

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 02.04.2019

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.283 of 2014

M/s.RPN Engineers Chennai Pvt. Ltd.

Rep. by its Managing Director

Mr.P.K.Luqmmman Basha

M-60. 9th Street, Anna Nagar East

Chennai - 600 102.

.. Petitioner

vs.

1.The Chief Engineer

Metropolitan Transport Project (Railways)

Southern Railway, Poonamalle High Road

Egmore, Chennai - 8.

2.The Deputy Chief Engineer - II

Metropolitan Transport Project (Railways)

Tirumailai Station Building, Mylapore

Chennai - 4.

3.Mr.P.Mohideenkutty (Presiding Arbitrator)

Deputy Chief Engineer-I (Construction)

Southern Railway, Ernakulam, Kearala.

4.Mr.P.Nagarajan (Arbitrator)

Deputy Financial Advisor and Chief

Accounts Officer,

Construction Branch, Souther Railway

Poonamalle High Road, Egmore, Chennai -8.

5.Mr.C.C.Joy (Arbitrator)

Senior Divisional Mechanical Engineer

Palghat Divisional Office, Southern Railway

Palghat, Kerala.

... Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the impugned award dated 20.12.2013 passed by the Tribunal (comprising of the Third, Fourth and Fifth Respondents) 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

For Respondents : Mr.P.T.Ramkumar for R1 & R2
R3 to R5 Arbitrator.

ORDER

Instant 'Original Petition' ('OP' for brevity) has been filed under Section 34 of 'The Arbitration and Conciliation Act, 1996' ('A & C Act' for brevity) assailing an arbitral award dated 20.12.2013 made by a three member 'Arbitral Tribunal' (AT for brevity) and it arises out of a Contract, which is in the nature of a 'Letter of Acceptance' ('LOA') bearing reference No.MTP/W.496/RTS/558 dated 16.08.2010.

2. Section 34 in the scheme of A & C Act finds its slot under Chapter VII of A & C Act, which is captioned 'RECOURSE AGAINST ARBITRAL AWARD'. A perusal of Section 34 of A & C Act also reveals that recourse to Court against an arbitral award may be made by an 'application'. Also to be noted, the very caption to Section 34 of A & C Act reads 'APPLICATION FOR SETTING ASIDE AN

ARBITRAL AWARD'. Be that as it may, such recourse against an arbitral award is being assigned the nomenclature 'Original Petition' in this Registry. Therefore, I shall refer to the instant proceedings as 'OP' for the sake of convenience and clarity.

3. Sole petitioner in the instant OP is the lone claimant before AT. Therefore, sole petitioner in instant OP shall be referred to as petitioner/claimant. Respondents 1 and 2 in instant OP are respondents 1 and 2 respectively before AT. Respondents 1 and 2 shall collectively be referred to as 'Railways' for the sake of convenience and clarity.

4. To be noted, respondents 3, 4 and 5 in the instant OP are the three individuals, who constituted the three member Arbitral Tribunal. In the considered opinion of this Court, considering the nature of instant OP, it is unnecessary to array the members of the Arbitral Tribunal as respondents in instant OP. As the instant OP itself is being heard out and disposed of, this Court is not delve into the same and this observation shall be borne in mind when Original petitions under Section 34 of A & C Act are filed in future.

5. Nature of the work vide the aforesaid LOA is as follows:

'The Respondent had awarded the work of "MRTS-Phase-II-

Tirumalai-Velachery-Proposed Water Supply, Sewage and Storm Water arrangements for Staff quarters and Car shed, Rectification works in Service Buildings of EMU Car shed at Velachery” vide LOA No.MTP/W.496/RTS/556 dated 16.08.2010 for a value of Rs.6,96,95,687.71 with a currency of six months i.e., 15/02/2011 to M/s.RPN Engineers Chennai Pvt. Ltd. The scope of work was proposed water supply, sewage and storm water arrangements for staff quarters and car shed, rectification works in service buildings of EMU Car shed at Velachery.'

6. It is not in dispute that the nature of work in aforesaid LOA is *inter alia* to provide water supply and sewage facilities.

7. The entire matter turns on a very narrow compass.

8. LOA is dated 16.08.2010 and it is valid only upto 15.02.2011. The entire matter became a complete non-starter and no contract was executed and no work was commenced.

9. Post 15.02.2011 Railways issued a communication dated 18.06.2011, wherein and whereby Railways appropriated the Earnest Money Deposit (EMD) of Rs.5,80,080/- stating that the same stands forfeited as the contractor has not produced performance guarantee and entered into a contract.

10. This became the trigger.

11. It is petitioner's case that they did not furnish performance guarantee and they did not enter into a contract as the site conditions were not enabling.

12. Saying so, Arbitration was triggered and before the AT, the petitioner/claimant made claim under five heads and Railways made counter claim under two heads. Nature of the claim and findings of the impugned award qua the same are set out as a tabulation in the instant OP. As this tabulation is not in dispute, the same is being usefully extracted/reproduced and it reads as follows:

No	PETITIONER'S CLAIMS	CLAIMS	AWARD
1	Declaration that the contract had expired on 15.02.2011.	Declaration	Declared
2	Declaration that the Railway's recovery proceedings made in its Termination Order dated 18.06.2011 is unlawful and void	Declaration	Declared except forfeiture of SD & EMD
3	Declaration that the Railway's debarment proceedings made in its Termination Order dated 18.06.2011 is unlawful and void.	Declaration	Debarment is Valid
4	Direction to Railways to refund/repay to the contractor all the monies in the form of the EMD etc. (i.e., the FDR No.263646 dated 18.03.2010 issued by the Central Bank of India, Nandambakkam Branch, Chennai)	Rs.5,80,080/-	Forfeiture of SD & EMD is valid
5	Direction to Railways to refund/repay to the contractor any	To be Estimated	Direction issued except

No	PETITIONER'S CLAIMS	CLAIMS	AWARD
	monies that it had recovered in pursuance of its Termination Order dated 18.06.2011 (Quantum to be estimated only during the time of Award)		the forfeited SD & EMD
No	RAILWAY'S COUNTER-CLAIMS	CLAIMS	AWARD
1	Non-submission of Performance Guarantee to be furnished as per Clause -10 (d) of Part-B Additional Instructions and Special Conditions of Contract	Rs.34,84,784/-	Recovery invalid except forfeiture of SD & EMD
2	Balance Security Deposit to be recovered	Rs.29,04,704/-	- Nil-

13. To be noted, petitioner/claimant shall be referred to as 'contractor' from hereon.

14. To be noted, Mr.Amalaraj S. Penikilapatti, learned counsel on behalf of petitioner claimant and Mr.P.T.Ram Kumar, learned Standing Counsel for respondents 1 and 2/Railways are before this Court.

15. Adverting to the aforesaid tabulation, it was submitted that there is no dispute or disagreement that virtually all the declaratory prayers sought for by the contractors were acceded to. What was negated is only the appropriation of EMD of little over Rs.5.80 lakhs. To be noted, it is not in dispute that EMD, which is paid at the time of tender, is subsequently appropriated towards 'Security Deposit' (SD).

16. The Primary issue before AT was that the notice of Railways post lapsing of LOA is invalid.

17. The entire crux and gravamen of the instant OP, which turns on a very narrow compass, is encapsulated in the impugned award in one paragraph in page 7 and the same reads as follows:

'From the details furnished the tribunal observes that even though six months' time was available, the claimant never complained regarding the reduction of scope of work and requested for foreclosure. His first representation was on 16.03.2011 after expiry of one month after original currency. Similarly it was his responsibility to furnish the P.G. and execute the agreement and also to progress the work. But he has not taken any steps. Similarly, even after handing over the site and drawings in time the claimant did not commence any work and respondent also did not initiate any action. The only letter issued is on 14.02.2011 just one day before expiry of original currency. Further action was only after expiry of currency and hence the termination and further recovery proceedings cannot be considered as valid. However, as per special conditions of Contract 3.5 of tender document if the tender is accepted, the EMD would be adjusted after encashment by Railway wherever necessary to form part of the cash segment of the security for the due and faithful fulfilment of the contract in terms of Clause 16 of the GCC. This amount of S.D. shall be forfeited if the Tenderer/Contractor fails to execute the agreement. Hence the claimant failed to execute the agreement without furnishing the P.G. and hence the recovery of EMD/SD available with Railway is

valid.'

18. There is no dispute or disagreement before this Court that the contractor has not made any communication with Railways post LOA on 16.08.2010. There was no communication from the Contractor till LOA lapsed on 15.02.2011. It is the pointed and specific case of the Railways that contractor has failed to provide Performance Guarantee and enter into a contract within the currency of LOA. This is the soul of the entire dispute as far as the impugned award is concerned.

19. On this basis, the impugned award while acceding to all the declaratory reliefs, which the contractor sought for, has held the appropriation of SD (original EMD) alone to be valid.

20. To be noted, it is not in dispute that Railways have not filed a separate OP assailing the impugned award. In other words, Railways accepts those portions of the award with regard to the declaratory reliefs. Only the contractor has filed the instant OP. As mentioned supra, instant OP pertains to SD of little over Rs.5.80 lakhs.

21. It was argued on behalf of the contractor that the findings returned by AT are in conflict with public policy of India as according to learned counsel

for contractor, findings are in contravention with fundamental policy of Indian law.

22. In *ONGC Ltd. v. Western Geco International Ltd.*, reported in **(2014) 9 SCC 263**, Hon'ble Supreme Court has culled out three juristic principles viz., (a) judicial approach, (b) principles of natural of justice and (c) perversity /irrationality, as facets of fundamental policy of Indian law. Hon'ble Supreme Court has also laid down three litmus tests for the three juristic principles viz., Fidelity of Judicial Approach, *audi alteram partem* and Wednesbury principle of reasonableness in that order. In the instant case, as would be evident from the narrative thus far instant OP is predicated on irrationality/perversity and therefore, Wednesbury principle of reasonableness test has to be applied.

23. In very simple terms Wednesbury principle of reasonableness is to the effect that no reasonable person would have arrived at conclusions, which AT has arrived at on the basis of material before it. On a careful examination of the impugned award, this Court is unable to persuade itself and convince itself that no reasonable person would have arrived at conclusions, which AT has arrived at based on material before it.

24. To be noted, *ONGC Ltd. v. Western Geco International Ltd.*, reported in **(2014) 9 SCC 263** was subsequently quoted with approval by

Hon'ble Supreme Court in ***Associate Builders Vs. Delhi Development Authority*** reported in **(2015) 3 SCC 49**.

25. This Court has also reminded 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 proceedings under Section 34 of A & C Act are summary procedures. That proceedings under Section 34 of A & C Act are summary procedures has been reiterated by Hon'ble Supreme Court subsequently in ***Emkay Global Financial Services Ltd. v. Girdhar Sondhi*** reported in **(2018) 9 SCC 49**.

26. In the light of the narrative supra and owing to all that have been set out supra, this Court is clear in its mind that no ground warranting judicial intervention qua impugned award has been made out.

27. Therefore, instant OP fails and the same is dismissed.

28. 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.

02.04.2019

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Speaking Order/Non-Speaking Order

Index : Yes/No

Internet: Yes/No

M.SUNDAR. J.,

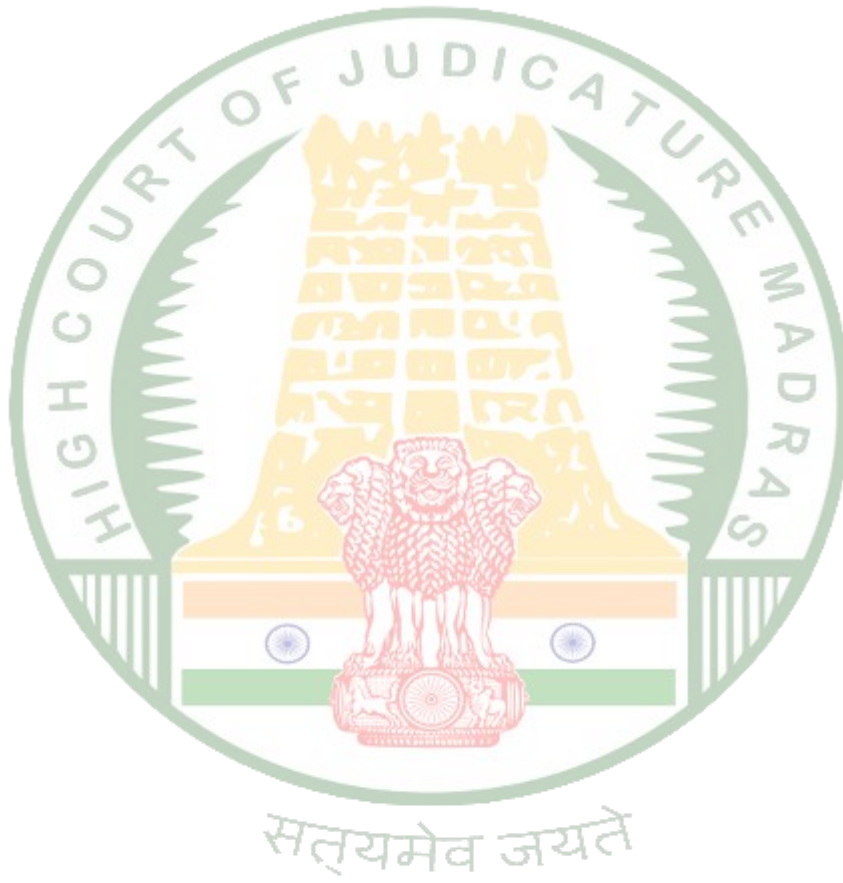
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O.P.No.283 of 2014

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