

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 05.03.2019

CORAM

THE HONOURABLE Mr.JUSTICE M.SUNDAR

O.P.No.549 of 2018
and A.No.4822 of 2018

The Senior Manager,
Heavy Vehicle Factory,
Avadi, Chennai 600 054.
Tamil Nadu.

... Petitioner

Vs.

K.Karthik
Manager - Operations,
Tamil Nadu Air Products (P) Ltd.,
Old No.47, New No.18,
5th Cross Street, Aminjikarai
Collectorate Colony, Chennai-29.
Tamil Nadu.

... Respondent

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, as amended in 2015, to set aside the award dated 06.09.2017 made in Arbitration matter No.ARB/342/Arbitration Cell dated 19.12.2016.

For Petitioner : Ms.C.Jayachitra
for Mr.Venkatasway Babu
For Respondent : Mr.S.A.Rajan

ORDER

There is a sole petitioner and a lone respondent in the instant 'Original Petition' ('OP' for brevity). Instant OP has been filed under Section 34 of 'The Arbitration and Conciliation Act, 1996' ('A & C Act' for brevity).

Section 34 of A & C Act is under Chapter VII of A & C Act captioned RECOURSE AGAINST ARBITRAL AWARD. A close perusal of Section 34 of A & C Act reveals that recourse against an Arbitral Award i.e., legal recourse for setting aside an Arbitral Award shall be by way of an 'application'. With regard to a legal recourse against Arbitral Award, Registry is assigning the nomenclature 'OP'. Therefore, I am referring to instant proceedings as 'OP', though it is an 'application' for setting aside an Arbitral Award under Section 34 of A & C Act.

2.A perusal of the case file placed before me reveals that instant OP has not been admitted and only notice has been issued. Post issue of notice, sole respondent has entered appearance through a counsel.

3.Ms.C.Jayachitra, representing counsel on record for petitioner and Mr.S.A.Rajan, learned counsel on record for respondent are before this Court.

4.To be noted, instant OP is listed before this Court today under the caption 'NOTICE REGARDING ADMISSION'.

5.I heard learned counsel in the instant OP, keeping in mind the obtaining status of instant OP i.e., that notice has been issued and the matter has been listed today under the caption 'NOTICE REGARDING ADMISSION'.

6. An Arbitral Award dated 06.09.2017 made by a Sole Arbitrator who constituted the Arbitral Tribunal has been called in question in the instant OP. This Arbitral Award dated 06.09.2017 which has been called in question in the instant OP shall hereinafter be referred to as 'impugned Arbitral Award', for the sake of convenience and clarity. The Sole Arbitrator who made the impugned Arbitral Award shall hereinafter be referred to as 'Arbitral Tribunal', for the sake of convenience and clarity.

7. A thumbnail sketch of facts which are necessary for appreciating this order will be set out infra under the caption 'FACTUAL MATRIX IN A NUTSHELL'.

8. FACTUAL MATRIX IN A NUTSHELL:

(a) As can be culled out from the case file before me, petitioner before me placed a supply order bearing No.LP 058034 dated 22.08.2006 with the respondent for supply of what has been described as D.A. gas in the instant OP. Both sides submit that D.A. stands for 'Dissolved Acetylene' and this is not in dispute before me. In other words, 'D.A. gas' is an abbreviated short form for 'Dissolved Acetylene gas'.

(b) The details of the supply order as can be culled out from the petition is as follows:

Qty	Payment Terms	Basic Price	Sales Tax	Surcharge	Transport Charges	Total Value
6818 M ³	100% against proforma invoice	Rs.145/-	4%	5%	Rs.1,16,740/-	Rs.11,46,871.52

(c) It is submitted by the petitioner that certain payments were made to the respondent for DA gas supplied against proforma invoices and the respondent had supplied 5666.24 M³ of DA gas. According to the petitioner, there is a deficit in the supply *qua* the aforesaid supply order and the deficit according to the petitioner is to the tune of 1151.4 M³ of DA gas.

(d) As can be seen from the instant OP, it is the case of the petitioner that measurement of DA gas was done in terms of Kgs (weight of cylinder) and the petitioner used a formula which is based on material safety data sheet of petitioner for DA gas.

(e) With regard to the aforesaid deficit in supply or what can be termed as short supply, certain discrepancies, disputes arose between the petitioner and the respondent.

(f) It further unfurls from the case file in instant OP placed before me that respondent requested for arbitration vide letter dated 19.01.2016 and the same was internally processed by the petitioner.

(g) It also unfurls from the case file that a pre-settlement meeting was held on 07.11.2016, respondent informed that it is willing to settle for certain terms but it may not be necessary to delve further into those aspects of the matter.

(h) It has been categorically averred in the instant OP that petitioner vide letter No.ARB/342/Arbitration Cell dated 19.12.2016 has appointed it's Director of the Regional Marketing Centre, Avadi as Sole Arbitrator. This is specifically set out in paragraph No.13 of the instant OP and the relevant portion of paragraph No.13 reads as follows :

"OFB vide letter No.ARB/342/Arbitration Cell dated 19.12.2016 has appointed Shri.S.Manivannan, Director, Regional Marketing Centre, Avadi as Arbitrator of the case."

(This Court is informed that abbreviation OFB stands for Ordinance Factory Board, which for all practical purposes is OFB)
It emerges clearly that the petitioner has appointed Sole Arbitrator who made the impugned Arbitral Award.

(i) Before the Arbitral Tribunal, the respondent before me was the claimant and the petitioner before me was the respondent. A perusal of the impugned Arbitral Award reveals that it is a highly technical issue which has been dealt with and ultimately, the petitioner before me has been directed to refund a sum of Rs.2,65,503.53 together with interest at the rate of 18%.

9. Having set out the factual matrix in a nutshell, this Court now proceeds to deal with the grounds of challenge and the discussion on the same under the caption 'DISCUSSION AND DISPOSITIVE REASONING'.

10. DISCUSSION AND DISPOSITIVE REASONING:

(a) Learned counsel for the petitioner arguing for admission, submitted that the primordial ground on which, the instant OP is predicated is that the Arbitral Tribunal has not given an opportunity to the petitioner to file its defence statement. On this basis, it is submitted by the learned counsel for petitioner that the instant OP will fit into the third limb of Section 34(2)(a)(iii) of A & C Act. In other words, it is the specific say of learned counsel for petitioner that the petitioner was unable to present its case and therefore, the impugned Arbitral Award is liable to be set aside.

(b) In the course of hearing, it was pointed out that the petitioner's typed set contains only the supply order dated 22.08.2006 and the impugned Arbitral Award. Faced with this above situation, an additional typed set of papers dated 05.03.2019 was presented in Court. I had the benefit of perusing the additional typed set of papers.

(c) Adverting to the legal notice dated 21.02.2016 issued by the respondent before me through counsel and the petitioner's reply to the same dated 29.03.2016, learned counsel for the petitioner submitted that the

petitioner has given a detailed reply and stated that the respondent can seek arbitration as per Clause 18 of the supply order terms and conditions, if they choose to do so. Unfortunately, even the supply order terms and conditions have not been placed before me.

(d) However, in the light of the positive averment in the instant OP, particularly, in paragraph No.13, which has been extracted and reproduced *supra*, it comes out clearly that the petitioner *vide* a letter dated 19.12.2016 has appointed the sole arbitrator. In this view of the matter and in the light of the trajectory of the hearing today, more so, in the light of the fact that the instant OP has been filed under Section 34 of A & C Act and to be precise Section 34(2)(a)(iii) of A & C Act (third limb therein) it may not be necessary to delve further into those aspects of the matter.

(e) With regard to testing whether the impugned Arbitral Award is hit/vitiated by the third limb of Section 34(2)(a)(iii) of A & C Act, I perused the impugned Arbitral Award. A perusal of the impugned Arbitral Award reveals that the Sole Arbitrator who constituted the Arbitral Tribunal has visited the petitioner's office on 20.07.2017 and has looked into the material that are relevant for deciding the arbitrable disputes in the instant case.

(f) Thereafter, a further closer perusal of the impugned Arbitral Award reveals that it mentions that the petitioner has placed purchase order

dated 22.08.2006 before Arbitral Tribunal as Annexure-C and the details have all been adverted to, besides alluding to the dispute pertaining to short supply which is the crux of the lis. This is articulated in paragraph No.5 of the impugned Award (Documents, Reasoning and Conclusion). Relevant part of paragraph No.5 reads as follows :

"Respondent had placed Purchase Order No.HVF/LP/058034/ 2006-07/GS dated 22.08.2006 for the supply of 6818 m³ Dissolved Acetylene (DA) gas as per IS Specification with accounting unit as cubic metre on Claimant at total cost of Rs.11,47,191/- which includes the transportation of the DA gas to Respondent office as per Purchase Order attached as 'ANNEXURE-C' "

(g) To be noted, with regard to the aforesaid extract, respondent in the impugned Arbitral Award is referred to as petitioner before me and the respondent before me was the petitioner before the Arbitral Tribunal. It unfurls from an examination of the impugned Arbitral Award that Arbitral Tribunal has even checked with the concerned section and checked the supply made by the respondent before me.

WEB COPY

(h) Thereafter, the reasons given by the Arbitral Tribunal for arriving at the conclusion have been discussed. It is clear that it is highly technical and the sole arbitrator, who admittedly is a Director in the Regional Marketing Centre in Avadi with the petitioner, has dealt with the technical aspects.

DISCUSSION AND DISPOSITIVE REASONING :

(a) Most importantly, under the reasoning, the Sole Arbitrator i.e., Arbitral Tribunal has raised queries and the answer given to it, which is clearly in the nature of oral examination. In fact, sole arbitrator has recorded the same in question and answer format. Relevant portion reads as follows :

"The Sole Arbitrator had raise some of the queries with the member of the Enquiry Officer viz.

Q: Respondent had been following the conversion factor of 0.9403 since July 2009, how come this report suggests that conversion factor of 1.173 is correct and factor 0.9403 suggested by Claimant which is as per IS Specification is wrong and claimant had followed the Purchase Order Terms and Conditions ?

A : The enquiry report was submitted considering the conversion factor of 0.9403m³ per kg, which is as per the IS Specification, it was the then Sr. General Manager, the Respondent with non-application of mind had directed to change the Enquiry report in favour of the respondent calculation method and accordingly the report had to be changed."

Therefore, in the light of the above said aspects of the impugned Arbitral Award, I am unable to persuade myself to believe that the petitioner was unable to present its case. Therefore, the petitioner's case predicated on the third limb of Section 34(2)(a)(iii) of A & C Act fails.

(b) An attempt was also made to say that the instant OP is

predicated on Section 34(2)(a)(v) of A & C Act also. In other words, an

attempt was made to say that the agreed procedure was not in accordance with the agreement of the parties. As mentioned *supra*, the supply order is in the typed set of papers filed with the instant OP and even though an additional typed set of papers has been filed, there is only a reference to the petitioner's reply dated 29.03.2016. In this reply, there is a reference to Clause 18 of the terms and conditions of supply order and as alluded to *supra*, the same has not been placed before this Court as part of the case file. Therefore, there is no material before this Court to show that the agreed procedure for arbitration has been given a go by.

(c) This takes us to Sections 24 and 19 of A & C Act. A combined reading of Sections 24 and 19 of A & C Act makes it clear that it is for the Arbitral Tribunal to evolve its own procedure.

(d) In the absence of any material before this Court, I am unable to persuade myself to believe that any agreed procedure has been given a go by warranting judicial intervention *qua* impugned Arbitral Award by resorting to Section 24(2)(a)(v) of A & C Act.

(e) This takes us to the conclusion.

CONCLUSION :

(a) In the light of the narrative *supra*, the instant OP predicated

on Section 34(2)(a)(iii) of A & C Act (3rd limb i.e., petitioner otherwise being unable to present its case) and on the ground that arbitral procedure was not in accordance with the agreement of the parties (Section 34(2)(a)(v)) does not qualify for admission. In other words, the petitioner has not made out a case for admission.

(b) Before parting with the instant case, it is necessary that this Court should remind itself for Sub-Section 6 of Section 34 of A & C Act. Sub-Section 6 of Section 34 of A & C Act has been reiterated by Hon'ble Supreme Court in *State of Bihar Vs. Bihar Rajya Bhumi Vikas Bank Samiti* reported in (2018) 9 SCC 472. Adverting to Section 34(6) of A & C Act, Hon'ble Supreme Court has held that every endeavour shall be made by Courts while hearing an application under Section 34 of A & C Act, to adhere to the time line prescribed under Sub-Section 6 of Section 34 of A & C Act. Further more, applications under Section 34 of A & C Act are to be disposed of by way of summary procedure and this has been laid down by Supreme Court in *Fiza Developers & Inter-Trade (P) Ltd. Vs. AMCI (India) (P) Ltd.* reported in (2009) 17 SCC 796. To be noted, *Fiza Developers* principle has been reiterated by Supreme Court subsequently in *Emkay Global Financial Services Limited Vs. Girdhar Sondhi* reported in (2018) 9 SCC 49, wherein Hon'ble Supreme Court has held that *Fiza Developers* principle is a step in the right direction towards expeditious disposal of petitions under Section 34 of A & C Act. Therefore, the instant OP has been examined on the basis of

materials that has been placed before me as part of the case file by the petitioner.

DECISION :

Owing to all that have been set out *supra*, the instant OP fails.

In the light of dispositive reasoning *supra*, I refrain from imposing costs.

This Original Petition fails and the same is dismissed.

Consequently, the connected application is also dismissed.

05.03.2019

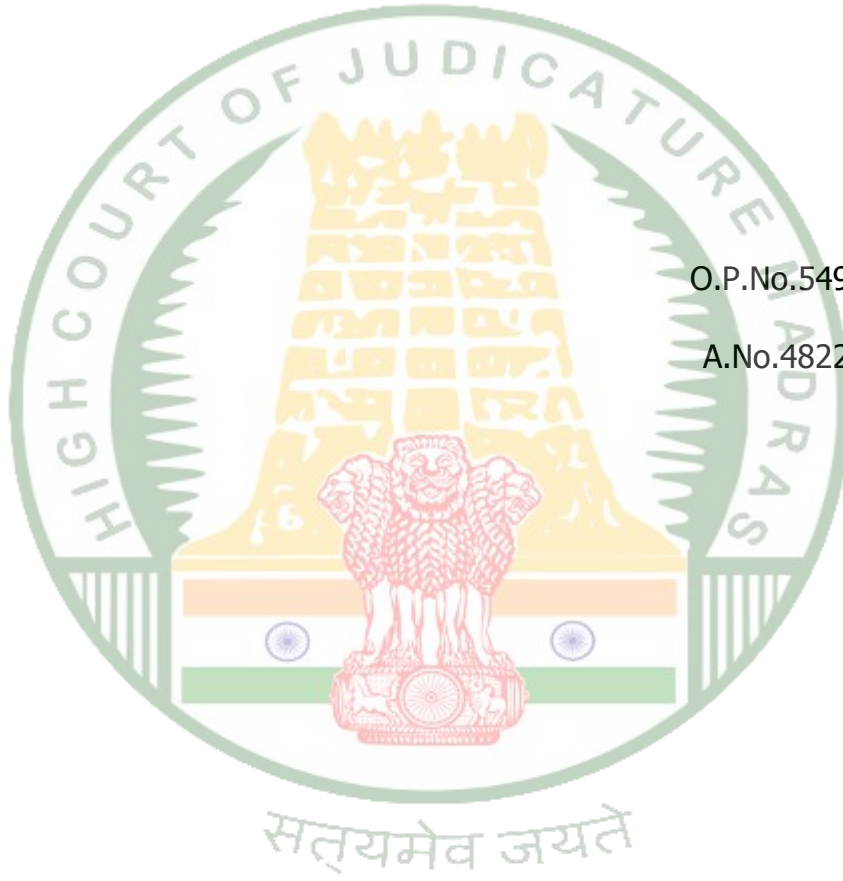
Index : Yes/No
Internet : Yes
gya



WEB COPY

M.SUNDAR, J.

gya



O.P.No.549 of 2018
AND
A.No.4822 of 2018

05.03.2019

WEB COPY