

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
20~08~2019	10~09~2019

CORAM:

THE HONOURABLE MR.JUSTICE **N. SATHISH KUMAR**

O.P.No.4 of 2015
and O.A.No.31 of 2015

Mr.K.Dhanasekar
Engineering Contractor,
No.60 Rajendra Prasad Road,
Chennai-600044. .. Petitioner

.Vs.

1. The Union of India,
rep.by its General Manager
Southern Railway, Park Town,
Chennai 600003.
2. The Deputy Chief Engineer/GC
Southern Railway, Madurai 625001.
3. Mrs.N.C.Sharda
Presiding Arbitrator & Senior Professor/Track-1
IRICEN/Pune,
Pune-411001.
4. Mr.Karunakar K.Menon
Dy.Director, Kalakshetra Foundation,
Chennai (formerly Dy.FA&CAO/G/MAS,
Southern Railway)

5. Mr.M.A. Inbarasu,
CME/Planning
Southern Railway,
Park Town, Chennai 600003.

.. Respondents

* * *

Prayer: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the Award dated 23.05.2014 passed by Respondents 3 to 5.

For Petitioner : Mr. Naveen Kumar Murthi
for M/s.S.Varsha

For Respondents: Mr. P.T. Ramkumar [for R1 and R2]

ORDER

Challenging the Three Members Arbitral Award, the present Original Petition has been filed.

2. The brief facts leading to file this O.P. is as follows:

2(a) The Respondent/Petitioner herein has awarded the work "collection and supply of 50mm size machine crushed hard granite ballast between Dindigul (excluding) and Madurai (including) as a part of doubling of the track between Dindigul & Madurai section" to the

claimant on 22.08.2006 and agreement No.183/CN/06 dated 13.11.2006 was executed by them for the value of Rs.6,18,24,000/- with a date of completion as 21.06.2007 (ten months).

2(b) It is the case of the claimant that work was not completed in time. However, contract was terminated. It is not as per general condition of contract. It is his further case that thereafter risk tenders were awarded on relaxed specification of 25% impact value at exorbitant rate. Despite his plea for relaxing the impact value to 25% was not considered by the Respondent. It is the plea of relaxation of impact value had been considered he would have supplied the entire quantity. The specification of the ballast has been changed in the risk & cost tender, the risk & cost is not tenable and the contract was also terminated after the last extended date which is also not legally correct. As per Clause 62(B)(b) of GCC the risk amount is payable if terminated work is got completed through another contractor. Final terminated work was awarded to the same contractor. Therefore, the risk amount claimed as counter claim is not maintainable.

2(c) It is the case of the respondent that the termination of the contract was due to poor progress of ballast supply by the claimant. The partial termination was done as per Clause 62 of GCC after giving 7 days on 21.02.2007 and 48 hours notice on 23.03.2007 and termination notice on 09.04.2007. The termination was done as the claimant did not show proper progress as per approved programme of ballast every month. Despite several notices he did not show any improvement. Therefore, the respondent forced to terminate the contract partially for 40000 cum.

2(d) The claimant requested for lowering of specification could not be accepted as in the tender condition vide clause 2.2.1 of special condition of contract. Relaxation in abrasion and impact value shall be given prior to invitation of tender. The lowering of the specification has to be resorted to due to the failure of the claimant to supply the ballast in time so as to get the ballast in time for targeted work of doubling. Moreover, lowering the specification has been beneficial to the claimant as otherwise risk amount would have been even more as cost of ballast with original specification would have been more. The

respondent has forced to terminate the contract finally as the claimant did not improve the supply position even after partial termination and had not even applied for extension. Learned three members Arbitrators finally allowed the counter claim to tune of Rs.1,70,96156 as risk & cost amount and dismissed the claim of the petitioner in entirety. Challenging the same the present Original Petition has been filed.

3. Though the Original Petition has been filed challenging the dismissal of the claim and also the counter claim, the main focus before this court is only with regard to the counter claim awarded by the Arbitrators.

4. The learned counsel appearing for the petitioner vehemently submitted that the Award has been passed with an inordinate delay of three years and seven months. The Award ought to have been passed within a reasonable time period. But in this case after the hearing was over the award has been passed after 3 years 7 months. Besides he has also submitted that the Tribunal has completely ignored the

fundamental principle of contract law while deciding the dispute. The contract for supply of 96000 cm of 50 mm machine crushed ballast at 20% impact value to be effected within 10 months period from 22.8.2006 to 21.06.2007. But however, the petitioner was unable to supply the same due to non-availability of the said ballast at 20% impact value. 20% of the impact value specification could not be procured anywhere in the surrounding area. Therefore it is his contention that Railways themselves have considered the impossibility of performing the said condition and issued a general circular dated 20.02.2007 whereby the impact value specification was relaxed from 20% to 25% for all contracts *en masse* from then onwards.

5. In view of the above relaxation the petitioner has made several requests to the Railways to relax the specification. But however, the Railway did not consider the same and also did not exercise their powers under the contract under clause 42(1) to modify the specification. However, issued partial termination notice whereby 40,000 cubic metre was removed from the petitioner's contract and was sought to be performed by way of a risk tender at the risk and

cost of the Petitioner. While issuing the risk and cost tender to the successful bidders, the Railways arbitrarily and unilaterally relaxed specification to 25%. Therefore, it is his contention that such risk and cost tender lost its character of being the risk and cost tender and became a completely fresh tender. The entire contract itself gets changed and the same could not be considered as a risk and cost tender. The risk and cost tender was awarded with a completely different scope of work than what was originally agreed by the petitioner in the contract. Therefore, it is his contention that the learned Arbitrators have not considered this aspect and the Award is certainly violation of fundamental policy of India. It is his further contention that once the scope of work is changed, the Petitioner would be held liable under the risk and cost of the same. Similarly the Tribunal also not considered the change of circumstances by the Railways' own circular dated 20.02.2007 and also not considered that contract has become impossibility of performance and become frustrated. Hence the award has to be set aside.

6. In support of his contention he relied upon the following

judgments:

1. *Harji Engg.Works Pvt. Ltd., vs. Bharat Heavy Electricals Ltd. & Another* **[(2009 (107) DRJ 213]**
2. *Edwinton Commercial Corporation and Tsavlis Russ (Worldwide Salvage & Towage) Ltd.,* **[(2007) EWCA Civ 547]**
3. *Union of India and others vs. Tania Constructions Private Limited.* **[(2011) 5 SCC 697]**

7. Learned counsel appearing for the Respondent would submit that though the Petitioner has not supplied the materials as per the contract the contract was partially terminated on 09.04.2007. Even several opportunities given to the petitioner he has not fulfilled the same. Further, the petitioner is also executed rider agreement with no objection whatsoever raised with regard to the subsequent contract for completing the balance work. It is his further contention that the final termination was done as per the Railway Board Circular dated 17.5.2004. Partial termination was done after adequate notice was given. Despite the extension was granted he has not supplied the

materials as per the contract. The petitioner himself would have applied for tender for risk and cost for completion of the remaining part, he has not done so. Entire aspect was considered by the arbitrators. Merely because the contract was awarded to complete the work with increase impact value of 25% at much higher rate of Rs.9,000/- per 10 cum during the period of execution of the remaining portion of the work, the contract awarded to the claimant was considered by the arbitrators. The Arbitrators have considered the entire arguments and arrived a just finding. Therefore, it is his contention that three member Arbitrators have passed the Award as per the contract terms. This court cannot re-appreciate the entire evidence. It is his further contention that mere delay in passing the Award no prejudice whatsoever occurred. Sufficient opportunities has been given and the matter has been heard in length. All the points have been considered. Hence, this Original Petition is not maintainable and the same is liable to be dismissed.

8. The scope of interference of the Award is dealt by the Apex Court in the following judgments:

10(a) Scope of interference under Section 34 of the Arbitration and Conciliation Act 1996 is discussed in ***Oil and Natural Gas Corporation Ltd., v. Saw Pipes Ltd., [2003 (5) SCC 705]***, wherein the Honourable Apex Court has held that an Award can be set aside if it is contrary to:

- a) fundamental policy of Indian law; or
- b) the interest of India; or
- c) justice or morality; or
- d) if it is patently illegal

Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

8(b). The power of the Court to set aside the Award would be exercised only in cases where the Court finds that the Arbitral Award is on the face of it erroneous or patently illegal or in contravention of the provisions of the Act. In the case on hand, considering the entire findings of the Arbitrator this court do not find any materials to show that this case requires interference under Section 34 of the Act. In ***Swan Gold Mining Ltd., v. Hindustan Copper Ltd reported in 2015(5) SCC 739*** the Honourable Apex Court has

held as follows:

"12. **Section 34** of the Arbitration and **Conciliation Act**, 1996 corresponds to **Section 30** of the Arbitration Act, 1940 making a provision for setting aside the arbitral award. In terms of sub-section (2) of **Section 34** of the Act, an arbitral award may be set aside only if one of the conditions specified therein is satisfied. The Arbitrator's decision is generally considered binding between the parties and therefore, the power of the Court to set aside the award would be exercised only in cases where the Court finds that the arbitral award is on the fact of it erroneous or patently illegal or in contravention of the provisions of the Act. It is a well settled proposition that the Court shall not ordinarily substitute its interpretation for that of the Arbitrator. Similarly, when the parties have arrived at a concluded contract and acted on the basis of those terms and conditions of the contract then substituting new terms in the contract by the Arbitrator or by the Court would be erroneous or illegal."

"13. It is equally well settled that the Arbitrator appointed by the parties is the final judge of the facts. The finding of facts recorded by him cannot be

interfered with on the ground that the terms of the contract were not correctly interpreted by him."

"21. Mr. Sharan, learned senior counsel appearing for the appellant, also challenged the arbitral award on the ground that the same is in conflict with the public policy of India. We do not find any substance in the said submission. This Court, in the case of Oil and Natural Gas Corporation Ltd. (supra), observed that the term 'public policy of India' is required to be interpreted in the context of jurisdiction of the Court where the validity of award is challenged before it becomes final and executable. The Court held that an award can be set aside if it is contrary to fundamental policy of Indian law or the interest of India, or if there is patent illegality. In our view, the said decision will not in any way come into rescue of the appellant. As noticed above, the parties have entered into concluded contract, agreeing terms and conditions of the said contract, which was finally acted upon. In such a case, the parties to the said contract cannot back out and challenge the award on the ground that the same is against the public policy. Even assuming the ground available to the appellant, the award cannot be set aside as because it is not contrary to fundamental policy of Indian law or against the interest of India or on the ground of patent illegality.

22. The words “public policy” or “opposed to public policy”, find reference in [Section 23](#) of the Contract Act and also [Section 34](#) (2)(b)(ii) of the Arbitration and Conciliation Act, 1996. As stated above, the interpretation of the contract is matter of the Arbitrator, who is a Judge, chosen by the parties to determine and decide the dispute. The Court is precluded from re-appreciating the evidence and to arrive at different conclusion by holding that the arbitral award is against the public policy."

8(c). The Honourable Apex Court in ***McDermott International Inc., v. Burn Standard Co.,Ltd., [2006 (11) SCC 181]*** explained the term patent illegality and held that patent illegality must go to the root of the matter. Public Policy violation should be so unfair and unreasonable as to shock the conscience of the Court. The supervisory role of the Court under Section 34 is to be kept at a minimum level and interference is envisaged only in case of fraud or bias, violation of natural justice, etc., If the Arbitrator has gone contrary to or beyond the express of law of the contract or granted relief in the matter not in dispute that would come within the purview of Section 34 of the Arbitration and Conciliation Act 1996.

8(d). A Division Bench of this Court in ***Puravankara Projects Limited v. Mrs.Ranjani Venkatraman Ganesh and Another [2018 (6) MLJ 588]*** also followed the above judgment of the Apex court and held that only in the circumstances envisaged under the decision of the Apex Court the Award can be interfered.

8(e). In ***Associate Builders Vs. Delhi Development Authority reported in (2015) 3 SCC 49***, the Honourable Apex Court has held that a contravention of the substantive law of India would result in the death knell of an arbitral award. Violation of Indian statutes i.e., the award which is, on the fact of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award /judgment/decision is likely to adversely affect administration of justice and would be regarded as being contrary to the fundamental policy of Indian law. Furthermore, the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act 1996. The Honourable Apex Court further held as follows:

'42. In the 1996 Act, this principle is substituted by the 'patent illegality' principle which, in turn, contains three sub-heads:

42.1.(a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of [Section 28\(1\)\(a\)](#) of the Act, which reads as under:

'28. Rules applicable to substance of dispute. (1) Where the place of arbitration is situated in India—

(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India.'

42.2. (b) A contravention of the [Arbitration Act](#) itself would be regarded as a patent illegality — for example if an arbitrator gives no reasons for an award in contravention of [Section 31\(3\)](#) of the Act, such award will be liable to be set aside.

42.3. (c) Equally, the third subhead of patent illegality is really a contravention of [Section 28\(3\)](#) of the Arbitration Act, which reads as under:

"28. Rules applicable to substance of dispute.

(1)... ..

(2)

(3) In all cases, the Arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

This last contravention must be understood with a caveat. An arbitral tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do.'

9. No doubt the Award has been passed with some delay. Much reliance has been placed on the judgment of the Delhi High Court in ***Harji Engg. Works Pvt. Ltd., vs. Bharat Heavy Electricals Ltd. & Another [2009 (107) DRJ 213]***. In the above judgment the Delhi High Court taking note of the fact that after certain hearings, the hearing has not been properly concluded and award has been passed without finally concluding the hearings and there is an inordinate delay in passing the Award. Accordingly, held that the Award has to be set

aside. In the above judgment, the learned Single Judge has referred the judgment of the Honourable Apex Court in ***State of Punjab v. Hardyal 1985 (2) SCC 629 and Flowmore Pvt. Ltd., v. National Thermal Power Corporation Ltd., [ILR (1996) 2 Del 476]*** and held as follows:

"20. It is natural and normal for any arbitrator to forget contentions and pleas raised by the parties during the course of arguments, if there is a huge gap between the last date of hearing and the date on which the award is made. An Arbitrator should make and publish an OMP No.241-2006 Page No.12 award within a reasonable time. What is reasonable time is flexible and depends upon facts and circumstances of each case. Is case there is delay, it should be explained. Abnormal delay without satisfactory explanation is undue delay and causes prejudice. Each case has an element of public policy in it. Arbitration proceedings to be effective, just & fair, must be concluded expeditiously. Counsel for the respondent had submitted that this Court should examine and go into merits and demerits of the claims and counter claims with reference to the written submissions, claim petition, reply, document etc. for deciding whether the award is justified. In other words, counsel for the respondent wanted the Court to step into the shoes of the Arbitrator or as an appellate court decide the present objections under Section 34 of the Act with reference to the said documents. This should not be permitted and allowed as it will defeat the very purpose of arbitration and would result into full fledged hearing or trial before the Court, while adjudicating

objections under *Section 34* of the Act. Objections are required to be decided on entirely different principles and an award is not a judgment. *Under the Act*, an Arbitrator is supposed to be sole judge of facts and law. Courts have limited power to set aside an award as provided in *Section 34* of the Act. *The Act*, therefore, imposes additional responsibility and obligation upon an Arbitrator to make and publish an award within a reasonable time and without undue OMP No.241-2006 Page No.13 delay. Arbitrators are not required to give detailed judgments, but only indicate grounds or reasons for rejecting or accepting claims. A party must have satisfaction that the learned Arbitrator was conscious and had taken into consideration their contentions and pleas before rejecting or partly rejecting their claims. This is a right of a party before an Arbitrator and the same should not be denied. An award which is passed after a period of three years from the date of last effective hearing, without satisfactory explanation for the delay, will be contrary to justice and would defeat justice. It defeats the very purpose and the fundamental basis for alternative dispute redressal. Delay which is patently bad and unexplained, constitutes undue delay and therefore unjust."

10. The above judgments make it clear that it is natural for any Arbitrator to forget contention and pleas raised by the parties during the course of arguments. There is a huge gap between the last date of hearing and the date on which the Award has been made. The Arbitrators should make and publish the Award within a reasonable

time. What is reasonable time is flexible and depends upon the facts and circumstances of each case. In case there is a delay, it should be explained. The abnormal delay without satisfactory explanation certainly cause prejudice to the other party. In the present Award the same makes it clear, claim statement was filed on 30.09.2008 and the counter claim was raised on 20.12.2008 and hearing started on 21.1.2009 and completed on 1.2.2011. Thereafter, written submissions were also received by the Arbitrators on 28.1.2009 and 15.5.2009 and further details on 3.2.2009. Thereafter it appears that the award has not been passed. The Arbitrators on 25.3.2014 i.e., after more than three years and 7 months have passed the Award and the delay has not been explained in the entire award.

11. In para 16 of the ***Harji Engg.Works Pvt. Ltd., vs. Bharat Heavy Electricals Ltd. & Another [2009 (107) DRJ 213]*** the Delhi High Court case further held as follows:

*"16. **The Act** based on UNCITRAL Model Law seeks to ensure fast and quick disposal and curtail delays (See, **Sections 4,12,13,16, 23 and 34(3)** of the Act). Commercial arbitration process should be efficient and*

disputes decided expeditiously for trade and commerce to prosper and grow. Contractual rights and obligations to have meaning should be enforced. Delay defeats justice and encourages breaches. Arbitration proceedings must be held with reasonable dispatch and promptness. Arbitration proceedings are encouraged because they are speedy alternative to court adjudication. Its primary objective is fast and quick disposal of disputes between parties without delays normally associated with court proceedings. Arbitration implies timeous decisions and promptitude. It is policy of law that arbitration proceedings should not be unduly prolonged. Arbitration proceedings, therefore, are expected to be prompt."

Finally the Delhi High Court concluded that when there is a delay with unexplained reason that award is violation of public policy and the same has to be set side.

12. In this case also on perusal of the records the Award has been passed after 3 years and 7 months. The letter issued by the Arbitrators clearly indicate that the Award dated 23.5.2014 was despatched only on 11.11.2014. There is no reasons whatsoever stated for the huge delay in passing the Award. Even the entire award do not indicate the reason for such delay. Therefore, applying the

above ratio and delay in passing the award beyond three years and 7 months after completion of the hearing, which is certainly against the very Act which is required to pass the award within a reasonable time. In the absence of any explanation or reason for the delay in passing the award, such delay in fact certainly have impact and violation of public policy of India. Therefore, the above Award cannot be sustained in the eye of law in view of the delay alone. Though, other contentions also raised with regard to the contract become frustrated and Clause 42.1 of the contract has not been considered and subsequent circular of Railways during the currency of contract has not considered, this court is of the view that since the award itself is not in according to law and vitiated by long delay, the above aspects are kept open to be raised during Arbitral proceedings. The respondents 1 and 2 are directed to appoint fresh Arbitrators within a period of three months from the date of receipt of copy of this Order and it is made clear that since the challenge is only with regard to the counter claim and the other aspects have not been challenged before this Court, the parties are at liberty to canvas their respective case as against the counter claim alone originally. On such reconstitution of the Tribunal the

learned Arbitrator(s) shall hear the counter claim alone and pass Award within three (3) months thereafter.

13. With the above observation the Original Petition is partly allowed. The Counter Claim alone is set aside. Respondents 1 and 2 are directed to appoint fresh Arbitrators within a period of three (3) months from the date of receipt of copy of this Order and on such appointment the learned Arbitrator(s) shall hear the counter claim alone and pass an Award within three (3) months thereafter. Consequently connected Original Application is closed. No cost.

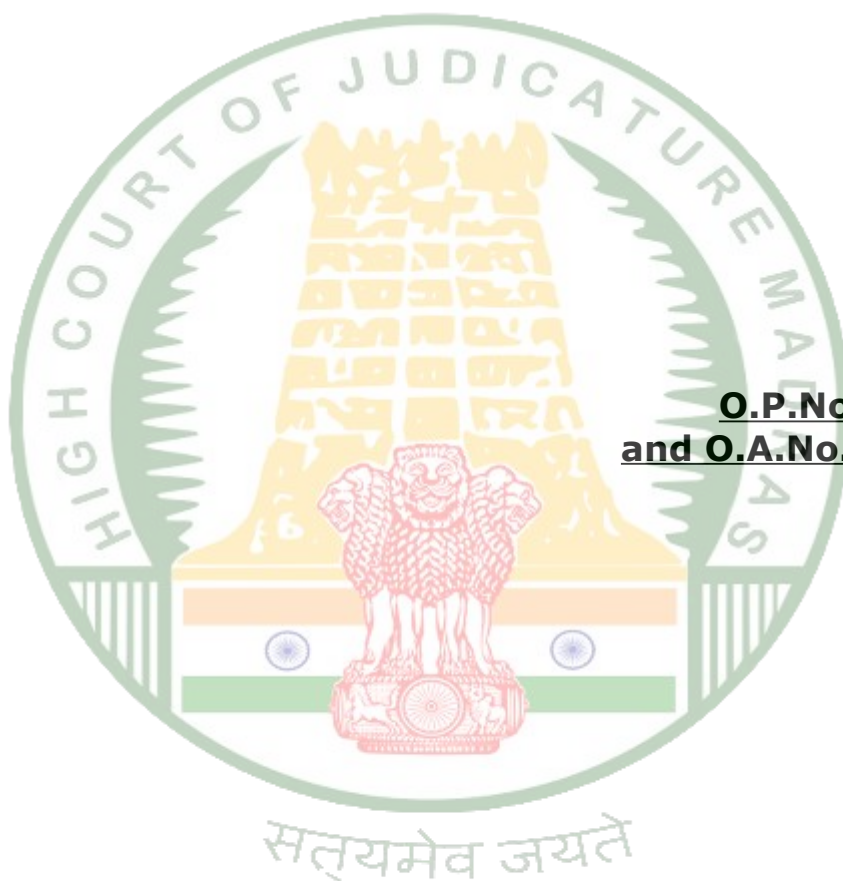
10.09.2019

Index : Yes / No
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