

Reserved on :25.06.2019

Pronounced on :03.07.2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

**Original Petition No.324 of 2016 &
A.Nos.5466 and 9002 of 2018**

The Principal
Madras Christian College,
Tambaram, Chenna – 600 059

... Petitioner

Vs

M/s.Sarcar Constructions,
'Shalom',
5/103, New No.1547, Palanjur Road,
Chembarampakkam P.O.,
Chennai – 600 123 rep. by its
Chief Executive – Projects, Mr.S.Arokiaraj

... Respondent

Prayer :- This Original Petition has been filed under section 34 of the Arbitration and Conciliation Act to set aside the impugned Award dated 09.02.2016 passed by the Arbitrator.

For Petitioner

: Mr.Yashodvardhan (Sr. Counsel)
for M/s.T.Madhusudhana Reddy

For Respondent

: Mr.R.Thiagarajan (Sr. Counsel)
for M/s.A.Fathimanathan

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ORDER

Challenging the Award passed by the Sole Arbitrator dated 09.02.2016 the present petition has been filed.

2. The petitioner invited tender for the project towards construction of Women Hostel in Madras Christian College premises. On 07.09.2008, the respondent invited tender for the project. The respondent as per tender quoted 2,69,49,279/- which was higher than the estimate of the consultant. Thereafter, on 15.05.2005, the respondent revised the tender value to Rs.3,87,61,031/-. On 31.10.2008, the construction agreement came to be executed between the petitioner and the respondent. The tenderers were required to quote the total amount worked out on the basis of the given quantity against each item of work. The Clause 5 of the Construction Agreement mandated the claimant to execute the entire work under the supervision of the Consultant and also to his entire satisfaction. It is also stipulated that the schedule of the accepted rates, invitation to tender and General Condition of the Contract shall form part of the construction agreement. The Claimant referred various drawings, specifications and scope of work in detail and also referred to running bills submitted to the respondent. However, the fifth running bill submitted on 12.06.2009 was declined to be entertained by the respondent. The Building Committee formed by the respondent held a meeting on 15.06.2009 . The changes introduced and

effected after finalization of tender were also furnished in detail along with the letter dated 17.06.2009. The Consultant analysed projected cost statement submitted by the Claimant. In pursuance of the same, the Consultant wrote a detailed letter to the petitioner on 26.06.2009 and justifying reasons for increased cost of Rs.1,18,11,752/- from the tender cost. As the petitioner had paid only Rs.11,92,772/- stating that the said payment is towards full and final settlement of the bills, the respondent invoked Arbitration clause. An Arbitrator was appointed at the instance of this Court.

3. It is the case of the respondent denying various allegations that the Claimant has fraudulently enriched itself under forged invoices by stating that it had purchased steel at higher price and subsequently failing to effectuate the price adjustment clause with regard to steel and cement. The Claimant in contravention of the Contract has billed items of work towards which it was not entitled for any payment. For instance, the cost of clearing the site and incidental cost on clearing the debris, which contravenes Clause (29) of the invitation of tender. According to the respondent, the Consultant failed to exercise due diligence in discharge of duty and there is a collusion between the Consultant and the Claimant. Hence, repudiated the claim.

4. The learned Arbitration has framed as many as 17 issues, which is extracted as follows :

1. Whether “excepted matters” under clause 49 of the Conditions of the Contract could be raised or gone into by this Arbitral Tribunal?

2. Whether it is open to the respondent to challenge or dispute the decision/opinion/certificate of the consultant either with respect to ordinary matters or expected matters? Whether the decision/opinion/certificate issued by the consultant is final and binding the parties?

3. Whether the amount claimed under the heading “Additional quantities of work as against the items of work” stipulated in the tender BOQ will constitute extra work in the terms of the Clause 5 of the conditions of the contract or fall within clause 20 read with clause 17 of the conditions of the contract?

4. Whether it is open to the respondent to reopen or re-agitate any dispute which is barred by limitation?

5. Whether it is open to the respondent to advance the plea of omission or commission on the part of the consultant in the present arbitration proceedings?

6. Whether the allegations of collusion between the consultant and the claimant can be the subject matter of adjudication in the present proceedings?

7. Is it open to the respondent to advance the plea of fraud in the present arbitration proceedings either with reference to price escalation or quantum of steel or cement utilized or claim to have been utilized in the construction? To what consequences?

8. Whether it is open to the respondent to raise the plea of fraud and challenge 'the certificate of payment' issued by the consultant? To what consequences?

9. Whether the execution of additional work by the claimant is authorized? If so to what consequences?

10. Whether the claimant is entitled to recover Rs.99,225/- from the respondent towards the alleged cost of clearing site?

11. Whether the claimant is entitled to claim Rs.1,04,46,743/- from the claimant in terms of final certificate issued by the consultant?

12. Whether the claimant is entitled to claim Rs.4,00,000/- deposited as EMD from the respondent?

13. Whether the respondent is entitled to set off Rs.76,145/- against the claims advanced in the present proceedings, being rental and electricity charges payable by the claimant?

14. Whether the claimant is entitled to claim interest, if so, at what rate and from which date?

15. Whether the plea of quantum merit advanced by claimant is sustainable? If so to what relief?

16. Whether the plea of quantum merit advanced by the claimant is sustainable? If so to what relief?

17. To what relief the parties are entitled to?

Finally, the Arbitrator directed the respondent to pay a sum of Rs. 1,01,42,341/- with interest at the rate of 12% per annum from the date of Award till the date of payment and also dismissed the counter claim placed by the respondent.

5. It is the contention of the learned Senior Counsel for the petitioner that the Contractor failed to comply the tender conditions. It is the obligation on the part of the Claimant to get the planning permission and infact, the Contractor has not obtained the planning permission. Therefore, the Contractor himself breached the construction agreement and hence, he cannot claim any amount. His further submission is that few invoices have been fabricated which has been admitted by the respondent in the cross examination. Similarly, in the price variation clause also fraud has been committed and the matter clearly falls under the matters, which ought not have been decided by the Arbitrator and it is not

arbitrable. The Arbitrator also decided the issue as against the clause 5 of the agreement. The Arbitrator has decided the issue which not fall within the excepted matters and beyond the jurisdiction of the Arbitrator. It is his further contention that interest awarded also has to be set aside. In support of his submission, he has also placed reliance on the judgment in **Associate Builders Vs. Delhi Development Authority** reported in **2015 (3) Supreme Court Cases 49**.

6. It is the contention of the learned Senior Counsel for the respondent that the Arbitrator has analysed the entire facts and taken note of various conditions of the contract and passed the Award. It is his contention that the final bill was certified by the Consultant appointed by the petitioner himself. As per Clause 7 of the Construction Agreement, the decision of the Consultant shall be final and the Consultant was appointed by the petitioner. Hence, it is submitted that the Arbitrator has considered the entire aspects in detail and passed the Award. With regard to the contention that the Contractor has failed to get planning permission, the learned Senior Counsel pointed out that Tender Clause 37 itself stipulate a condition to the effect that only the employer has to get the planning permission and the contractor has to do follow up action. Therefore, it is his contention that the Clause 37 of the tender condition cannot be pressed into service. Besides such issue has never been raised before the Arbitrator and cannot be permitted to be agitated. Hence, submitted that the

Arbitrator has analysed the entire matter and passed a detailed Award and this Court cannot re-appreciate the entire evidence as an appellate Court. The Arbitrator has also taken note of the relevant clauses in the agreement and reasonably interpreted the agreement and passed the Award. Hence, prayed for dismissal of this petition.

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 Honorable 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;
- 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 the judgment in ***Associate Builders Vs. Delhi Development Authority*** reported in **2015 (3) Supreme Court Cases 49** 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. From the above judgements, the settled position of law is that this Court cannot sit as an appellate authority and re-appreciate the entire evidence. The Award can be interfered, only when there is violation of public policy or patent illegality in the Award passed by the Arbitrator.

10. With regard to the first submissions of the petitioner that the Contractor has breached the conditions of the contract in not obtaining the planning permissions, Clause 37 of the tender conditions makes it clear that only the Contractor has to follow up the planning application with the local authorities. The said condition further makes it clear that the Consultant and Clients will sign necessary application forms and plans and only when necessary applications are

signed and given to the client, the same has to be followed. Therefore, the contention of the learned Senior Counsel that the Contractor has breached the condition, cannot be countenanced. That apart, this issue has not been raised before the Arbitrator.

11. As far as second submission is concerned, Clause 3 of the condition of the contract makes it clear that no claim for payment for extra work shall be preferred unless the said work shall have been agreed to as extra by the consultant or unless the work shall have been decided by the Arbitrator or Arbitrators etc. Clause 7 of the Conditions of the Contract makes it clear that the Consultant decision will be final and binding the parties. Clause 20 of the contract particularly states that the consultant decision on all the above matters regarding price for extra work shall be binding on the parties. Clause 10 of the contract deals with materials and workmanship to conform to description. Wherein also it has been stated that the decision of the Consultant is binding on the parties. The learned Arbitrator also taken note of the facts and made threadbare analysis all the provisions of the contract and also found that despite the fact that the Consultant was impleaded as a party to the proceeding before the High Court and the petitioner and the respondent having made him as a necessary party before the Arbitrator, no claim whatsoever, has been made against the Consultant. The learned Arbitrator also has factually found that the petitioner has not made any claim at any point of time in respect of execution of

the project and for alleged omission or commission on the part of the Consultant before any form. The learned Arbitrator also reasonably interpreted clause 49 which deals with excepted matters and held that the matter which are covered by clause 4, 10, 15, 25, 35 [a, b, c, d, e, f, g] of the condition of the Contract, in respect of those matters it is primarily and rightly contended that the decision of the Consultant shall be final and binding upon both the parties and shall not re-agitate the matter.

12. Similarly Clause 19 of the Contract stipulates the obligation of the consultant to check measurements, calculations etc. in terms of 42 of the Conditions of the Contract. Clause 43 of the Contract deals with the rate of interest for delayed payment and this clause provides payment of interest for delayed payment. Hence, the Arbitrator ordering interest cannot be faulted. The learned Arbitrator has infact considered the entire clauses in the contract and has found that the allegation of forgery and fraud has been raised only at a later point of the proceedings and also taken note of the conduct of the petitioner in keeping silent for several years against the Consultant for his alleged betrayal of confidence. The learned Arbitrator has also considered the Consultant's decision for increasing the cost of the project. The Arbitrator has considered the entire documents and found that there is no whisper of allegation either against the Claimant or against the Consultant in respect to the documents filed by them. When the Arbitrator has come to the conclusion based on various clauses and

analysed the entire matter and reasonably interpreted the contract, this Court cannot re-appreciate the entire evidence as an appellate Court. The Arbitrator has passed the Award after analysing the entire evidence. Hence, this Court do not find any patent illegality or violation of fundamental policy of Indian law to interfere with the well considered Award of the Arbitrator.

13. Accordingly, this Original Petition is dismissed. Consequently, the connected applications are closed. No cost.

03.07.2019

Index : Yes/ No

Internet : Yes

Speaking/Non-speaking Order

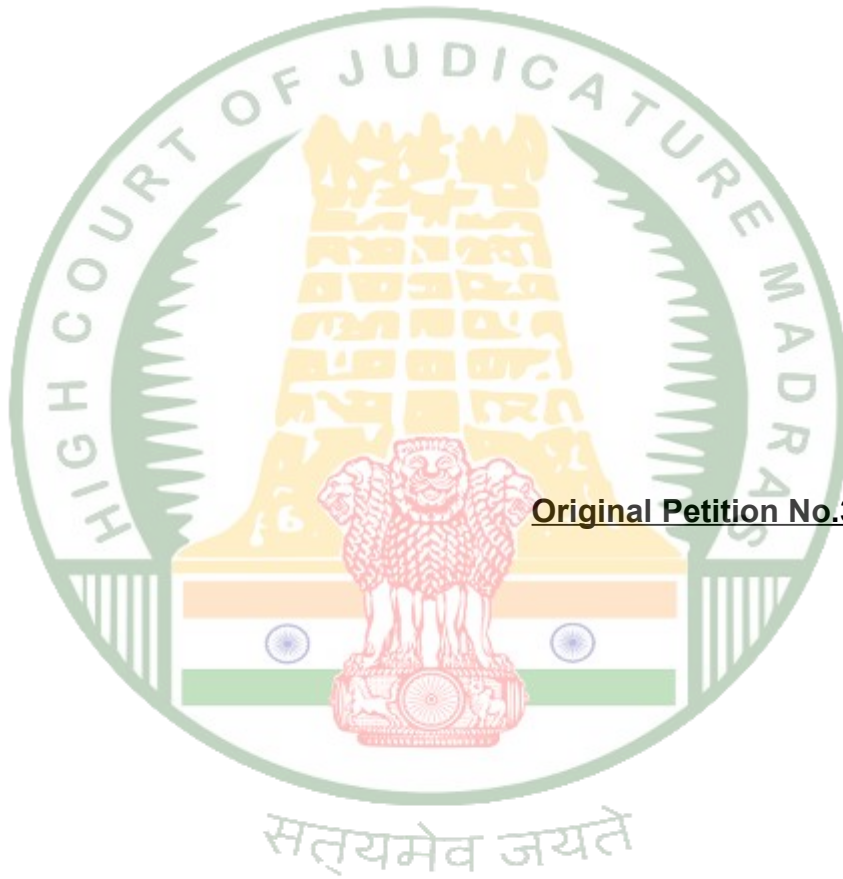
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To

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Chennai – 600 123.

N.SATHISH KUMAR, J.

VRC



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