

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 18.03.2019

CORAM

THE HONOURABLE Mr.JUSTICE M.SUNDAR

O.P.No.288 of 2014

1.Union of India,
Rep. by the General Manager,
Southern Railway,
Chennai-3.

2.The Chief Engineer (Construction),
Formerly Chief Project Manager (Gauge Conversion),
O/o.The Chief Administrative Officer (Construction),
Southern Railway,
Egmore, Chennai - 8.

... Petitioners

Vs.

1.A.Chockalingam,
Rep. by its Power Agent,
K.Soundararajan,
Plot No.829, Street No.15,
TNHB Colony,
Korattur, Chennai-80.

2.Hon'ble Mr.Justice S.Marimuthu (Retired),
7/21, Parthasarathypuram Extension,
T.Nagar, Chennai-17.

... Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 12.07.2010 made in relation to disputes arising out of agreement dated 26.11.1996 bearing No.361/CPM/GC/MS/96.

For Petitioners : Mr.S.R.Sundaram

For 1st Respondent : Mr.Amalraj S.Penikilapatti

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 12.07.2010 (hereinafter 'impugned award' for brevity) made by a Arbitral Tribunal ('AT' for brevity) constituted by a Sole Arbitrator.

2. Respondents 1 and 2 before the AT, who shall collectively be referred to as 'Southern Railway' for the sake of convenience and clarity are petitioners 1 and 2 in the instant OP. Sole claimant before the AT is the contesting first respondent in the instant OP. To be noted, the Sole Arbitrator who constituted the AT has been arrayed as second respondent in the instant OP.

3. In the scheme of A & C Act, Section 34 is slotted under Chapter VII captioned 'RECOURSE AGAINST ARBITRAL AWARD'. A perusal of Section 34 also reveals that recourse to a Court against an arbitral award under Section 34 of A & C Act may be made by an 'application'. Also to be noted, caption to Section 34 itself reads 'APPLICATION FOR SETTING ASIDE ARBITRAL AWARD'. Be that as it may, with regard to legal proceedings which are in the nature of recourse against arbitral awards, are being assigned the nomenclature 'Original Petitions' in the Registry of this Court and therefore,

instant proceedings are being referred to as 'OP', for the sake of convenience and clarity.

4.Mr.Sundaram, learned counsel for Southern Railway and Mr.Amalraj S.Penkilapatti, learned counsel for contesting first respondent are before this Court.

5.A perusal of the case file placed before this Court reveals that the instant OP has not been admitted. Mr.Amalraj S.Penkilapatti, took notice on behalf of first respondent on 02.06.2014. Therefore, the Registry has listed this matter under the caption 'NOTICE REGARDING ADMISSION'. Considering the fact that the impugned award is more than 8 years old and considering the fact that the instant OP itself is nearly half a decade old, by consent of both learned counsel, the main OP was heard out.

6.It comes to light from the case file placed before me and on the basis of submissions made by both learned counsel that the entire matter turns on a very narrow compass. There is no dispute or disagreement before me that work that forms subject matter of instant OP is 'proposed conversion of MG Diesel shed to Home 40 BG Locos, assembling & linking of P.way BG/MG mixed gauge points & crossings, including collection and dumping of ballast' which shall hereinafter be referred to as 'said work' for the sake of convenience and clarity and the said work was entrusted by Southern Railway

to first respondent in the instant OP, who shall hereinafter be referred to as 'contractor' for the sake of convenience and clarity. With regard to execution of said work, contract dated 26.11.1996 bearing reference No. 361/CPM/GC/MS/96 came to be executed between Southern Railway and the contractor. This contract is the nucleus of the instant OP and epicentre of the lis. This contract dated 26.11.1996 bearing reference No.361/CPM/GC/MS/96, though referred to as agreement, shall hereinafter be referred to as 'said contract' for the sake of convenience and clarity.

7.Total value of the said work is Rs.26,48,458/-. In other words, total value of the said contract is little over Rs.26.48 lakhs.

8.There is no dispute or disagreement before this Court that said work has since been completed albeit with a delay. Said work ought to have been completed on or before 17.12.1996 as per covenants of the said contract, but, time was extended and it was ultimately completed on 15.06.1998. To be noted, there was no dispute or disagreement before me, regarding the dates and extension of time.

9.After completion of said work, the contractor raised arbitral disputes and the second respondent in instant OP as Sole Arbitrator, constituted the AT, entered upon reference and the arbitration commenced. Before the AT, the contractor made claims under eight heads which are as follows :

No	Description of the claim head	Amount
1	Damages for the loss of the anticipated profits (inbuilt in the contract value) suffered by the contractor due to the reduction in the scope of work at the rate of 20% of the unexecuted portion of the civil works.	Rs.2,70,000/-
2	Damages towards the cost of finding and under utilisation of Labour, Men and Machinery suffered by the claimant for executing the works beyond the original period.	Rs.4,10,000/-
3	Damages towards the additional 'OverHeads; Site Establishment and Staff suffered during the extended period of contract (due to prolongation of working period)	Rs.1,80,000/-
4	The Release of the Payments for the Extra and Additional items of works executed by the Claimant	Rs.1,78,000/-
5	Balance Payment for the executed contract items of works	Rs.4,50,000/-
6	Refund of security deposit	Rs.1,00,000/-
7	Damages towards unlawful retention and non-payment of the above claim amounts. [pendente-lite interest from 15/06/1998 till date of Award and for post award]	To be Quantified
8	Costs for securing appointment of Arbitrator and for Legal & Technical counsel and Cost of Arbitration	To be Quantified
	Total [without Claims-7 & 8]	Rs.15,58,000/-

10.To be noted, in the impugned award placed before me as a part of case file, the claims made by the contractor have been extracted in page 4 of the impugned award, wherein, claim under head number 4 has not been shown. It is submitted that this is a typographical error. However, a perusal of the impugned award reveals that this claim has also been examined.

11. Be that as it may, contractor made the aforesaid claims vide Claim Petition dated 30.06.2008 to which Southern Railway replied by reply statement dated 14.11.2008. This reply statement was met by way of a rejoinder by the contractor and this rejoinder is dated 02.01.2009. Pleadings were thus completed before AT.

12. On pleadings being completed before AT, as many as 13 issues were framed and the same as can be culled out from the impugned award reads as follows :

"On examining the pleadings of both the sides and documents filed the following issues have been framed to resolve the disputes between the parties.

1. Whether the appointment of the Arbitrator and the constitution of this Tribunal thereon are proper and legal ?
2. Is there any violation of any of the conditions or terms of the Contract ? If so, whether by the Claimant or by the Respondent ?
3. Was there any delay by the Respondent in handing over the entire work site with the identifications of Points and Crossings to the Claimant ?
4. Was the drawings were furnished in time by the Respondent to the Claimant ?
5. Whether the materials as per the contract were supplied in time by the Respondent to the Claimant ?
6. Whether any additional items of works, not covered by the agreement, were executed quantum ?
7. Whether the Claimant is entitled for damages for the additional work covered by the agreement executed during the extended contract period ?

8. Whether there are any outstanding balance payments to the Claimant for the works executed ? If so, whether the Claimant is entitled to claim the same with interest ?
9. Whether the Claimant is entitled for damages towards the loss of Anticipatory Profits on the unexecuted contract works ?
10. Whether the Claimant can claim damages towards cost of idling and under utilization of Labour, Men and Machinery ?
11. Whether the Claimant is entitled for refund of Security Deposit ?
12. What is the order as to Costs ?
13. What are the reliefs, the parties are entitled to ?"

13. Before AT, oral evidence was not let in. Though there was no oral evidence, on the side of the contractor/claimant, as many as 55 documents were placed before AT and on the side of the Southern Railway, as many as 30 documents were placed before AT. An adumbration of these 55 documents which were marked as exhibits and 30 documents which marked as exhibits on the side of the Southern Railway has been made in the last three pages of the impugned award.

14. *Vide* the impugned award, AT acceded to a part of the claim made by the contractor. Whilst the claims made by the contractor under eight different heads extracted and reproduced *supra* was for a total sum of Rs.15,58,000/-, the AT awarded 12,92,365/- together with interest at the rate of 15% per annum, details of which have been set out in the impugned award.

15.Learned counsel for contractor, on instructions submitted that no application under Section 34 of A & C Act has been filed against such negating qua impugned award i.e., the disallowed portion of the claim and the claimant/contractor accepts the impugned award as it has been made. This is recorded.

16.Assailing the impugned award, learned counsel for Southern Railway drew my attention to grounds 2, 3, 4 and 8 in the instant OP.

17.A perusal of the aforesaid grounds in instant OP reveal that they can be summarised as three points on which instant OP is predicated and they are as follows :

- a) AT acceded the claims made with regard to cost of idling qua labour, men and machinery and also awarding damages.
- b) With regard to claim No.3, AT has acceded the claim of the contractor without sufficient evidence before it.
- c) With regard to interest that has been awarded by AT, the same runs contradictory to the covenant between the parties and that covenant is clause 64.5 of the general conditions of contract.

18.Predicated on the aforesaid three grounds, it was argued before this Court that the impugned award is liable to be set aside under Section 34 of

A & C Act.

19. With regard to the first ground of cost towards idling and damages being awarded, though ground No.2 alluded to *supra* which was referred to by learned counsel for the petitioners/Southern Railway, an Apex Court judgment on the hearing, it was submitted that the citation or the reported case law is not before this Court and even a copy of any order of the Apex Court is not available. Therefore, this Court has no option other than proceeding on the basis that the Southern Railway is unable to produce any judgment of the Apex Court, though there is a reference to Apex Court judgment in ground No.2, without giving the name of the case, date, citation if reported. This takes us to the twin claims pertaining to idling and damages with regard to men and machinery. AT has clearly addressed these two claims in issue No.7 and issue No.10. To be noted, 13 issues framed by the AT have already been extracted and reproduced *supra*.

20. A perusal of the impugned award reveals that issue Nos.7 and 10 have been answered together by AT. A perusal of that portion of the impugned award wherein issue Nos.7 and 10 have been dealt with and answered together clearly reveals that there has been appreciation of evidence by AT in this regard, particularly, Exhibits C48, 49 and 50. This is articulated in that part of the impugned award which deals with issue Nos.7 and 10 together.

21.Learned counsel for claimant/contractor pressed into service a judgment made by a Hon'ble Single Judge of this Court in *The Union of India and another Vs M/s.Appachi Gounder and Sons* and another. Learned counsel submitted that as long as there is evidence for idling charges and as long as AT has appreciated evidence in this regard, it cannot be gainsaid that impugned award is liable to be set aside. Learned counsel for the claimant/contractor adverting to paragraph Nos.11, 15 and 16 submitted that idling charges is certainly permissible. Further, adverting to paragraph No.17 of the said order made by another Hon'ble Judge, learned counsel for claimant/contractor submitted that facts are similar and therefore the judgment made in O.P.No.77 of 2011 dated 17.03.2017 is clearly applicable. There is no dispute on this before me.

22.Considering the importance, I deem it appropriate to extract paragraphs 15 to 17, which reads as follows :

"15. With regard to the claim for damages towards idling, the same was considered in issue Nos.6,7,8 &13. Taking note of the fact that the Railways did not dispute the delivery of the machinery at the works site as evidenced by Exhibits 96C to 96J, 97A to 97Y and C98A & C98B, the Arbitral Tribunal held that there was no dispute that all the machinery was brought to site. Further, Arbitral Tribunal noted that in respect of agreement No.130/CN/2000, the total value of the work is Rs.41,00,000/-, and most of the work was completed before 31.04.2001, inspite of the extension granted. Therefore, the Tribunal rejected the stand taken by the Railways that the men and machinery

were not idling. Thereafter, the Arbitral Tribunal considered the reasonable salary that would be payable to the engineers and staff, who are mandatorily to be appointed, took up for consideration regarding unutilisation of machinery and after considering Exhibits C93, 96D, 96E, 97A etc., held that the contractor has proved that he has purchased the machinery to be used for the contract and all the machinery were delivered at work site and under the belief that the contract would be over in six months, the machineries were taken to site, but were kept idle for more than three years and if the machinery had been rented out, the contractor would have earned out of the same and thus considering all the factors, the loss per month was estimated at Rs.2,34,000/-, and as the loss was much higher, the contractor had claimed only Rs.35,00,000/- and the same was awarded.

16. Similarly with regard to the cost of idling and unutilisation of scaffolding and shuttering materials etc., the claim was awarded after taking note of Exhibits C96A to C96N, C98A & C98F etc. The counter claims, which was raised by the Railway Administration, were negated and elaborate reasons have been assigned by the Arbitral Tribunal. Thus, the impugned award being a reasoned award, this Court cannot interfere with the award, unless and until the Railway Administration is able to make out a case for interference within the parameters laid down in Section 34(2) of the Act.

17. The sheet anchor of the arguments of the learned Senior counsel for the Railways is based on the decision of the Hon'ble Division Bench of this Court in the case of Sree Kamatchi Amman Constructions,(supra). In the said case, the contractor claimed compensation under various heads before the learned Arbitrator, two of the claims pertain to labour, which were rendered idle by the Railway Administration and losses suffered owing to, overstayal at work. While considering the correctness of the award, which was affirmed by the learned Single Judge, the Hon'ble Division Bench held

that considering the conditions of the agreement (clause 8 of the Special Conditions of Contract), the Arbitral Tribunal acted beyond its jurisdiction and therefore, the award being contrary to the terms of the contract, is open to interference by the Court under Section 34(2)(b)(ii) of the Act. The Hon'ble Division Bench therefore held that the Arbitral Tribunal could not have passed an award, which was contrary to the mutually agreed terms between the parties to the contract and therefore, liable to be set aside. This decision when put to challenge before the Hon'ble Supreme Court, Hon'ble Supreme Court did not interfere with regard to this issue. The subtle yet marked distinction between the facts in Sree Kamatchi Amman Constructions, (supra) and the present case is that the contractor has put forth his claim as a claim for damages/compensation. It is true that in terms of the rider agreement, the contractor is not entitled to extra rates, but such agreement cannot put fetters on the right of the contractor to claim for damages, which right is inherent in the contractor subject to the contractor establishing that the Railway Administration were at fault and he is liable to be compensative. In fact, the claim made by the contractor is in terms of the Section 73 of the Contract Act and this issue was not subject matter of consideration before the Hon'ble Division Bench in Sree Kamatchi Amman Constructions, and therefore, the said case is distinguishable on facts."

Ultimately, the OP was dismissed by the Hon'ble Single Judge.

23. Thereafter, learned counsel for claimant/contractor submitted that the above said order was carried in appeal by Southern Railway by way of an intra court appeal vide O.S.A.No.279 of 2018 and after full contest, the O.S.A. also came to be dismissed vide a detailed order dated 05.09.2018.

24. In the absence of any Apex Court judgment to the contrary before

me, this Court as a matter of judicial discipline follows the order made by

another Hon'ble Single Judge as confirmed by a Division Bench of this Court which has been alluded to *supra*.

25.The next ground of attack which has been raised pertains to acceptable evidence not being there before AT with regard to damages.

26.As mentioned *supra*, there were as many as 55 exhibits marked on the side of the claimant/contractor and as many as 30 exhibits marked on the side of the Southern Railway before AT. These exhibits have been analysed by AT in dealing with 13 different issues and answered the claims made under eight different heads. It is well settled that AT is the best Judge of the quality and quantity of evidence as has been held in *Hodgkinson* principle (*Hodgkinson Vs. Fernie*, the reference being 140 ER 712) though written in 1857, the same can safely be followed as Hon'ble Supreme Court very recently in the oft-quoted *Associate Builders Vs. Delhi Development Authority* case reported in (2015) 3 SCC 49 has quoted the same with approval. This puts an end to the second ground of attack or in other words, fire in the second ground on which instant OP is predicated stands doused.

27.The third ground turns on clause 64.5 of general conditions of contract. With regard to clause 64.5, it was pointed out that the same came into force only after August of 1997. A letter being a circular dated 06.08.1997 bearing reference No.96/CE-I/CT/29 was placed before this Court.

It was pointed out by learned counsel for claimant/contractor that said

contract is dated 26.11.1996 which is prior in point of time. It is the specific say and submission of learned counsel for claimant/contractor that this clause 64.5 in general conditions of contract, which has been adverted to and alluded to in ground No.8 does not apply to the said contract as said contract is prior in point of time. In support of this contention, learned counsel draws my attention to clause 8 of said contract which reads as follows:

"8.0 These special conditions of contracts, "The Schedule of Rates, 1990, Southern Railway Engineering Department" corrected up to correction slip No.2 of 6-8-92. "Specifications for materials and works 1969", of the Engineering Department Southern Railway up to correction slip No.7 of 19.11.83, "The Regulations for Tenders and Contracts", "Conditions of Tender", "Tender agreement Form", "General Conditions of Contract, 1984", corrected up to the date of submission of Tender. The "Contract Labour (Regulation and Abolition) Act, 1970" and "Central Rules, 1971" as amended from time to time, and specific drawings issued for the purpose of this work govern this contract. It may be noted that the "General Conditions of Contract" together with its correction slips is not attached to the tender form. It can be obtained from the office of the Chief Project Manager, Gauge Conversion, Southern Railway, Madras Egmore, Egmore 600 008, on production of a cash receipt for the sum of Rs.50.00 paid to the Chief Cashier, Southern Railway, Park Town, Madras 600 003 or any Station Master on Southern Railway, failing which it shall be deemed that the contractor is in possession of the same."

(underlining made by this Court to supply emphasis)

28.Adverting to clause 8 and more specifically the underlined portion,

learned counsel for claimant/contractor submitted that the general conditions

of contract, corrected up to the date of submission of tender alone is applicable and furthered his submission by saying that it is axiomatic that any correction to general conditions of contract thereafter is not applicable.

29. In the light of this, the third ground of attack or the third ground on which instant OP is predicated also stands doused.

30. As already mentioned *supra*, impugned award is dated 12.07.2010 which means, it is more than eight years old and that instant OP itself is more than half a decade old in this Court, instant OP having been presented in this Court on 01.11.2014.

31. As far as the grounds on which instant OP is predicated and the grounds on which impugned award is assailed are concerned, a careful analysis of the case seen in the context of the submissions made before this Court, brings to light and leaves this Court with the considered opinion that the grounds do not snugly fit into those clauses adumbrated in Section 34 of A & C Act in such a manner which entitles Southern Railway to have the impugned award set aside.

32. Be that as it may, Hon'ble Supreme Court recently in *Fiza Developers & Inter-Trade (P) Ltd. Vs. AMCI (India) (P) Ltd.* reported in (2009) 17 SCC 796 held that an application in the nature of instant OP which is

under Section 34 of A & C Act is a summary procedure and this principle laid down by Supreme Court in *Fiza Developers & Inter-Trade (P) Ltd. Vs. AMCI (India) (P) Ltd.* was subsequently reiterated in *Emkay Global Financial Services Limited Vs. Girdhar Sondhi* reported in (2018) 9 SCC 49. While referring to the *Fiza Developers* principle, Supreme Court in *Emkay Global* 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.

33.To be noted, *State of Bihar Vs. Bihar Rajya Bhumi Vikas Bank Samiti* reported in (2018) 9 SCC 472 is an authority, case law for proposition that notice under Sub-Section 5 of Section 34 of A & C Act is not mandatory and is only directory clause. However, in *Bhumi Vikas*, the Supreme Court has referred to *Fiza Developers* and held that endeavour shall be made for disposal of Section 34 of A & C Act application within prescribed time line.

34.This Court has reminded itself of *Fiza Developers* principle and this Court has also borne in mind that it is a summary procedure. It is not an appeal. Not being an appeal the grounds canvassed by Southern Railway in instant OP cannot be countenanced. It is a mere challenge to the award within the contours of Section 34 of A & C Act.

35.This Court has also borne in mind, that minimum judicial intervention is a sanctus pillar of Alternate Dispute Resolution Mechanism. In

the light of all that have been set out *supra*, this Court has no difficulty in coming to the conclusion that the instant OP is one where the petitioners/ Southern Railway have not made out any case, warranting judicial intervention qua impugned award. OP is therefore dismissed. Considering the nature of the submissions made and in the light of the trajectory which this hearing has taken, parties are left to bear their respective costs.

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