of clause 3 and 14 have been completely ignored.*
>
> *25.32. **Findings of the Arbitrator**: Having considered all the aspects, the analysis, observations, conditions of contract, I, as Sole Arbitrator, find and hold that the orders issued in letter No.CW/ADDL.ROAD/SITP/2005 dated 22.08.2006, signed by an authority not vested with powers of terminating the contract which was not in force as on that date suffers from serious infirmities and is opposed to the terms of contract and is not legally valid and binding and enforceable against the Claimant.'*

15. More importantly, the petition under Section 34 of A & C Act placed before me reveals that the petition has been filed specifically under Section 34 (2) (b) (ii) of A& C Act. To be noted, this is set out in the caption of the OP (which was presented in this Court on 13.07.2011, 7 years ago) itself.

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16. Therefore, it becomes clear that challenge to the impugned Arbitral award is on the ground that it is in conflict with public policy of India. Before, I proceed further with this petition under Section 34 of A & C Act, it is

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necessary to set out that a perusal of the impugned Arbitral award reveals that it is not only extensive with expansive articulation, but several highly technical details have also been adverted to and alluded to therein.

17. Besides being articulate, a perusal of the impugned Arbitral award reveals that the contentions, claims, counter claims, discussion and dispositive reasoning which went into making of impugned arbitral award have been compartmentalised neatly and put under separate heads by the Arbitral Tribunal. Compartmentalised heads also contains sub paragraphs, wherein the claims and dispositive reasons for dealing with each of the claims, besides the counter claim and response to the same that have all been articulated adequately. Under the aforesaid circumstances, this Court has to remind itself that Hon'ble Supreme Court in ***Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited*** reported in ***(2009) 17 SCC 796*** held that petitions under Section 34 of A & C Act are one issue summary procedures. This is referred to as 'Fiza Developers principle'. This Fiza Developers principle was reiterated by Hon'ble Supreme Court in ***Emkay Global Financial Services Ltd. v. Girdhar Sondhi*** reported in **(2018) 9 SCC 49** and while reiterating the Fiza Developers principle, Hon'ble Supreme Court held that Fiza developers principle is a step in the right direction towards expeditious disposal of petitions under Section 34 of A & C Act by adopting summary procedure. To be

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noted, as mentioned supra, the impugned Arbitral award is more than 7 years old and the same will turn 8 in two months from now.

18. Be that as it may, being a summary procedure, it may not be necessary to examine the impugned arbitral award as it is done in a regular first appeal under Section 96 of CPC . This is mentioned only in terms of a contradiction.

19. With regard to conflict with public policy of India, it is useful to refer to the celebrated case law of Hon'ble Supreme Court in ***ONGC Ltd. v. Western Geco International Ltd.***, reported in ***(2014) 9 SCC 263*** which was reiterated by the Hon'ble Supreme Court in ***Associate Builders Vs. Delhi Development Authority*** reported in ***(2015) 3 SCC 49***. Relevant paragraph is paragraph 28. In paragraph 28 of Associate Builders case there is a reference to ***Western Geco International's*** case and the three distinct juristic principles that have been culled out with regard to testing whether an arbitral award is in conflict with public policy can be applied.

20. The three distinct juristic principles as culled out and laid down by the supreme Court are (a) judicial approach, (b) adherence to principles of natural justice and (c) perversity /irrationality.

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21. Elaborating on the same, it can be said that with regard to judicial approach, it has to be tested whether the arbitral tribunal has shown fidelity qua judicial approach. With regard to second juristic principle viz., natural justice it has to be tested on the celebrated *audi alteram partem* principle and as to whether sufficient reasons have been given in the arbitral award. With regard to third juristic principle namely perversity/irrationality, the same has to be tested on the time honoured *Wednesbury* principle of reasonableness. In other words, third juristic principle should be tested on the touchstone of *Wednesbury* principle of reasonableness.

22. Having set out the litmus test that has been elucidatively laid down by the Honourable Supreme Court in ***Western Geco International's*** case and reiterated in ***Associate Builders*** case, I now apply the three distinct juristic principles to the impugned arbitral award in the instant case. As mentioned supra, the award is a articulated speaking award and each one of the nine claims made by the claimant (first respondent before me) and the four heads of counter claim made by SIPCOT (petitioner before me) have been dealt with under separate heads adverting not only to the technical details, but also alluding to the legal principles underlying the same.

23. Therefore, the Arbitral Tribunal has certainly shown fidelity of judicial approach qua the impugned arbitral award.

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24. With regard to natural justice, it is nobody's case before me that time honoured principle of *audi alteram partem* has been breached or there is lack of reasons.

25. With regard to perversity/irrationality, in the light of the narrative supra, it may not even be necessary to apply the *Wednesbury* test of reasonableness, but however, when the same is applied, considering the elucidation with which the arbitral Tribunal has articulated its' dispositive reasoning qua each one of the nine heads of claims and each one of the four heads of counter claims, there is no doubt in my mind that the arbitral award clearly passes the muster of *Wednesbury* principle of reasonableness

26. In my considered opinion, there is no other ground to hold that the arbitral award is in conflict with public policy of India.

27. With regard to thrust of the arguments and pivotal/primordial submission made by the petitioner that the sole Arbitrator erred in holding that termination of the said contract on and with effect from 31.07.2006 is incorrect, I have already extracted the relevant paragraphs, which give the dispositive reasoning for the claims. They are paragraphs 25.29 and 25.32. A perusal of 25.32 reveals that Arbitrator has held that the termination of said

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contract by SIPCOT suffers from serious infirmity, as it is opposed to the very terms of the contract and therefore, Arbitrator has come to the conclusion that it is not legally valid and not binding and it is not enforceable against the contractor/first respondent. Even if there could be a possible reason, which can be substituted for reasons given, such a course is impermissible in proceedings under Section 34 as has been repeatedly held by the Hon'ble Supreme Court in a line of authorities including the most recent judgment in ***State of Bihar Vs. Bihar Rajya Bhumi Vikas Bank Samiti*** reported in ***(2018) 9 SCC 472*** which has also been reiterated in ***Emkay Global Financial Services Ltd. v. Girdhar Sondhi*** reported in **(2018) 9 SCC 49**.

28. As long as it is a possible view there is no ground whatsoever for this Court to interfere with the impugned arbitral award.

29. Moreover, the termination notice being held to be bad is not only a ground under which nine claims and four counter claims have been agitated notwithstanding the finding returned regarding the same, arbitral tribunal has technically considered each one of the nine claims and four claims independent of the finding returned regarding the termination notice. In other words, the termination notice being held to be bad is not the only ground on which challenge to the impugned arbitral award is predicated.

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30. In the light of the narrative supra and particularly in the light of the expeditious disposal which is the sublime philosophy underlying A & C Act and 'Alternate Dispute Resolution mechanism ('ADR mechanism' for brevity), besides minimum judicial intervention being the principle underlining the A & C Act, I find no reason to interfere with the impugned arbitral award within the contours of Section 34 of A & C Act. To be noted, an expansive enquiry as in an appeal under Section 96 of CPC is impermissible as it is a summary procedure as laid down in Fiza Developers case. In other words, considering the contours of Section 34 of A & C Act, I find no reason to entertain this petition by admitting the same.

31. I find that this OP is bereft of merits and does not pass muster for admission before this Court. This OP is dismissed. Considering the submissions before me, I leave it to the parties to bear their respective costs.

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Speaking Order/Non-Speaking Order
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