

Reserved on :21.06.2019

Pronounced on :26.06.2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Original Petition No.400 of 2014

Kamarajar Port Limited
(formerly known as Ennore Port Limited),
P.T.Lee.Chengalvaraya Naicker Malligai,
1st Floor, No.23, Rajaji Salai,
Chennai – 600 001.

... Petitioner

Vs

1. M/s.Afcons Infrastructure Limited,
Plot No.1633, Door No.54, H-Block,
(First Floor), 13th Main Road,
Anna Nagar (West),
Chennai – 600 040.
2. Mr.Sri Dharni Dhar
R-12/3, Raj Nagar, Gaziabad – 201 002.
3. Mr. A.Ananthakrishnan,
E-10, TNHB HIG Flat, Ashok Pillar Road,
K.K.Nagar, Chennai – 600 078.
4. Mr.E.Kurien Mathew,
SIE, H.No.33/2527 – C, Ezhumanthuruthil,
Madapet, Road, Kochi – 682 032.

... Respondents

Prayer :- This Original Petition has been filed under section 34 of the Arbitration and Conciliation Act to set aside the majority Award passed by the third and

fourth respondents communicated vide communication/Notice dated 27.12.2013 relating to claim Nos.1 and 2 and consequently confirm the Minority Award passed by the Second respondent.

For Petitioner : Mr.K.Manoj Menon

For Respondents : Mr.D.Balaraman – R1

ORDER

The majority of the members of the Arbitral Tribunal Awarded 75% of the expenditure incurred by the Claimant, for doing temporary piling for timely commencement of the main work, to be paid to the claimant as recommended by the Dispute Review Board, besides interest at the rate of 12% per annum from 05.12.2001. Challenging the same, the present petition has been filed.

2. A Contract was allotted for re-enforcement of the construction of 550 m long piled wharf and three berthing jetties. Besides certification issued by the Engineers, the claim has been negated. Subsequently the claim has been referred to the Arbitral Tribunal. The claim has been preferred not only on the ground that the extra works was done due to change in sequence of work and additional temporary work necessitated due to adverse physical conditions at site caused by erosion of shore and flow through hot water channel. It is not in dispute that the matter has been referred to the Dispute Review Board as per the agreement between the parties. Though the Dispute Review Board not

constituted at the time of commencement of the Contract, the fact remains that the Dispute Review Board has been constituted subsequently and the experts in the field formed the Dispute Review Board. They visited the place of work and they accepted the additional work done by the claimant and recommended 75% of the actual expenditure incurred by the Claimant for the temporary work of piling. The majority members of the Arbitral Tribunal after analysing the factual aspects, found that the work was necessitated and the claimant is entitled to claim for the additional work and the delay was on the part of the respondent and accepted the recommendations of the Dispute Review Board and the majority members of the Arbitral Tribunal passed an Award for 75% of the expenditure incurred by the claimant.

3. The claim was resisted by the respondent mainly on the ground that the claim for payment of laps and chairs/supports is contrary to contractual conditions and the work is only temporary in nature and the claimant is not entitled to claim for any additional work. The contractual terms do not permit the petitioner to claim for any extra work. Similarly, the Engineers have rejected the claim mainly on the terms of the contract. It is his further contention that as per Clause 12.1 of General Condition of the Contract, the Claimant is deemed to have based the tender on its own inspection and examination of all the relevant factors.

4. The final claim has been referred to the Dispute Review Board. In fact the Dispute Review Board has accepted the expenditure and recommended 75% of the total expenditure incurred by the Claimant. The respondent not agreeable with the Dispute Review Board recommendations, referred the matter to Arbitration. The Arbitration Tribunal has been constituted with three members. The majority of the Arbitrators have accepted the recommendations. The minority view rejected the claim on the ground that the terms of the contract does not provide for additional work and further the work is temporary in nature and the claimant is not entitled for any such claim.

5. The majority members of the Arbitral Tribunal have in fact found that the Dispute Review Board has found the actual work done in the site and accepted the recommendation for expenditure towards additional work. Similarly, the Arbitral Tribunal consists of the experts in the field. They found that the recommendations are factually correct and accepted the same. When the Tribunal itself constitute expert members in the field, their recommendations and findings ought to be acceptable. Since, they are not only experts in the field but they have also factually arrived at the decision on merits.

6. The issue of re-routing hot water channel was considered by the Tribunal and found that the delay in completion of work was due to hot water channel has not been attended and re-routed. The Arbitration Tribunal has

factually found that the hot water re-routing issue never arose at the time of pre-bid. This issue has been factually considered and the majority members of the Arbitration Tribunal have accepted the recommendation of the Dispute Review Board.

7. The learned counsel appearing for the respondent has placed his argument on the ground that the terms of the Contract does not provide for additional work and the additional work is a temporary work as per Clause 12.12 of the General Conditions of the Contract and placing reliance on the terms of the Contract, it is his contention that at the time of temporary work, the construction work shall be protected at all time by the Contractor himself and the work shall be executed immediately and necessary cost shall be borne by the Contractor. When work is Governed by the terms of the contract, any temporary work has been executed due to changes because of soil erosion, the employer cannot be fastened with liability. It is the Contractor who has to take responsibility of erosion while executing the work. The Arbitral Tribunal has gone beyond the Contract and such an Award is certainly against the terms of the Contract and is liable to be interfered. Hence, his main contention is that the Award has to be set aside. Further to buttress his submissions, he also relied on the following judgments :

Numaligarh Refinery Ltd. Vs. Daelim Industrial Co. Ltd. reported in 2007 (8) Supreme Court Cases 466

Hindustan Zinc Ltd. Vs. Friends Coal Carbonisation reported in **2006**

(4) Supreme Court Cases 445

Delhi Development Authority Vs. R.S.Sharma and Company, New Delhi reported in **2008 (13) Supreme Court Cases 80**

Oil and Natural Gas Corporation Limited Vs. Western GECO International Limited reported in **2014 (9) Supreme Court Cases 263**

Bharat Heavy Electricals Limited Vs. Tata Projects Limited reported in **2015 (5) Supreme Court Cases 682**

Raghubir Singh Vs. Delhi Metro Rail Corporation Ltd., and others reported in **2007 SCC OnLine Del 213**

M.S.T.C. Limited Vs. Jain Traders & others reported in **2011 (125) DRJ 435**

State of Rajasthan Vs. Nav Bharat Construction Company reported in **2010 (2) Supreme Court Cases 182**

Union of India Vs. Varindera Constructions Limited and others reported in **2018 (7) Supreme Court Cases**

Vedanta Ltd. Vs. Shenzhen Shandong Nuclear Power Construction Co. Ltd. reported in **2018 CC OnLine SC 1922**

8. Whereas, it is the contention of the learned counsel for the respondent that the Dispute Review Board consist expert members besides Arbitrators are also experts in the field and they had factually found that the additional work has

been done due to hot water erosion and re-routing was not done by the respondent. Therefore, the finding of the majority members of the Arbitral Tribunal cannot be interfered. Hence, prayed for dismissal of the petition.

9. No doubt, the law emerge from the judgments cited by the petitioner is that any Award is beyond the scope of the Contract, such Awards can be interfered under section 34 of the Arbitration and Conciliation Act. Absolutely, there is no doubt with regard to the above preposition. In the given case, the nature of the work completed and the Contract is not in dispute. The expenditure incurred in construction of the Wharf is also not in dispute. What was disputed by the respondent is that since it is a temporary work, additional work was necessitated due to erosion, which was not attributed to the respondent and such erosion cannot be construed to mean physical obstruction. Therefore, they are not liable to pay the amount.

10. The undisputed facts as narrated above are that the Dispute Review Board consist of expert members, though Dispute Review Board has not been constituted at the time of commencing the work, the Dispute Review Board has been constituted at a later stage. The members of the Dispute Review Board had accepted the Claimant's case. However, the employer was not satisfied with such recommendation. As a result, the Arbitration proceedings has been initiated. The majority members of the Arbitration Tribunal is of the view that the

petitioner, namely, the Claimant is entitled to the amount recommended by the Dispute Review Board. In fact, they found that the additional work was due to hot water erosion. Hot water erosion would have been avoided if re-routing was done. Admittedly, re-routing was not done. Holding so, the Arbitral Tribunal had interpreted various provisions of the contract and passed an Award for 75% of the expenditure incurred by the Claimant.

11. The majority of the Arbitral Tribunal consisting of the experts in the field had arrived at a reasonable conclusion based on the nature of the work done in that field. Therefore, the Award cannot be interfered by this Court by re-appreciating the entire evidence. The Arbitrators are the experts in the field and arrived at a just conclusion by reasonably interpreting the terms of the Contract. Therefore, a perusal of the entire Award, this Court finds that the Award of the Arbitral Tribunal is well balanced and in fact they considered the nature of the work and accepted the finding of the Dispute Review Board. In view of the same, the Award of the majority members of the Arbitration Tribunal does not require any interference.

12. Accordingly, this Original Petition is dismissed. No cost.

26.06.2019

Index : Yes/ No

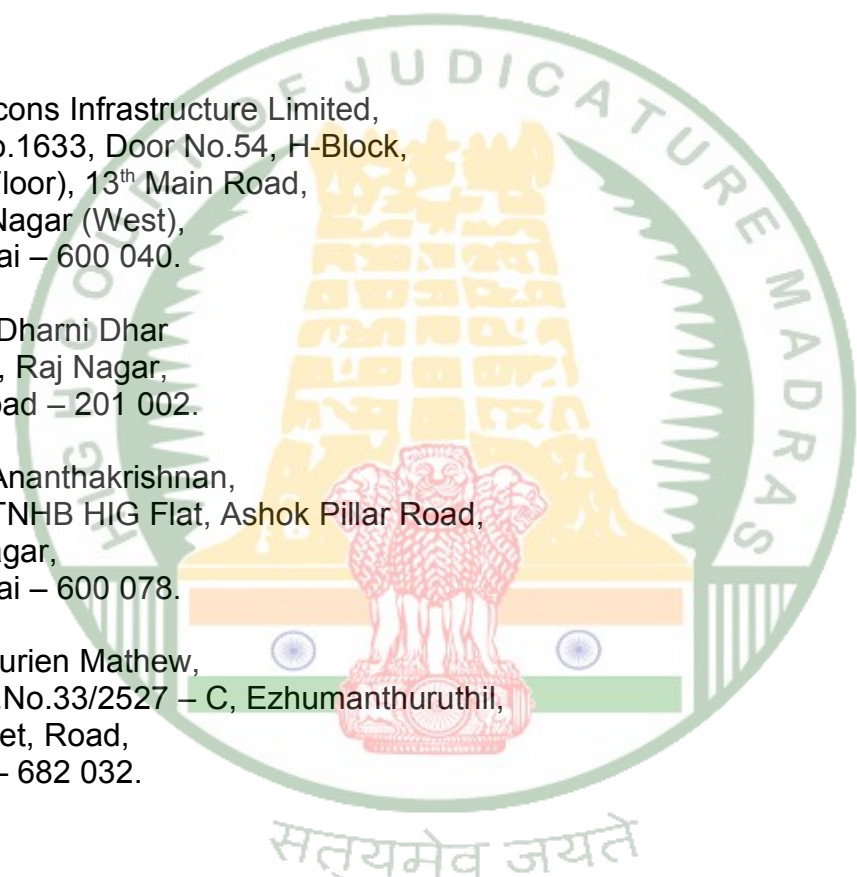
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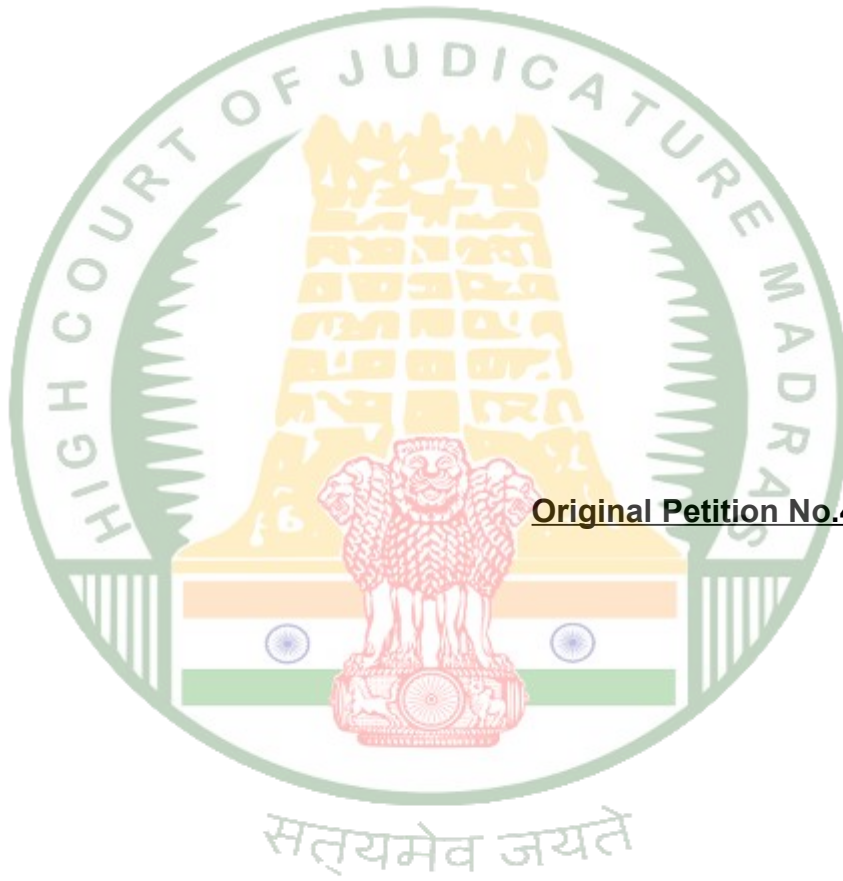
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N.SATHISH KUMAR, J.

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