

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :21.02.2019

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.730 of 2015

Tamil Nadu Civil Supplies Corporation
Rep. By its Managing Director
No.12, Thambusamy Road, Kilpauk
Chennai - 600 010

... Petitioner

vs.

1.M/s.Al.Champdany
Industries Limited
No.25, Princep Street
Kolkata - 700 072

2. T. Vijayalakshmi
No.13, 3rd Street
Malangandapuram
Pallavaram
Chennai - 600 043

... Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 10.04.2013 passed by the 2nd respondent herein in respect of Arbitration proceedings between the petitioners and the 1st respondent in Arbitration Case No.1 of 2010.

For Petitioner : Mr.A.Kumar
Additional Advocate General

For First Respondent : Mr.B.Giridhara Rao

ORDER

There is one petitioner and there are two respondents in this 'Original Petition' (hereinafter 'OP' for brevity). To be noted, Section 34 of 'The Arbitration and Conciliation Act, 1996' ('A & C Act' for brevity) refers to an 'application' for setting aside an Arbitral award. However, such an application is being assigned the nomenclature 'Original Petition' in this Registry and therefore, I shall refer to the same as 'OP' for the sake of convenience and clarity.

2. Be that as it may, with regard to the array of parties, the petitioner before me is 'Tamil Nadu Civil Supplies Corporation' ('TUCSC' for brevity) and it was the respondent before the Arbitral Tribunal. To be noted, second respondent before me, is the Arbitral Tribunal i.e., sole Arbitrator. First respondent before me was the claimant before the Arbitral Tribunal.

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3. Parties in this petition besides being referred to by their respective ranks in the instant OP, shall also be referred to TUCSC, Contractor and Arbitral Tribunal/sole arbitrator (petitioner, first respondent and second respondent respectively).

4. The trajectory of instant OP as per the case file placed before me reveals that this Court had issued notice at the time of inception of OP. First respondent Contractor has since entered appearance and both the learned counsel are before me. To be noted, on behalf of petitioner TUCSC, learned Additional Advocate General Mr.A.Kumar and on behalf of first respondent contractor Mr.B.Giridhara Rao, learned counsel on record are before me. As mentioned supra, the second respondent constituted the Arbitral Tribunal as sole arbitrator.

5. From the submissions made before me today in the hearing (to be noted, the matter was listed under the caption 'Notice regarding Admission' today), it unfurls that the fulcrum of the entire dispute is a contract dated 19.01.2009 between the TUCSC and the contractor. It is not in dispute that this contract pertains to supply of gunny bags. It is also not in dispute that this contract dated 19.01.2009 (which shall hereinafter be referred to as 'said contract' for brevity and clarity) pertains to supply of 100 lakhs of 50kgs capacity gunny bags, which are described as 'B' Twill New Bale gunny bags (hereinafter referred to as 'said gunny bags' for the sake of convenience and clarity). A schedule of/calendar for supply has also been drawn up and the same is as follows:

- 'a) 40 lacs by 28th February 2009*
- b) 40 lacs by 31st March 2009 and*
- c) 20 lacs by 15th April 2009'*

6. There is no dispute about aforesaid schedule of/calendar for supply.

It is not in dispute that there was delay qua this schedule of supply.

7. Supply ultimately made with delay (as can be culled out from the case file before me) was in the following manner:

Sl.No.	Scheduled Month	Quantity allotted	Quantity supplied in time	Quantity covered by belated supply	Total amount of LD imposed Rs. P.
1	February 2009	40,00,000	26,75,000	13,25,000	7,79,611.44
2	March 2009	40,00,000	19,23,000	20,77,000	12,36,198.96
3	April 2009	20,00,000	1,87,000	18,13,000	10,97,848.56
	Total	100,00,000	47,85,000	52,15,000	31,13,658.96

8. The above table is contained in the counter statement filed by TUCSC before the Arbitral Tribunal and there is no dispute or disagreement on facts between the parties about the table extracted and reproduced supra. It is also not in dispute that payment for the value of this supply made has been made albeit after deducting 'Liquidated Damages' ('LD' for brevity) and another component, which goes by the abbreviation 'GTA'. The expansion for 'GTA' as in one of the covenants i.e., Clause 3 (ii) of the said contract and the relevant portion reads as follows:

'3(ii) The seller agree to supply 'B'Twill New Bale Gunnies at GTA open price basis. The open price of 50 kg capacity (94cms x 57 cms x 665 gms) 'B'Twill gunnies for each month delivery shall be determined on the basis of average price of 50 kg capacity 'B'Twill Gunnies bags quoted by the G.T.A (Gunny Trades Association) in

Kolkata's daily ruling one month prior to the month of delivery. (e.g.) if the supply of the gunnies is made by the tenderer during January 2009, the month average price arrived at from out of the daily market prices declared by the GTA (Gunny Trades Association) Kolkata during December 2008 for January 2008 position will be taken into account to settle the cost of the gunnies.'

9. Contending that the deduction of LD and GTA totalling Rs.35,86,294/- is improper, contractor invoked arbitration clause in the said contract between the parties and filed a claim before the Arbitral Tribunal. To be noted, arbitration agreement between the parties within the meaning of Section 7 of A & C Act is in the form of a clause in the said contract and said clause is Clause 21 of the said contract, reads as follows:

'21.ARBITRATION

It is agreed that in the case of any dispute arising out of any of the terms and conditions of the agreement including the interpretation of any of the clauses of the tender or the agreement, the matter shall be referred by the Corporation/Supplier to an Arbitrator who shall be selected by the party from the panel of the Arbitrators approved by the Board of Directors of TNCSC Limited and communicate the same within 15 days from the date of receipt of the letter from the Corporation along with the panel of the Arbitrators. If there is no reply from the supplier within 15 days, the purchaser shall choose any one of the Arbitrator from the panel of Arbitrators. The remuneration for the Arbitrator and other expenses shall be shared equally by the TNCSC Limited and the seller to the Arbitration.

The venue of Arbitration will be at the Head Office of the TNCSC Limited, Chennai. The decision of the Arbitrator shall be final and binding on both the parties to the Arbitration.'

10. There is no dispute or disagreement on this also. Reverting to the claim made by the Contractor before the Arbitral Tribunal, besides the aforesaid sum of deduction i.e., LD and GTA, interest on the same and costs have also been claimed.

11. TUCSC, which was arrayed as respondent before the sole Arbitrator entered appearance and filed a detailed counter statement in February of 2011. Before I advert to the rival submissions and the issue that fell for consideration before the Arbitral Tribunal, it may be necessary to note that under Clauses 10(a)(b) and (e) there is provision for LD to be imposed, with regard to delay in supply, the same being at the rate of 2% upto 15 days and 4% beyond 15 days and upto 30 days . This is also not in dispute.

12. On facts, it is not in dispute that the contractor sought extension / enlargement of time for supply vide letters dated 25.02.2009 and 05.06.2009. This request has been made *inter alia* in accordance with relevant covenants in the said contract.

13. In making this request for extension of time, the case file placed before me reveals that the contractor takes umbrage under clause 12 of the said agreement, which has been captioned 'FORCE MAJEURE'. To be noted, a

fire broke out in contractor's premises and that is the reason for seeking enlargement/extension of time.

14. Under the aforesaid circumstances, matter went before the Arbitral Tribunal.

15. The Arbitral Tribunal, after analysing all the documents placed before it, came to the conclusion that TUCSC ought to have enlarged/extended time for supply, exercising its powers under Clause 12 of said contract and ought not to have imposed/deducted GTA and LD. On this basis, the sole arbitrator acceded to the claim of the contractor. This is vide the arbitral award to which challenge is made in the instant proceedings. This arbitral award dated 10.04.2013, shall hereinafter be referred to as 'impugned award' for the sake of convenience and clarity.

16. Therefore, the pivotal issue, which was before the Arbitral Tribunal is, whether TUCSC should have imposed/deducted LD and GTA or it should have enlarged/extended time as admittedly enlargement of time was sought by the contractor stating that there was a fire in its unit on 16.02.2009. To be noted, the Force Majeure clause, which is Clause 12 in the agreement talks about fire also. The Force Majeure Clause and particularly sub-clause (i) of Clause 12 reads as follows:

'(i) It is agreed that if any delay in delivery is expected due

to natural calamities like earthquake, flood, fire, storm, the supplier shall inform to the purchaser by Fax/Telex/Telegram/RPAD letter for the expected delay in delivery, positively within 3 days from the date of occurrence of above events with proof of documentary evidences. A perusal of the aforesaid provision reveals that the force majeure clause includes fire. '

(Underlining made by Court to supply emphasis)

17. As far as challenge to the impugned award before me is concerned, learned Additional Advocate General submitted that the entire challenge is under Section 34(2)(b)(ii) read with sub-clause (ii) of Explanation 1 of A & C Act. In other words, it is the specific submission of learned Additional Advocate General that challenge to the impugned award is laid on the basis that the impugned award is in conflict with public policy of India and it is in contravention of fundamental policy of Indian law.

18. Before I deal with this legal submission, it may be necessary to note that it is not in dispute that three documents in the form of Fire brigade service report, a certificate issued by the jurisdictional Inspector of Police, namely Jagaddal Police Station, North-24, Parganas and an English version of a paper cutting from a daily, which goes by the name 'SANMARG' being (dated 17.02.2009) have been placed before the sole Arbitrator. To be precise, the documents are described as follows:

'1) Fire brigade service report

2) Certificate issued by the Inspector of Police, Jagaddal

Police Station, North-24, Parganas

3) English version of the earlier paper cutting in SANMARG dated 17.02.2009 obtained from the Interpreting Officer, High Court, Kolkata.

19. Aforesaid description of three documents are, as culled out from the case file placed before me. More particularly, to be noted, it has been culled out from the counter statement of TUCSC before the Arbitral Tribunal and it is specifically contained in paragraph 3 of the counter statement of TUCSC. In other words, it is not in dispute by the petitioner TUCSC before me that the aforesaid three documents were placed before the Arbitral Tribunal. To be noted, this is articulated in Paragraph 3 of the counter statement of TUCSC as mentioned supra.

20. After analysis and appreciation of evidence i.e., documents placed before the Arbitral Tribunal/sole arbitrator, sole arbitrator came to the conclusion that the contractor has taken all efforts to comply with the conditions stipulated in the said contract (dated 19.01.2009) and that the delay by any stretch of imagination is not abnormal. The arbitral tribunal/sole arbitrator has also come to the conclusion that TUCSC ought to have extended the time for supply of said gunny bags under sub-clause (iv) of Clause 12 of said agreement instead of resorting to deduction of GTA and LD.

21. This now takes us to the question as to whether the impugned award is liable to be set aside as one in conflict with public policy of India owing to being in contravention with the fundamental policy of Indian Law.

22. Fundamental policy of Indian law has been elucidatively set out as three distinct juristic principles by Hon'ble Supreme Court in the celebrated **ONGC Ltd. v. Western Geco International Ltd.**, reported in **(2014) 9 SCC 263**. Three fundamental juristic principles so laid down are judicial approach, adherence to principles of natural justice and perversity /irrationality. The above said three principles have been reiterated in **Associate Builders** case [**Associate Builders Vs. Delhi Development Authority** reported in **(2015) 3 SCC 49**].

23. With regard to judicial approach, Hon'ble Supreme Court held that it is to be tested by seeing whether the arbitral tribunal has shown fidelity to judicial approach. With regard to Natural Justice, Hon'ble Supreme Court explained that it should be tested on the celebrated *audi alteram partem* principle and as to whether sufficient reasons have been given in the arbitral award.

24. With regard to third juristic principle which has been laid down by Hon'ble Supreme Court, namely irrationality/perversity, Hon'ble Supreme Court explained that 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.

25. I applied all these three distinct juristic principles laid down by Hon'ble Supreme Court in the celebrated ***Western Geco International Ltd.***, case to test whether the impugned award before me is in contravention with the fundamental policy of Indian law and therefore in conflict with the public policy of India. A careful analysis of the impugned award placed before me reveals that the answer is in the negative. The sole arbitrator has certainly shown all fidelity of judicial approach as all the rival submissions as well as clauses of said contract have been considered, *audi alteram partem* is a non issue and reasoning is well articulated in the impugned award.

26. It is also seen that three documents which have been adumbrated supra have been placed before the Arbitral Tribunal. The Arbitral Tribunal has adverted to the same, appreciated the same (to be noted, re-appreciation of evidence is impermissible in this case). To be noted, rehearing on merit is also impermissible as in my considered view Explanation 2 to 34(2) (b) (ii) controls Explanation 1). Therefore, the second principle with regard to reasoning is also well articulated in the impugned award that has been placed before me. With regard to the last of the distinct juristic principles that have been laid down by the Hon'ble Supreme Court in the celebrated Associate Builders case, namely

irrationality/perversity, to my mind it comes out clearly that the impugned award and the reasoning therein certainly pass the muster of *Wednesbury* principle of reasonableness test. The reasons are two fold. One is Force Majeure, as set out in Clause 12 of said contract. The second is, that there was a fire on 16.02.2009 has been established before the Arbitral Tribunal by way of aforesaid three documents, that there is provision for TUCSC to extend the time is also clear from the covenant which has been articulated in the impugned award. Most importantly, the contractor has sought extension of time vide two letters, the details of which have been set out supra. Notwithstanding the contractor seeking extension of time vide two letters, the details of which have been set out supra, TUCSC without acceding to the request for extension of time has deducted LD and GTA.

27. Considering the narrow compass on which a petition under Section 34 turns, it will suffice and it may not be necessary to delve further into the factual aspects of the matter. In this regard, I deem it appropriate to refer to *Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited* reported in (2009) 17 SCC 796, wherein and whereby Hon'ble Supreme Court held that proceedings under Section 34 of A & C Act are one issue summary procedure and that Section 34 is summary procedure, is not in dispute. This was reiterated by Hon'ble Supreme Court in *Emkay Global Financial Services Ltd. v. Girdhar Sondhi* reported in (2018) 9 SCC 49. Besides reiterating Fiza Developers principle i.e., Section 34 being a summary procedure, Hon'ble Supreme Court also held that Fiza

Developers principle is a step in the right direction with regard to expediting proceedings under Section 34.

28. In the light of Fiza Developers principle laid down by Hon'ble Supreme Court and reiterating the same to be a step in the right direction Section 34 is clearly a summary procedure and therefore there is no need to delve further into the factual aspects of this matter. I also remind myself that this is traceable to 'minimum judicial intervention' philosophy which is one of the pillars of 'Alternate Dispute Absolution Mechanism' ('ADR Mechanism').

In the light of the narrative supra, this OP fails and is liable to be dismissed. Considering the nature of the submissions made before me, I refrain from imposing costs leaving the parties to bear their respective costs.

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Index: Yes/No

Speaking order / Non speaking order

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