

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :12.12.2019

CORAM

The Honourable Ms.JUSTICE P.T.ASHA

O.P.No.789 of 2013

M/s. Nilakantan and Sons Private Ltd.,
No.2 First Floor, Gokul Towers,
No.7,C.P. Ramasamy Road,
Chennai- 600 018.

...Petitioner

Vs.

1. The Union of India represented by its
Chief Engineer/West/Construction,
Construction Office, Southern Railway,
Poonamalle High Road, Egmore,
Chennai- 600 008.

2. R.R. Pratap
Presiding Arbitrator
Sr. Divisional Mechanical Engineer
Loco Shed
Erode.

3. S. Killivalavan
Arbitrator,
Dy. Chief Engineer/Planning
Construction
Egmore, Chennai.

सत्यमेव जयते

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Respondents

Prayer : Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996
praying to set aside the award passed by the Arbitral Tribunal dated 06.09.2013.

For petitioner	: Mr. Mr. T.R. Rajagoplan, Senior Counsel for Ms.C.Usha
For Respondents	: Mr. P.T. Ramkumar for R1

ORDER

The claimant in arbitral proceedings is the petitioner in this petition seeking to set aside an arbitral award dated 06.09.2013.

2. The facts preceeding the filing of this petition is herein below narrated:

The petitioner had been awarded the work contract for the proposed construction of the Jolarpettai-Erode Section of 2x35.0m clear span PSC Box Girder ROB in lieu of existing level crossing number 116 at Kilometer 354/32-33 in Magudanchavadi Yard. This was in pursuance of the tender floated by the first respondent on 25.10.2002. The contract was subject to general conditions as well as special conditions and the agreement for work was made ready by the first respondent on 08.09.2003. The first item of work valued at Rs.23,53,539/- related to excavation work, cement, concrete and RCC work and erection of precast articles etc. The second item valued at Rs. 1,05,750/- related to removing the existing lifting barriers, dismantling the same and restoring the track to normal standard etc. The 3rd item of work which is valued at Rs.56,00,000/- related to the construction of the road over bridge and its attendant activities. The last item of

work valued at Rs.33,41,000/- related to the supply of cement and steel. The detailed works for the above was described in annexures A to D respectively. In keeping with the terms of the letter of acceptance dated 17.04.2003, the claimant had to furnish a security deposit of Rs.3,00,000/-. The EMD of Rs.50,000/- was adjusted towards this security deposit and the balance of Rs.2,50,000 was given in the form of a bank guarantees.

3. As per the terms of the contract, the time for performance was 12 months and the agreement was made ready by 08.09.2003. The petitioner herein would contend that the first respondent had committed several breaches and some of them were major breaches like

- a) not handing over the site in time,
- b) failure to cooperate/approve/provide the requisite drawings/designs/details in time.

Apart from the above there were several minor breaches by the first respondent. The petitioner had been addressing the first respondent about the non receipt of working, drawings, alignment marking not being done by the highways department and insisting on excavating through hard rock when the respondent had approved the concreting

of the two foundations level for concreting.

4. The petitioner would submit that after overcoming these hurdles, the petitioner had started the work in real earnest when the respondent had all of a sudden stopped further work on the ground that the extension of time was not granted by the Chief Engineer. The work was stopped for over 3 weeks in April/May 2004. After several letters from the petitioner calling upon the first respondent for extending the time, the first respondent by their letter dated 06.05.2004 had granted an extension only up to 30.09.2004 and the extension was granted under provisions of Clause 17(2) of the general conditions. This would clearly indicate that the petitioner was not responsible for the delay.

5. The first respondent did not address the various problems the petitioner had brought to its notice regarding the slowing down of the work on account of the first respondent not taking steps to immediately address the petitioners requirements. The first respondent had once again extended the period till 30.11.2005 and the first respondent had stated that the delay was on account of the petitioner which allegation was stoutly refuted by the petitioner. The

petitioner had completed all the work for which drawings and details were made available to them and what remained was only the portions for which drawings and details were not provided by the first respondent. However the first respondent went on to terminate the contract vide their letter dated 14.11.2005. The petitioner would submit that they had been ready with the material and resources from the date the award of the contract was made in their favour.

6. For over 16 months during the original contract period and four months thereafter, the petitioner has not received any payment. They had also informed the first respondent to make arrangements to clear their bills as the price of diesel had gone up and considering the fact that delay had occurred only on account of the first respondent. The claimant had issued a notice to the first respondent herein dated 19.09.2006 invoking the arbitration clause. The petitioner had claimed compensation under 6 heads excluding interest and cost. Though the request for arbitration was made as early as in February 2005, the first respondent had terminated the contract only on 14.11.2005. Since the value of the claim exceeded Rs.10,00,000/- the first respondent railways had to constitute an Arbitral Tribunal of 3 arbitrators as specified in the contract. On 28.07.2005, the first respondent had

send the names and requested the petitioner to select one person as their nominee. On 15.11.2006 one R.Selvaraj was appointed as the Principal Arbitrator and one R.Selvanayagam and K.K.Reddy (Petitioner's choice) were appointed as arbitrators.

6. However though the Arbitral Tribunal was constituted they did not enter into reference. The first respondent by their letter dated 31.01.2007 requested the petitioner to send their claim. Meanwhile Mr.K.K.Reddy, resigned and on 26.07.2007 one B.M.S Chalam was appointed in the place of K.K.Reddy. Thereafter in the month of August 2007, the petitioner was asked to submit their claims. Meanwhile another of the arbitrator was promoted and transferred. On 17.08.2007, a new panel of arbitrators were appointed. Despite the request of the petitioner, to appoint a Civil engineer to the panel as and when vacancy arises, the first respondent went on to appoint one Killivalavan as an arbitrator.

7. In the interregnum another Arbitrator Nesamani also retired. Taking into account the fact that the first respondent was not proceeding any further in the arbitral proceedings, the petitioner had filed a petition under Section 11 of the Arbitration and Conciliation Act

1996, hereinafter called 'The Act' seeking constitution of the Arbitral Tribunal. This Court by order dated 15.03.2013, while appointing the arbitrator had deprecated the conduct of the petitioner but ultimately observed that the Tribunal shall go ahead with the reference and pass a reasoned order after giving opportunities to both parties within 6 months from the date of the order. Despite the above order, the Tribunal did not afford an opportunity to the claimant to submit their case and had simply proceeded to dismiss the claim. In fact, the last hearing of the Tribunal was last held on 14.09.2012 much prior to the orders of this Court in OP.No.408 of 2010. Aggrieved by the award passed by the Arbitral Tribunal contrary to the directions of this Court and without affording an opportunity to the petitioner to put forward their case. The claimant has challenged the Award in these proceedings.

8. Mr. T.R.Rajagopalan, Senior Counsel appearing on behalf of the petitioner would contend that the Arbitral Tribunal had clearly flouted the order passed by this Court in OP.No.408 of 2010. The Arbitral Tribunal has not held a hearing after the passing of the order in OP.No.408 of 2010. That apart the award has been signed only by two arbitrators as against the three members who were constituted as

the Arbitrators. He would also submit that with the amendment to the Act only the new Act will apply. He would submit that in the light of the above, the award has to be set aside.

9. Per contra, Mr. P.T. Ramkumar making submissions on behalf of the first respondent would submit that this Court in the proceedings in OP.No.408/2010 has clearly deprecated the conduct of the petitioner herein in not participating in the Arbitration proceeding despite notice to the petitioner by the Tribunal. He would further contend that the award had been passed by the Arbitral Tribunal with the consent of the 3rd arbitrator. Contradicting the petitioner's arguments that only the new Act would apply, the learned counsel submitted the following Judgments:

- 1. [2019 SCC OnLine SC 442] in the case of Union of India Vs Parmar Construction Company**
- 2. OP.No.4 of 2015 in the case of MR.K.Dhanasekar Vs. The Union of India**

10. Heard the counsels on either side and perused the records.

The issue in hand relates to a narrow compass. Whether the award of the Arbitral Tribunal has to be set aside on the ground that the Arbitral

Tribunal has ignored the dicta laid down by this Court in OP.No.408 of 2010 by not affording an opportunity to the petitioner to put forward their case. A reading of the said order would clearly demonstrate that the award is against the said directions laid down in the said order.

The order in OP.No.408 of 2010 is herein below extracted:

" The present original petition is, therefore, dismissed. The Arbitral Tribunal constituted with the consent of both parties on 14.05.2008 is directed to go ahead with the reference and pass a reasoned award after due opportunity to both sides expeditiously, at any rate within a period of six months from today. By way of abundant caution, it is directed that if any of the present members of the arbitral tribunal are due to retire or are unable to continue as part of the tribunal, that vacancy shall be filled up immediately and the matter adjudicated without any further delay. The original petition is accordingly dismissed."

11. The above order makes it clear that an award can be passed only after opportunity is given to both sides expeditiously and that in the event one of the members of the Tribunal is due for retirement or is unable to continue with the work then the first respondent was duty bound to fill up the vacancy at the earliest. The order has also given a time frame. Without following the directions issued in OP.No.408 of 2010, the Arbitral Tribunal has proceeded to pass an award. The award has been passed without giving an opportunity to the petitioner

and therefore violative of the provisions of Section 34(2)(iii) of the Act. Such an award is a patent illegality and deserved to be set aside. In the result, the OP is allowed and the award dated 06.09.2013 passed by respondents 2 and 3 is set aside. No costs.

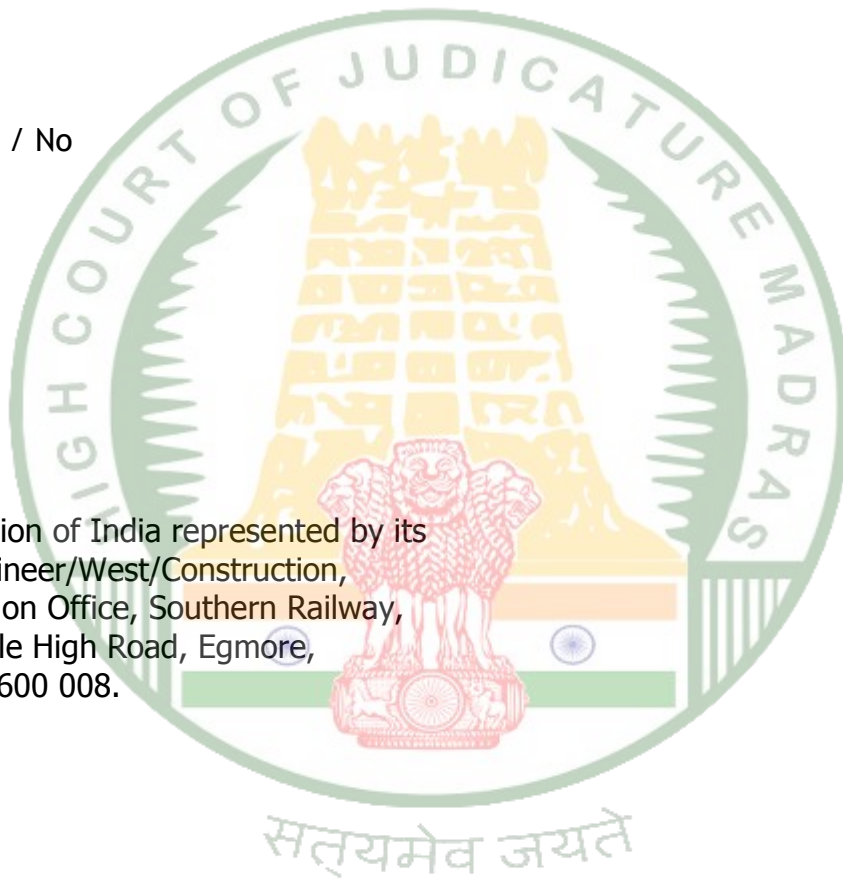
12.12.2019

Index:Yes / No

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To

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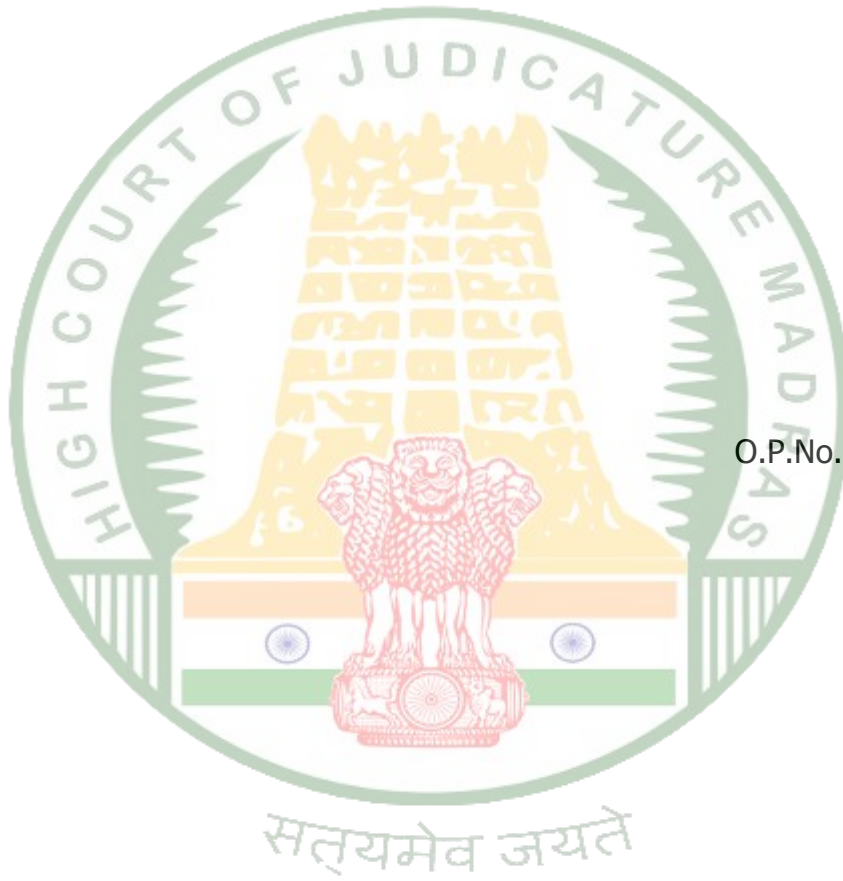


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