

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.06.2019

CORAM :**THE HONOURABLE MR. JUSTICE N.SATHISH KUMAR****O.P.No.437 of 2018**

Chennai Metropolitan Water Supply
and Sewerage Board,
No.1, Pumping Station Road,
Chennai – 600 002.

.. Petitioner

Vs.

1. M/s.VATech Wabag Limited &
11, Murrays Gate Road,
Alwarpet, Chennai – 600 018.

2. M/s.VATech Wabag GmbH
11, Murrays Gate Road,
Alwarpet, Chennai – 600 018.

3. Mr.K.K.Paramanandam,
Presiding Arbitrator,
T-3. 4th Floor, KGEYS Home, 6E, T.M.Maistry Street,
Vannanthurai, Chennai – 600 041.

4. Mr.K.Ramalingam,
Arbitrator,
AP 506, Vaigai Colony, 16th Street, J-Block,
Anna Nagar, Chennai – 600 040.

5. Mr.K.V.Kuppusamy,
Arbitrator,
197, Lloyds Road,
Gopalpuram, Chennai – 600 086.

.. Respondents

PRAYER: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the exparte arbitration Award dated 02.03.2013 passed by the Respondents 3 to 5.

For Petitioners : Mr.N.Ramesh

For Respondents : Mr.Karthik Balan – R2

ORDER

Challenge has been made in this petition as against the award passed by the Arbitrator dated 02.03.2013.

2. The brief facts leading to the filing of this Original Petition is as follows :

The petitioner had invited tenders for design, build, operate and transfer sewage treatment plants of 54MLD and the first and second respondents entered into a joint venture agreement dated 22.07.2003 with the petitioner. The value of the work was Rs.1,37,45,000/- and it is part of main work of value of Rs.57.02 Crores which consisted construction for a value of Rs.32.69 crores and the value of maintenance and operation is Rs.24.32 crores. The work was awarded on 14.07.2003. Claimant raised a claim for 2,59,62,778/- on 03.07.2004 and the first respondent had not accepted the claim and intimated the same to the first respondent on 26.09.2005. The claimants invoked arbitration on 22.09.2008 and appointed Mr.K.V.Kuppusamy as their nominee, as member of the Tribunal. The first respondent appointed Mr.K.Ramalingam as

their nominee and both the members selected Mr.K.K.Paramanandam as the third and presiding arbitrator and the Tribunal was formed and the first meeting was held on 16.08.2012. Mr.Rajiv D.Mittal, their Managing Director, was examined as the witness from the Claimant's side and Mr.D.Chandrasahas, Executive Engineer was examined as the witness from the side of the Respondents. The Tribunal visited the site on 23.01.2010. After meeting both the parties, the Tribunal expressed their satisfaction at the meetings and exchange of documents and expressed their opinion that no more meetings were necessary and requested for giving the award.

3. Based on the above pleadings, the following issues have been framed by the arbitrator :

- (i) Are the claims barred by limitation?
- (ii) Whether the claimant is entitled to succeed on the grounds stated by him in the claims statement?
- (iii) Whether the first claimant is entitled to a sum of Rs.41929886/-?
- (iv) To what other reliefs are the parties entitled?

Arbitrator finally held that the additional clause 38(1) of the agreement contemplates additional charges for the work made as per the contract. The Tribunal has analysed all the documents and heard both the parties and passed the award for a sum of Rs.1,50,82,614/-. As against which the present petition

has been filed.

4. The main contention of the learned counsel appearing for the petitioner is that originally tender was given to construct 9 MLD of sewerage treatment plants. Now under the 38(1) clause, the respondent cannot claim a compensation for additional work and the award of the Arbitrator is beyond the contract. In support of his submissions, he has also relied upon the judgment of the Apex Court in **Satyanarayana Construction Company Vs. Union of India and others** reported in **2011 (15) Supreme Court Cases 101**.

5. The learned counsel for the respondents submitted that the claim has been preferred on the basis of clause 38(1) of the agreement. Further, there is no dispute with regard to the construction and the measurement has also been approved by the respondent. When there is a clear agreement between the parties to claim for additional work in the contract, it cannot be said that the Award has been passed for excess amount and it is beyond the contract. Hence, no ground made out in this petition to interfere with the award.

6. Heard the learned counsel for the petitioner and the respondent and perused the Award.

7. It is now well settled that the award can be interfered only when the

grounds set out under Section 34 of the Arbitration Act is made out. A perusal of the entire award, there is no patent illegality which goes into the root of the matter. Similarly, to contend that there is violation of public policy, I find no materials available on record. 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. In a subsequent judgment in ***McDermott International Tnc., v. Burn Standard Co.,Ltd., [2006 (11) SCC 181]*** when the Apex Court 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.

9. 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.

10. 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."

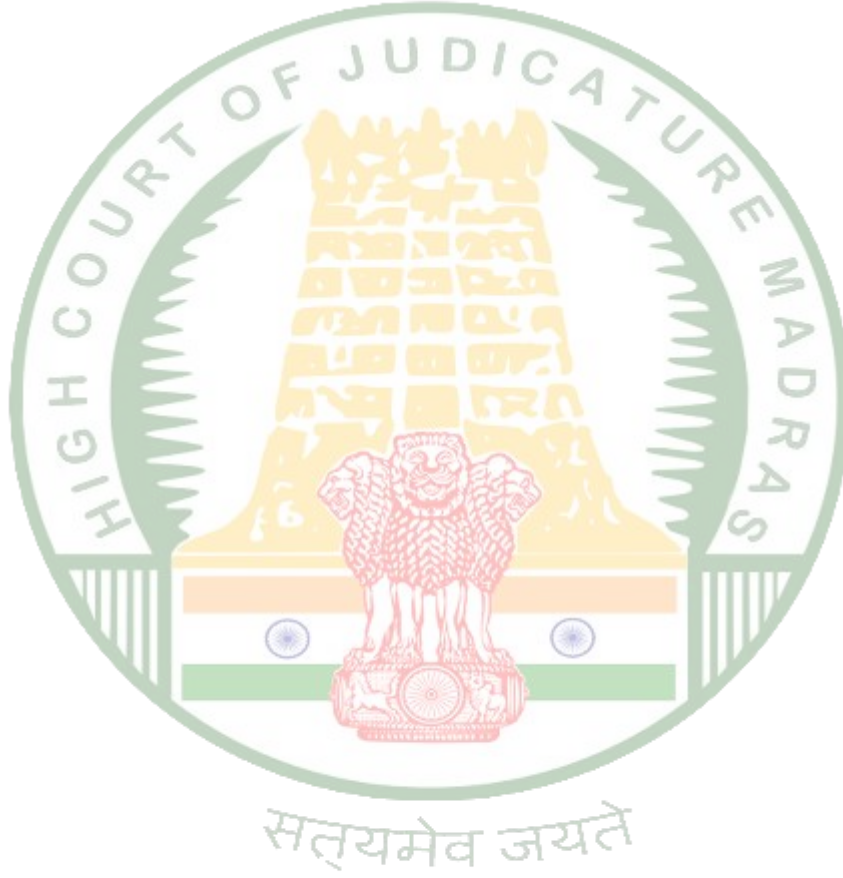
11. In line with the above judgments, it could be seen that the Award has been passed taking into consideration the entire contract and nature of the work and the documents filed on either side has been been factually considered by the Arbitrator and has approved the nature of the work carried out by the first respondent. Further, the Arbitrator has also come to the conclusion that there is no dispute with regard to the execution of work, as to the quantity and quality of the work. In view of such finding by the arbitrator, taking note of the specific covenant in the agreement under clause 38(1) passed the award and as the Arbitrator has factually found that the claim has been made for the additional work carried out as per the contract, the petitioner has not made out any grounds

to interfere the well considered Award of the Arbitrator.

12. Accordingly, this Original Petition is dismissed.

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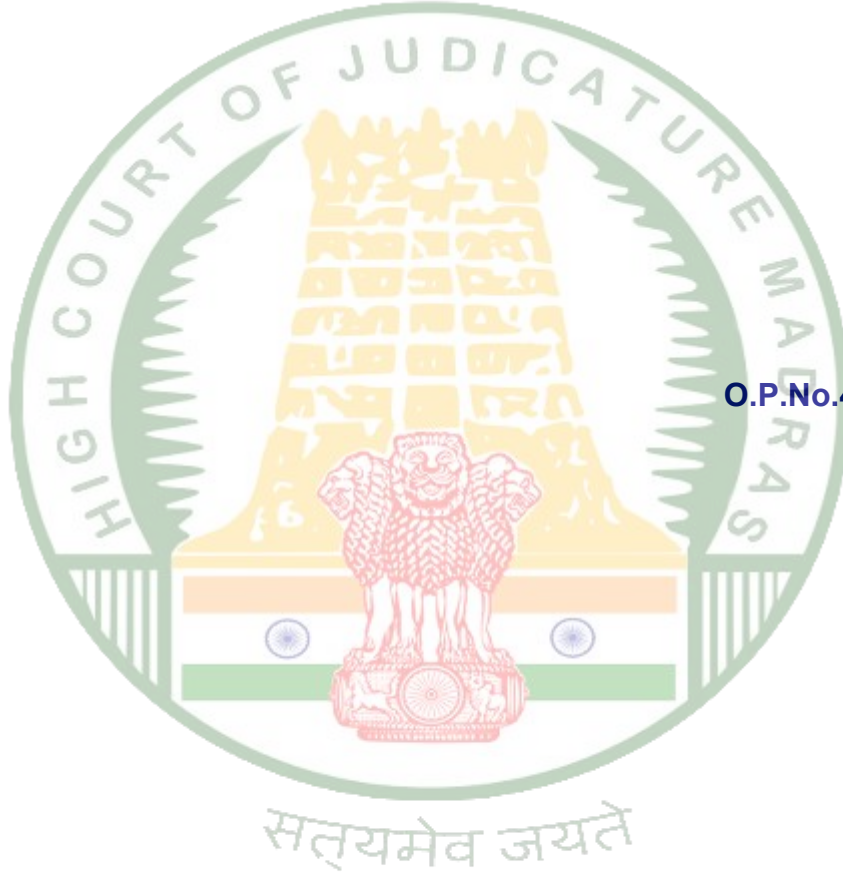
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