

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 04.04.2019

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.Nos.879 to 881 of 2013

Mr.A.Chockalingam
Represented by his Power Agent
Mr.Soundararajan
Plot No.829, Stree No.35, T.N.H.B. Colony
Korattur, Madras - 600 080.

.. Petitioner in
all O.Ps'

vs.

1.The Union of India
Represented by the Chief Engineer (MTP)
Southern Railways, Egmore, Chennai - 8.

2.Mr.R.Selvaraj (Presiding Arbitrator)
Presently employed as the Finance
Advisor & Chief Accounts Officer
(Workshop, Stores & Traffic), South
Western Railway
Club Road, Hubli, Karnataka - 580 023.

3.Mr.K.Rama Subramonia Pillai (Arbitrator)
Presently employed as the Dy.FA/Finace/SC
South Central Railway, Secunderabad.

4.Mr.G.Chandrasekaran (Arbitrator)
Presently employed as the Chief
Communication Engineer
Southern Railway, Park Town,
Chennai - 3.

... Respondents in
all O.Ps'

Original Petitions filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 18.02.2012 passed by the Tribunal comprising of the Respondents 2 to 4 and to pass a fresh award allowing all the claims of the petitioner and pass such further or others orders as this Court may deem fit and proper in the circumstances of the case.

For Petitioner : Mr.Amalaraj S.Penikilapatti
(In all O.Ps')
For Respondents : Mr.P.T.Ramkumar for R1
(In all O.Ps') R2 to R4 Arbitrator.

COMMON ORDER

Instant 'Original Petitions' ('OPs' in plural and 'OP' in singular for brevity) have been filed under Section 34 of 'The Arbitration and Conciliation Act, ('A&C Act' for brevity) assailing one 'common Arbitral Award dated 18.02.2012' ('impugned award' for brevity) made by an 'Arbitral Tribunal' ('AT' for brevity) constituted by three members.

2. The impugned award is a common award pertaining to three different agreements, the details of which are as follows:

'First Agreement: Agreement No.176/CN/96 dated 01/07/1986 modernisation of wagon complex, Balance work etc.- Tondiarpet Marshalling yard-O.P.No.197 of 2002 filed in the

Honourable High Court of Madras.

Second Agreement: Agreement No.38/DyCE/CN/MAS 92 dated 26/11/92 - Proposed BG Railway siding for North Madras Thermal Power station at Athipattu:Madras Gudur Section. O.P.No.198 of 2002 filed in the Honourable High Court of Madras.

Third Agreement: Agreement No.34/DyCE/MAS 95 dated 14/8/95 - Proposed construction of camp office at Nungambakkam - O.P.No.199 of 2002 filed in the Honourable High Court of Madras.'

3. Before AT, petitioner in instant OPs is the sole claimant qua all the three agreements and first respondent in instant OPs is the sole respondent before AT qua all three agreements.

4. For the sake of convenience and clarity, 'petitioner' in instant OPs shall be referred to as 'contractor' and 'first respondent' in instant OPs shall be referred to as 'Southern Railways'. To be noted, respondents 2 to 4 in all the three instant OPs are the three individuals, who constituted the three member arbitral tribunal i.e., AT.

5. In the normal circumstances, these three OPs would have assigned reference terms (for the purposes of this order), based on the sequence in which, numbers have been assigned to them by the Registry, but this Court

makes a departure from this usual practice and assigns nomenclature to these three OPs based on the agreements out of which they arise. 'O.P.No.880 of 2013' arises out of first agreement and therefore, the same shall be referred to as 'senior OP'. 'O.P.No.879 of 2013' arises out of second agreement and therefore, the same shall be referred to as 'first junior OP'. 'O.P.No.881 of 2013' arises out of third agreement and therefore, the same shall be referred to as 'second junior OP'.

6. Before this Court proceeds to deal with the instant three OPs, it is necessary to make a prefatory note that instant OPs can be described as 'vintage' and may be even 'ancient', in the light of expeditious disposal being fundamental sublime philosophy underlining 'Alternate Dispute Resolution Mechanism' ('ADR Mechanism' for brevity)

7. A perusal of the narrative thus far will reveal that senior OP arises out of an agreement of the year 1986, which itself is three decades and three years old. The last and third of the three agreements is of the year 1995 and therefore, that is more than two decades old. Impugned award itself is dated 18.02.2012 and therefore, the impugned award came to be made more than seven years ago. Instant OPs were presented in this Court on 26.04.2012.

8. In three weeks from today, instant OPs itself will turn seven in this Court. Thus in the light of expeditious disposal being one of the pillars on which the edifice of ADR mechanism is built instant proceedings have been described as vintage, and may even be an ancient.

9. With the above prefatory note, this Court now proceeds to examine the instant OPs on merits.

10. Mr.Amalaraj S.Penikilapatti, learned counsel for contractor and Mr.P.T.Ramkumar, learned Standing Counsel for Southern Railways are before this Court.

11. The grounds on which impugned awards are assailed before this Court can broadly be summarised as follows:

a) three agreements which are for entirely different kinds of work ought not to have been heard together and common arbitral award i.e., impugned award ought not to have been passed.

b) there was reconstitution of the AT and such reconstitution was unilaterally made by Southern Railways without taking the contractor into confidence.

c) impugned award is bad as it has given a go by to the provisions of Indian Contract Act.

12. This Court now embarks upon the exercise of dealing with the aforesaid three points one after another. With regard to first ground that the three agreements ought not to have been combined and heard together, there is nothing before this Court to show that the contractor raised any objections in this regard before the AT. Furthermore, it is not the case of the contractor that any prejudice has been caused to the contractor owing to the arbitral disputes arising out of the three agreements being heard together. Furthermore, a perusal of the impugned award reveals that each of the agreements have been dealt with separately and obviously the hearings have been held together owing to the parties and the counsel appearing being the same.

13. There is a reference to O.P.Nos.197 to 199 of 2002 in the impugned award, but the dates have not been given.

14. Therefore, this Court summoned the records of the said OPs from the Registry. A perusal of the said records reveal that said OPs were filed under Section 11 of A & C Act and these are OPs in which AT was appointed by

consent vide order dated 10.09.2004. To be noted, in the impugned award the dates have not been given, but from a perusal of the records in OPs concerned (which were summons from the Registry), this Court noticed that the orders are dated 10.09.2004 and each of the order reads as follows:

'O.P.No.197 of 2002

'This petition has been filed under Section 11(4) of the Arbitration and Conciliation Act, 1996 and both the learned counsel have agreed upon the names of (1) Sri R.Selvaraj, Deputy Financial Advisor and Chief Accounts Officer, CN/MS, (2) Sri V.R.Naidu, Senior Divisional Engineer/Metro/MAS and (3) Sri G.Chandrasekaran, Dy.CSTE/SW/Mas to be the arbitrators. Hence this petition is allowed appointing (1) Sri R.Selvaraj, Deputy Financial Advisor and Chief Accounts Officer, CN/MS, (2) Sri V.R.Naidu, Senior Divisional Engineer/Metro/MAS and (3) Sri G.Chandrasekaran, Dy.CSTE/SW/Mas as arbitrators to enter upon the arbitration and decide the dispute in accordance with the provisions of the Arbitration and Conciliation Act, 1996.

O.P.No.198 of 2002

'This petition has been filed under Section 11(4) of the Arbitration and Conciliation Act, 1996 and both the learned counsel have agreed upon the names of (1) Sri R.Selvaraj, Deputy Financial Advisor and Chief Accounts Officer, CN/MS, (2) Sri V.R.Naidu, Senior Divisional Engineer/Metro/MAS and (3) Sri G.Chandrasekaran, Dy.CSTE/SW/Mas to be the arbitrators. Hence this petition is allowed appointing (1) Sri R.Selvaraj, Deputy Financial Advisor and Chief Accounts Officer, CN/MS, (2) Sri V.R.Naidu, Senior Divisional Engineer/Metro/MAS and (3) Sri

G.Chandrasekaran, Dy.CSTE/SW/Mas as arbitrators to enter upon the arbitration and decide the dispute in accordance with the provisions of the Arbitration and Conciliation Act, 1996.

O.P.No.199 of 2002

'This petition has been filed under Section 11(4) of the Arbitration and Conciliation Act, 1996 and both the learned counsel have agreed upon the names of (1) Sri R.Selvaraj, Deputy Financial Advisor and Chief Accounts Officer, CN/MS, (2) Sri V.R.Naidu, Senior Divisional Engineer/Metro/MAS and (3) Sri G.Chandrasekaran, Dy.CSTE/SW/Mas to be the arbitrators. Hence this petition is allowed appointing (1) Sri R.Selvaraj, Deputy Financial Advisor and Chief Accounts Officer, CN/MS, (2) Sri V.R.Naidu, Senior Divisional Engineer/Metro/MAS and (3) Sri G.Chandrasekaran, Dy.CSTE/SW/Mas as arbitrators to enter upon the arbitration and decide the dispute in accordance with the provisions of the Arbitration and Conciliation Act, 1996.'

15. With regard to first ground of attack, it was pointed out that it has been recorded as follows in the impugned award:

'Both the parties gave in writing that their case has been heard fully and they have been given equal and full opportunity to present their case vide proceedings dated 01.03.2011.'

16. In the light of the aforesaid undisputed position in the impugned award coupled with the fact that the contractor is not able to show that any

prejudice has been caused with regard to the disputes arising out of three agreements being heard together simultaneously, the first ground does not carry the Contractor any further in the instant OPs.

17. With regard to the second ground, this Court deems it appropriate to extract the grounds as articulated in the senior OP. The grounds as articulated in the senior OP read as follows:

'(1) This Hon'ble Court, in its order dated 10.09.2004 in O.P.No.:197/2002 was pleased to appoint the following three Railway Officers as the Arbitrators:-

- (a) R.Selvaraj (then employed as Dy.FA & CAO)*
- (b) V.R.Naidu (then employed as Senior Divisional Engineer/Metro)*
- (c) G.Chandrasekaran (then employed as Dy.CSTE)*

The Railway administration in total disregard to the sanctity of the aforementioned order dated 10.09.2004 of this Hon'ble Court unilaterally reconstituted the Arbitration Tribunal by replacing Mr.V.R.Naidu with another Railway Officer namely Mr.G.S.Manoharan. The Railways also disregarded the Claimant's letter dated 12.03.2008 protesting against the said reconstitution.

(2) The Railway Administration subsequently in compliance of the Presiding Arbitrator's request contained in his letter dated 23.06.2010, replaced the above mentioned Mr.G.S.Manoharan with another Railway Officer namely Mr.K.Rama Subramonia Pillai. The Railway administration's letter dated 16.08.2010

reconstituting the Tribunal for the second time was also unilateral and without the prior permission or knowledge of this Hon'ble High Court. Hence, the Arbitration Tribunal utterly lacked any legal sanctity whatsoever to adjudicate or arbitrate the dispute between the parties.

(3) The repeated reconstitution of the Arbitration Tribunal by the railway administration without the knowledge or permission of this Hon'ble High Court was done in total disregard to the repeated and consistent protest of the claimant, including his letters dated 01.06.2010 and 13.12.2011. Hence, the Railway Administration finally constituted the instant Tribunal, comprising of the respondents 2 to 5, only in an attempt to ensure an utterly subservient Tribunal that would most religiously protect the interest of the Railways.'

18. Southern Railways has filed a typed set of papers dated 02.04.2019, which contains exchange of correspondence between contractor and Southern Railways being letters dated 06.09.2007, 13.12.2007, 04.07.2008, 26.08.2008, 22.12.2008, 05.07.2010 and 31.07.2010. A perusal of these letters brings to light that reconstitution of AT had been done with the consent of both sides and reconstitution has not only been made with the consent of both sides, but it has been done at the instance of both sides. To avoid prolixity and to avoid this order becoming verbose, this Court does not embark upon the exercise of extracting the contents of the correspondence. However, contents of the letters exchanged between the contractor and Southern Railway as contained

in the typed set of papers dated 02.04.2019, adumbration of which has been made supra, is not disputed. Therefore, the second ground also completely pales into insignificance. To be noted, the grounds in senior OP has also been made in the first and second junior OPs. This takes us to the third ground.

19. The third ground of attack is that the provisions of the Contract Act have been given a go by. A careful perusal of impugned award reveals that in Senior OP, which arises out of the first agreement, the Contractor has made 10 claims, which are as follows:

1. *Compensation for the reduction in the scope of work and loss of profit [Rs.6,60,000]*
2. *Compensation for the works carried out beyond the original date of completion (i.e., 21.07.1996) [Rs.14,59,000/-]*
3. *Compensation for salaries of staff and site establishment for carrying out the work beyond original completion date [Rs.3,20,000]*
4. *Compensation for hire charges for machinery and T & P [Rs.7,40,000]*
5. *Compensation for extra items of work carried out [Rs.1,20,000]*
6. *Compensation for the works carried out above 25% of the agreement quantity [Rs.1,17,352/-]*
7. *Compensation for transport of cement and steel supplied at other depot not stipulated in the agreement-expenditure due to transportation [Rs.50,000]*
8. *Payment of final bill [Rs.2,50,000/-]*

9. *Payment of bank charges for the extended period of contract towards the bank guarantee furnished [Rs.40,000]*

10. *payment of interest at 24% on the sums due to the claimant illegally kept in the hands of the respondent [to be worked out].'*

20. In the first junior OP arising out of the second agreement, eight claims have been made and the same read as follows:

1. *Compensation for works carried out beyond the original completion dated (17.02.93). [Rs.4,50,000/-].*

2. *Compensation for staff salaries and site establishment for carrying out the work beyond the original completion date. [Rs.2,09,000/-]*

3. *Compensation for the idle charges for piling machinery and equipments for 8 months. [Rs.96,000/-]*

4. *Compensation for the Hire charges of machinery, tools, plant etc., for the extended period of 22 months [Rs.2,20,000/-]*

5. *Compensation for extra items of work carried out. [Rs.27,500/-]*

6. *Payment of final bill. [Rs.50,000]*

7. *Refund of security deposit recovered from CC bills. [Rs.82,00]*

8. *Payment of interest @ 24% on all the claims from 30.02.94 [to be calculated].'*

21. With regard to the second junior OP, which are arises out of the third agreement, eight claims have been made and the same are as follows:

'1.Compensation for the works carried out beyond the original completion date (beyond 29.11.1995) [Rs.5,71,200/-]

2. Compensation for salaries of staff and site establishment for carrying out work beyond original completion date. [Rs.2,58,000]

3. Compensation for hire chargers for machinery and T & P for carrying out the work beyond original completion date. [Rs.2,00,000/-].

4. Compensation for the items of work carried out above 25% of Agreement of quantities. [Rs.1,33,402/-]

5. Payment of Final Bill. [Rs.1,20,000/-]

6. Release of Security Deposit [Rs.20,000]

7. Payment of Bank Charges due to extentsion of Bank Guarantee more than the period required. [Rs.25,000]

8. Interest.'

22. After detailed analysis of each of the claims, AT has returned its findings.

23. The findings returned by AT in each of the claims and a summary of the same, as can be culled out from the impugned award, reads as follows:

'Summary of Awards:

Sl. No.	First Agreement No.176		Second Agt. No.38		Third Agt.No.34	
	Claim (Rs.)	Award (Rs.)	Claim (Rs.)	Award (Rs.)	Claim (Rs.)	Award (Rs.)
1	2	3	4	5	6	7
1.	Claim No.1	NIL	Rs.4,50,000	NIL	Rs.5,71,200	NIL

Sl. No.	First Agreement No.176		Second Agt. No.38		Third Agt.No.34	
	Claim (Rs.)	Award (Rs.)	Claim (Rs.)	Award (Rs.)	Claim (Rs.)	Award (Rs.)
	Rs.6,60,000					
2.	Claim No.2 Rs.14,59,000	Rs.32,399	Rs.2,09,000	NIL	Rs.2,58,000	NIL
3.	Claim No.3 Rs.320000	NIL	Rs.96,000	NIL	Rs.200000	NIL
4.	Claim No.4 Rs.7,40,000	NIL	Rs.2,20,000	NIL	Rs.1,33,402	NIL
5.	Claim No.5 Rs.1,20,000	NIL	Rs.27,5000	NIL	Rs.1,20,000	1,12,563
6.	Claim No.6 Rs.1,17,352	NIL	Rs.50,000	NIL	SD Rs.20,000	Rs.20,000 Plus currency expired Bank Guarantee Bond shall be released
7.	Claim No.7 Rs.50,000	NIL	Rs.82,000	Rs.81,052	Rs.25,000	NIL
8.	Claim No.8 Rs.2,50,000	Rs.177060. The currency expired. The Bank Guarantee Bond shall also be released to the Claimant	Claim of Interest to be quantified.	NIL	Claim of Interest to be quantified	NIL
9.	Claim No.9 Rs.40,000	NIL			-	-
10.	Claim No.10 (Interest to be reckoned)	NIL			-	-
Total	Rs.37,56,352 + Unquantified amount.	2,09,459	11,34,500+ Unquantified amount.	81,052	13,27,602 + unquantified amount	1,32,563

24. With regard to the third ground that AT has given a go by to the provisions of Indian Contract Act in the impugned award. Two paragraphs in the impugned award are of relevance and the same read as follows:

'Section 55 and 56 of Indian Contracts Act, 1872 deal with the question of delay in performance of contract. If there is an abnormal rise in prices of materials and labour, it may frustrate the contract and the innocent party need not perform the contract. If instead of avoiding the contract, the contractor accepts the belated performance of reciprocal obligation on the part of the employer, the innocent party i.e the contractor cannot claim compensation for any loss occasioned by the non-performance of the reciprocal promise by the employer at the time agreed, "unless at the time of such acceptance, he gives notice to the promisor of his intention to do so.

.....

As per clause 43(1) of General conditions of contract, the contractor shall prepare and furnish to the Engineer once in every month on account giving full and detailed particulars of all claims for any additional expenses to which the contractor may consider himself entitled to and of all extra or additional works ordered by the Engineer, which he has executed during the proceeding month and no claim for any such work will be considered which has not been included in such particulars. The claimant made no such monthly claims during the course of execution.'

25. A careful perusal of the aforesaid two paragraphs and the manner in

which the AT has dealt with each of the claims viz., ten claims arising out of first agreement and eight claims arising out of second and third agreements reveal that it cannot be gainsaid that AT has given a go by to the Contract Act much less can it be said that the AT has passed the award by completely ignoring the Contract Act, much less can it be contended that it is in conflict with public policy of India or in contravention with fundamental policy of Indian law, as AT has read General Conditions of Contract (GCC) in the light of Contract Act.

26. Further perusal of the grounds raised will reveal that the grounds are more in the nature of regular first appeal under Section 96 of 'The Code of Civil Procedure, 1906' ('CPC' for brevity). It may not be necessary to examine those grounds in any detail, as proceedings under Section 34 of A & C Act are not appeals.

27. In this regard, this Court reminds 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 Fiza Developers principle was explained by Hon'ble Supreme Court in ***Emkay Global Financial Services Ltd. v. Girdhar Sondhi*** reported in (2018) 9 SCC 49 and while explaining 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 noted, expeditious disposal is one of the pillars on which, edifice of ADR mechanism is built.

28. This Court also reminds itself that another pillar on which the edifice of ADR mechanism is built is minimum judicial intervention. In the light of minimum judicial intervention being another pillar on which ADR mechanism is built prohibits examining the award on merits as if it is an appeal, more so as if it is a regular first appeal under Section 96 of CPC as that would militate against the very legal concept and philosophy underlying Section 34 of A & C Act. No elucidation or elaboration is required to highlight that Section 34 is not an appeal and that it is very limited judicial review besides being a fine/delicate balance between the sanctity of judicial review and the sacrosanct finality of arbitral awards.

29. In the light of all that have been set out supra, this Court does not embark upon the exercise of examining the grounds which are in the nature of a regular first appeal under Section 96 of CPC.

30. From the narrative thus far, it will be clear that no ground has been made out for judicial intervention qua impugned award.

31. All three OPs fail and the same are dismissed. Considering the nature of the matter and the trajectory of the hearing, this Court deems it appropriate to leave the parties to bear their respective costs.

04.04.2019

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Speaking Order/Non-Speaking Order

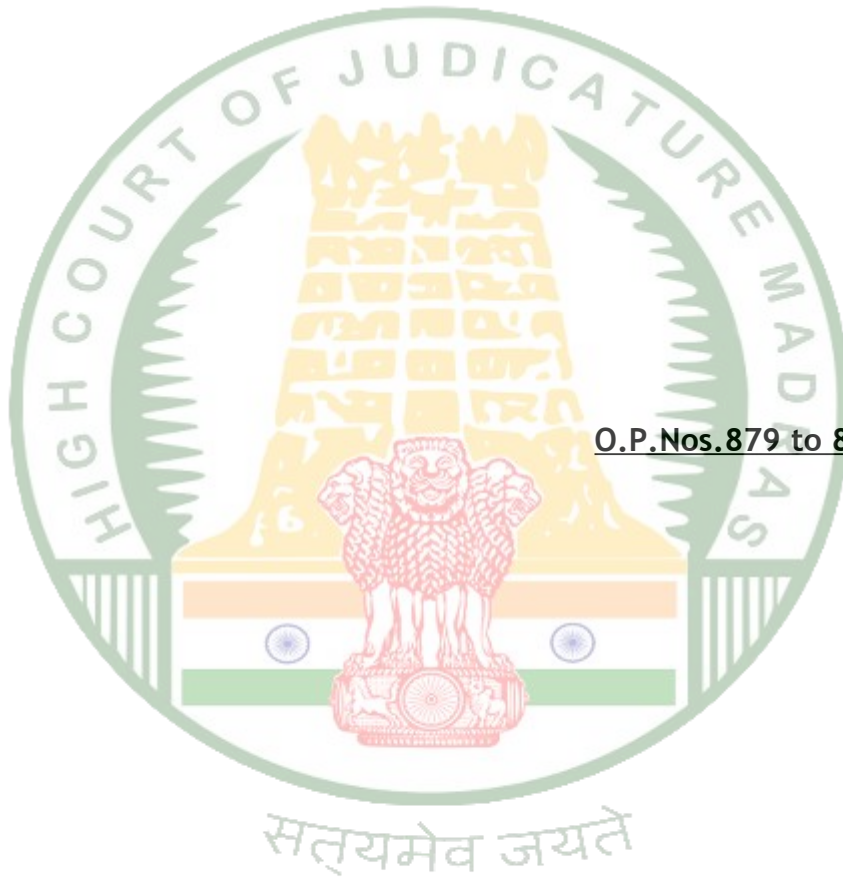
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