

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.08.2019

CORAM

THE HONOURABLE DR. JUSTICE VINEET KOTHARI  
and  
THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

O.S.A. No.157 of 2019  
and  
CMP No.14364 of 2019

Software Technology Parks of India,  
No.5, 3rd Floor,  
Rajiv Gandhi Salai,  
Taramani, Chennai 600 113. ....Appellant / 1st Respondent

Vs

1. Consolidated Construction Consortium Limited,  
No.5, 2nd Link Street, CIT Colony,  
Mylapore, Chennai 600 004.
2. K.Srinivasan, Sole Arbitrator,  
Block No.1, Flat No.C-2,  
Mayfair Apartments,  
No.2A, LIC Colony Main Road,  
Velacherry, Chennai 600 042. ....Respondents / Petitioner and  
2nd Respondent

PRAYER: Appeal filed Under Section 37 of the Arbitration and Conciliation Act, 1996, Order XXXVI Rule 9 of O.S. Rules read with Clause 15 of Letters Patent against the decree and order dated 02.01.2019 made in O.P.No.433 of 2010 on the file of this Court

For Appellant : Mr.Puhazh Gandhi.P

For Respondents : Mr.S.S.Rajesh for R1  
R2-Arbitrator

JUDGMENT

[Judgment of the Court was delivered by DR.VINEET KOTHARI, J.]

This Appeal has been filed by Software Technology Parks of India under Section 37 of the Arbitration and Conciliation Act, aggrieved by the order dated 02.01.2019 passed by the learned

Single Judge of this Court in O.P.No.433 of 2010, which was filed under section 34 of the Act by the Respondent/ Contractor, Consolidated Construction Consortium Limited, Chennai vs. Software Technology Parks of India and the learned Single Judge by the order impugned before us, was pleased to set aside the Arbitral Award dated 10.05.2010 passed by the learned Arbitrator, Mr.K.Srinivasan, the sole Arbitrator.

2. The dispute between the parties, in brief is as follows:

The Software Technology Parks of India, awarded a contract of construction of office building to the Respondent contractor M/s.Consolidated Construction Consortium Limited and the scheduled date for completion of the said construction was 31.01.2007. Since the Contractor did not complete the construction within the time 30.01.2007 but it was completed only by 30.11.2007 after about ten months, the Respondent Software Technology Parks of India deducted/ recovered 'Liquidated Damages' in terms of clause 26 of the Agreement between the parties from the outstanding dues of the contractor and paid the balance amount. The contractor therefore raised the dispute before the learned Arbitrator for claiming its difference against the Bills raised for completion of construction and also challenged the deduction of the 'Liquidated Damages' by the award of the contractor from such amount.

3. The learned Arbitrator by its Award dated 10.05.2010 upheld the deduction of the liquidated damages by M/s. Software Technology Parks of India but refused further claims by both sides and thus, dismissed the counter claim of the Appellant contract as well as the claim of the contractor and granted Nil amount in its impugned Award. The said Award came to be challenged before the learned Single Judge under Section 34 of the Act by the contractor M/s.Consolidated Construction Consortium Limited and the learned Single Judge set aside the said award by the order impugned dated 02.01.2019, by making the following observations in the impugned order:

"12. Heard the learned counsel for the parties and perused the material documents available on record.

13. The fact that the Petitioner was granted the Contract on 15.03.2006 for a period of two months is not in dispute. Though, the work has to be executed within a period of ten months as per the contract, the Petitioner could not execute the work within the agreed period, due to landslides and rains. The Petitioner could complete the Project on 30.11.2007, by seeking extension of time that was granted by the 1st

Respondent and as on date, there appears to be no complaint about the building constructed.

14. The fact that there were rains and landslides is also not in dispute. If the building had been erected and there were landslides, it would affect the building constructed and there would not not only have been loss of money, but also loss of lives and that the 1st Respondent should thank the stars that no untoward event took place.

15. Clause 26 cannot be read in isolation without reference to Clause 27 of the Agreement. For better appreciation, both clauses are extracted hereunder:

"26. Liquidated Damages: If the Contractor fails to complete the works by the date stated in the Appendix or within any extended time under Clause 28 hereof, the Contractor shall pay or allow the Employer to deduct the same named in the Appendix as 'Liquidated Damages' for the period during which the said works shall remain incomplete and the Employer may deduct such damages from any money due or that may become due to the Contractor.

27. Extension of time: If the contractor shall desire an extension of time for completion of the work on the grounds of his having been unavoidably hindered (a) by force majeure or (b) by reason of any exceptional inclement weather or (c) reason of any proceedings taken or threatened by or dispute with adjoining or neighbouring Employers or public authorities arising otherwise than through the contractor's own defaults or (d) by the work or delays of other contractors or tradesmen engaged or nominated by the Employer or the Architect and not referred to in the Schedule of Quantities and/or specification or (e) by strikes or Lockout affecting any of the building trades or (f) by reason of delays in the supply of materials stipulated to be supplied by the Employer he shall apply in writing to the Architects/Employer within 15 days of such hindrance on account of which he desires such extension as aforesaid and the Architect/Employer, if in his opinion,

reasonable extension of time for completion of the contract works, but the contractor shall nevertheless constantly use his endeavours to prevent delay and shall do all that may reasonably be required of him to proceed with the work expeditiously, provided

(a) that the contractor shall have no claim other than extension of time for the delay in completion of the work due to such hindrance and nothing else and

(b) that the contractor shall suspend the works whenever called upon to do so in writing by the Architects/Employer and shall be allowed reasonable extension of time for completion of work due to such suspension of work and nothing else."

16. Although, there is no specific order of extension of time granted by the 1st Respondent, the fact that the Petitioner was allowed to carry on the work and subsequently complete and hand over the building to the 1st Respondent, cannot be denied. Once there is extension of time, a narrow interpretation to Clause 26 that after completion of a period of 10 months as originally agreed as per the appendix/schedule, liquidated damages can be levied from day one after the completion of original ten months and during the extended period of time also, the liquidated damages can be claimed, cannot be accepted. The purpose of extension of time is only for completion of work.

17. The contention of the Respondents would have been accepted, if there was no extension of time under Clause 26 or the work was incomplete after the extended period of ten months. In such an event, the 1st Respondent would be entitled to recover not only the liquidated damages, but also the loss incurred deeming the original extension as being terminated from day one, and the entire amount would have been required to be forfeited and further damages would have been claimed. The contention of the parties that Civil Procedure Code and Evidence Act applies to the proceedings, cannot be accepted in the light of Section 19 of the Arbitration and Conciliation Act, 1996.

18. As the 1st Respondent did not file any Original Application challenging the counter-claim and that the Petitioner has completed the work agreed

during the extended period of time, the grant of liquidated damages in favour of the 1st Respondent cannot be accepted. Hence, I am of the view that the Original Petition has to be allowed.

19. Accordingly, the Arbitral Award dated 10.05.2010 is set aside and the Original Petition is allowed. No costs. "

4. Aggrieved by the same, Software Technology Parks of India has approached this Court under Section 37 of the Act.

5. Learned counsel for the Appellant Mr.P.Puhazh Gandhi, has urged before us that even though the Awarder of the contract i.e., the Appellant before us allowed the contractor to complete the construction beyond 31.01.2007, his entitlement to claim liquidated damages was not taken away and since no specific extension of time was granted to the contractor for completing the said construction in question, the Appellant was entitled to claim the liquidated damages on account of delay in completion of contract in terms of clause 26. Therefore, he submitted that the learned Single Judge has erred in setting aside the Award in question on the ground of implied extension of contract period by the Appellant and has gone to the extent of holding without any evidence that there were rains and landslides, which caused the delay in completion of construction by the contractor and the Appellant, who was Respondent before the learned Single Judge should have thanked stars that no untoward event took place and thereafter, the learned Single Judge proceeded to hold that the Appellant was not entitled to claim such liquidated damages on a narrow interpretation of clause 26 provided for such liquidated damages in the contract. He therefore prayed for setting aside the order of the learned Single Judge and restoring the Award made by the learned Arbitrator.

6. Per contra, Mr.S.S.Rajesh, the learned counsel appearing for the Contractor submitted before us that the learned Single Judge failed to take note of clause 28 of the Agreement between the parties, while taking note of only clause 26 and 27. The learned counsel submitted that clause 28 between the parties, which is quoted below, provided for making claim against the contractor only on the basis of the Certificate issued by the Architect/Engineer and since the work of the building in question was completed by the contractor under the implied extension of time granted by the present Appellant, the claim of liquidated damages by the Appellant herein under clause 26, without invoking clause 28 was unjustified and was contrary to the provisions of the Contract Act under Sections 73 and 74 of the Act read with Section 28 of the Contract Act and therefore,

such a claim upheld by the learned Arbitrator was hit by the legal provisions of the Contract Act and such clause 26 would be hit by Section 28 of the Contract Act 1872 and therefore, the learned Judge could not have upheld the deduction of the liquidated damages under clause 26 of the Agreement.

7. Clause 28 of the Agreement between the parties is also quoted below for ready reference:

"28. Failure of contractor to comply with Architect's/Employer's instructions

If the contractor after receipt of written notice from the Architects/Employers requiring compliance within ten days fails to comply with such further drawings and/or Architect's/Employer's instructions the Employer may employ and pay other persons to execute any such work whatsoever that may be necessary to give effect thereto, and all costs incurred in connection therewith shall be recoverable from the contractor by the Employer on the Certificate of the Architects as a debt or may be deducted by him from any money due to or become due to the contractor."

8. Provisions of Section 28 of the Contract Act as well as the provisions of Sections 73 and 74 of the Contract Act, 1872 are also quoted below for ready reference:

"28. Agreements in restraint of legal proceedings, void:— [Every agreement,—

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to the extent.]

Exception 1:—Saving of contract to refer to arbitration dispute that may arise:—This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred."

73. Compensation for loss or damage caused by breach of contract.—

When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

74. Compensation for breach of contract where penalty stipulated for:—

[When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.]

Explanation:—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.]

Exception:—When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the [Central Government] or of any [State Government], gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested."

9. Learned counsel for the Respondent/Contractor therefore submitted that the Award passed by the learned Arbitrator was not at all sustainable in law. Learned counsel also relied upon the decision of the Hon'ble Supreme Court in Bharat Sanchar Nigam Limited vs Motorola India Private Limited, 2009 (2) SCC 337, para 32, 33 and 40.

10. We have heard the learned counsels at length and perused the materials on record and the legal provisions and the citations.

11. Having heard the learned counsels, we are of the opinion that the learned Single Judge has erred in setting aside the Arbitral Award dated 10.05.2010 on the assumptions and surmises, which were not at all the relevant consideration while dealing with the original petition under Section 34 of the Act. As is well settled by now by catena of judgments including the recent one delivered by us, Section 34 confers a very narrow and limited scope to the Court dealing with the petitions under Section 34 of the Act. Only if those narrow grounds specified in Section 34 of the Act are established with relevant evidence that Section 34 can be invoked to interfere with the Arbitral Award. We reiterate that Section 34 is not a regular appellate jurisdiction of this Court and therefore, the grounds of dispute, interpretation of the terms of the Agreement, appreciation of evidence made before the Arbitrator, etc., cannot even be traversed by the learned Single Judge of this Court, while dealing with Section 34 of the Act. In *Fomra Housing and Infrastructure v. Raagul Foundations Pvt. Ltd.* (W.A.No.151 of 2019 dated 08.07.2019), it was held as under by us:

"10. Having heard the learned counsel for the parties, and on considering the above averments and arguments of the learned counsel for the parties, we are satisfied that no case for interference was made out before the learned Single Judge under Section 34 of the Act. We are of the considered opinion that the manner of appreciation of the evidence of the learned Arbitral Tribunal cannot be a ground to set aside the Arbitral Award. It is simply outside the parameters of Section 34 of the Act and it is not a regular Appeal provided against the Arbitral Award. It would be contrary to the letter and spirit of Section 34 of the Act itself if such petitions were to be treated as regular Appeal against the Arbitral Awards. The narrow parameters provided in Section 34 of the Act which require to be established with averments and cogent evidence. None of them is found in the present case except the reiteration of the provisions of Sections 34 of the Act. The very emphasis placed by the learned counsel for the appellant before us on the

manner in which the learned Arbitrator considered the documents leads us to believe that there is nothing beyond this in the case under Section 34 of the Act, which in our opinion could not satisfy the parameters of Section 34 of the Act. It is neither against morality nor justice much less against the public policy.

11. We are rather baffled with the manner in which Petitions under Section 34 of the Act are so casually filed by invoking the court process against the very spirit to get expeditious justice through the Alternative Dispute Mechanism provided in the Act and the purpose is defeated. Mere filing of the Petition under Section 34 of the Act and pendency thereof will become an excuse for the parties not to permit the execution of the Arbitral Awards in such cases, even though there is no stay granted by High Court and that is precisely what defeats the purpose of the Act itself. Section 37 of the Act is a further remedy still on a narrower compass. The said provision is also quoted below for ready reference:-

"37. Appealable orders. -(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely: -

(a) refusing to refer the parties to arbitration under Section 8;

(b) granting or refusing to grant any measure under section 9;

(b) setting aside or refusing to set aside an arbitral award under section 34.

(2) An appeal shall also lie to a court from an order of the arbitral tribunal--

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under

this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

12. The scope of Appeal under Section 37 of the Act is only to the extent of clause (a) refusing to refer the parties to arbitration under Section 8; (b) granting or refusing to grant any measure under Section 9 and (c) setting aside or refusing to set aside an Arbitral Award under Section 34. A mere refusal of the learned Single Judge of this Court with cogent reasons for confirming the Arbitral Award is not a ground to entertain an Appeal under Section 37 of the Act. That only further delays and defeats the very purpose for which a remedy of this nature is provided for very exceptional circumstances in the Act.

13. We are completely satisfied that these parameters are not even touched, nor established with proper averments and evidence in the present case. Therefore, the learned Single Judge, in our opinion, was perfectly justified in rejecting the Original Petition filed under Section 34 of the Act.

13. We do not find any merit in the present Appeal and the same is liable to be dismissed. Accordingly, it is dismissed. No costs. The connected miscellaneous petition is also dismissed. "

12. The argument of the learned counsel for the Respondent/Contractor that clause 26 of the Agreement provided for liquidated damages is hit by Section 28 of the Contract Act being an Agreement in restraint against legal proceedings is void, is not at all a sustainable argument. A reference to clause 28 of the Agreement quoted above in clause 26 is of no relevance to the facts of the present case, as clause 28 quoted above is a clause like "risk and cause clause" which is usually provided for in Government contracts. It envisages performance of incomplete work by the third parties at the cost of the contractor. No such situation has happened in the present case at all. It was only a question whether the present Appellant Company had really extended the time for completion of the contract or it was the case of implied extension of time and whether liquidated damage could be recovered irrespective of extension of time. While the Appellant contends that no such extension of time was granted, the contractor contends otherwise.

13. Be that as it may, it was nothing more than an interpretation of the clauses of the contract to be applied in factual circumstances on the basis of the evidence led before the learned Arbitrator. The appreciation of such evidence and interpretation of various clauses of the Agreement may be right or wrong at the hands of the learned Arbitrator but that does not render such Awards open to challenge under Section 34 of the Act.

14. We cannot sustain the argument of the learned counsel for the Respondent Contractor herein, who submits that clause 26 was hit by Section 28 of the contract Act. No such challenge to clause 26 was ever laid. It is the part of the contract under which the Respondent Contractor himself has undertaken the said work and completed the same. Therefore, there is clear admission and acquiescence to all the terms of the contract on the part of the Respondent Contractor. Therefore, such a flimsy challenge raised at this belated stage before this Court is only an ingenuity of the argument of the learned counsel, which has no substance at all. Therefore, the said argument is liable to be rejected and is accordingly rejected.

15. The right to claim the liquidated damages under clause 26 appears to be independent right of the Awarder of the contract and therefore, the challenge to the said clause on a conjoint reading under clause 28, as contended by the learned counsel for the Respondent Contractor is not at all sustainable.

16. In our opinion, therefore, such contentions raised within the realm of Section 34 of the Act, and now further, in a still narrower scope under Section 37 of the Act are absolutely misconceived contentions and cannot be entertained.

17. The judgment relied on by the learned counsel for the Respondent Contractor in the case of Bharat Sanchar Nigam Limited vs Motorola India Private Limited, 2009 (2) SCC 337, is also not applicable to the facts of the present case. On the contrary, we find that akin to clause 28 therein, while referring to clause 16.2 and clause 62, under which the liquidated damages was provided, the Hon'ble Apex court has held in para 40 that the contention of the Respondent that clause 62 referring to special clauses has an overriding effect on clause 16.2 and there is no conflict between clauses 62 and 16.2 and that is what we also feel that the claim of the liquidated damages does not depend upon the operation clause 28 of the Agreement between the parties, which is not even a fact

situation in the facts of the present case, as no third party was ever engaged for the execution of the work in question. Therefore, the said Judgment, instead of being of any help to the learned counsel for the respondent, supports the view which we have taken as aforesaid.

18. Therefore, we find that the grounds, on which the learned Single Judge thought it fit to set aside the Award were not at all available within the scope of Section 34 of the Act and therefore, the order of the learned Single Judge impugned before us in the present Appeal cannot be upheld and the same deserves to be set aside.

19. Accordingly, we allow the present Appeal and set aside the order of the learned Single Judge dated 02.01.2019. No order as to costs. The connected miscellaneous petition is closed.

Sd/-  
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

- 1) The Sub Assistant Registrar,  
Original Side,  
High Court, Madras.

+1 cc to Mr.Puhazh Gandhi.P., Advocate, S.R.No.68136

+2 ccs to Mr.S.S.Rajesh, Advocate, S.R.No.67989

सत्यमेव जयते O.S.A. No.157 of 2019

SAI (CO)  
SSM(15/10/2019).

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