Reserved on: 10.06.2019

PRONOUNCED ON : 21.06.2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

C O R A M

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

O.P.No.480 of 2017

1. The Managing Director
   Tamil Nadu Fisheries Development
   Corporation Limited
   No.167, Poonamallee High Road,
   Chetpet Eco Park Campus,
   Kilpauk, Chennai – 600 010.

2. The General Manager
   Tamil Nadu Fisheries Development
   Corporation Limited
   No.167, Poonamallee High Road,
   Chetpet Eco Park Campus,
   Kilpauk, Chennai – 600 010.

3. The Manager (Production and Sales)
   Tamil Nadu Fisheries Development
   Corporation Limited
   Sathanur Dam, Sathanur Village,
   Thandarampet Taluk, Tiruvannamalai District. ... Petitioners

WEB COPY

Vs.

K.Subramanian ... Respondent

Prayer: Original Petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the Award dated 15.05.2017 rendered by the learned Sole Arbitrator.

For Petitioners : Mr.Vijay Narayan, Advocate General for M/s.R.Master Ganesh

For Respondent : Mr.V.T.Gopalan, Senior Counsel for M/s.S.Radha Gopalan

ORDER

Aggrieved over the award passed by the learned Arbitrator, the petition has been filed challenging the award dated 15.05.2017.

WEB COPY

2. The brief facts leading to file this original petition is as follows:

(i). The first petitioner/first respondent floated a tender for fishing in Sathanur dam, for a period of 5 years from 15.07.2012 to

http://www.judis.nic.in

14.07.2017. In the auction, the respondent/claimant became a successful bidder. Hence, the 1st petitioner vide the deed of license, dated 13.07.2012 awarded the licence to the respondent/claimant for a sum of Rs.1,23,45,678/-. Besides, the 1st petitioner collected a sum of Rs.85,55,239/- towards incidental charges. Thus, the total amount collected by the 1st petitioner from the respondent/claimant works out to Rs.2,09,00,917/-. In addition to the said amount, the respondent/claimant invested a sum of Rs.45,00,000/- towards the purchase of seedlings and fingerlings. The respondent/claimant has to handover 1/3 of the catches to the 1st respondent Corporation and the remaining 2/3 could be sold by the claimant. Further, the petitioners did not allow the respondent/claimant to do fishing, which caused loss to the respondent/claimant.

(ii). As per Clause 13 of the deed of license, the respondent/claimant is entitled to avail the service of the share fishermen of the 1st petitioner, after furnishing the list of the share fisherman to the 1st petitioner. Similarly, the respondent/claimant is entitled to do the fishing through authorized representatives not exceeding 7 members, after furnishing the list of their names.

WEB COPY

The respondent/claimant furnished the list of fisherman and their authorized representatives to the first petitioner. It is further contention of the respondent/claimant that the clause 13 of the Deed of Licence, no geographical limitation has been set out. In fact, the share fisherman from the Mettur Dam have been beaten up by the share fishermen of Sathanur Dam at the instances of the third petitioner. Despite the Peace Committee was convened by the District Collector, the respondent/claimant could not do the fishing. Hence, the respondent/claimant has approached the High Court of Madras in Writ Petition No. 2315 of 2013. The High Court has permitted the respondent/claimant to do fishing at the Mettur Dam and appointed an Advocate Commissioner to oversee the fishing operation. However, the petitioners did not allow the respondent/claimant to do fishing. In Subsequent, the tender was floated in the year 2013 and the condition imposed therein was that the service of share fishermen of Sathanur dam alone shall be availed, which condition was not there when the respondent/claimant took part in the auction in the year 2012.

WEB COPY

3. The respondent/claimant has filed a counter stating that the licence itself makes it clear that only using the service of share fisherman irrespective of any Geographical limits. In pursuant to that, Clause 12 and 13 of the Licence Deed between the parties provides for the same. Because of the respondent/claimant's poor management skills and not having experts, he could not access the Sathanur Dam. It is denied that the claimant has incurred a loss to the extent of Rs.3,88,00,000/-.

4. On the side of the claimant, 12 documents were filed and on the side of the respondents 13 documents were filed and 6 witnesses were examined on the side of the respondent/claimant.

5. Based on the pleadings of the parties, the following issues were framed:

i. Whether the claimant is entitled to the amount claimed in his claim statement?

ii. Whether the terms and conditions enumerated in the license agreement dated 13.07.2012 has been violated by either of the parties?

WEB COPY

iii. Whether the claimant is entitled to any interest on the claim and if so what is the rate of interest?

iv. Whether the claimant or the respondents entitled to any cost and if so what is the cost?

v. To what other relief the claimant or the respondents entitled to?

6. The learned Arbitrator after appreciation of entire evidence has passed an award directing the petitioners to pay a sum of Rs.2,09,00,607/- and to pay interest at the rate of 12% per annumn on Rs.1,23,45,685/- from 13.07.2012 till filing of claim petition and to pay interest at the rate of 12% per annumn on Rs.85,55,239/- from the date it has been paid by the claimant to the petitioners till the filing of the claim statement; to pay interest at the rate of 12% per annum on Rs.2,09,00,617/- from the date of award till realization by the claimant and to pay a sum of Rs.5 lakhs as cost.

7. The learned Advocate General appearing for the petitioners challenging the award submitted that the award of the Arbitrator is beyond the scope of the contract. When the contract specifically stipulates that only the share fisherman registered under the

http://www.judis.nic.in

Corporation alone to be engaged, the respondent/claimant has violated the main term of the contract. When the claimant himself violated the main term of the contract, he cannot seek any compensation.

8. The learned Advocate General placing the reliance on Clause 12 and 13 of Licence Deed submits that the agreement was entered specifically on condition that the share fishermen registered under the Corporation who are residing in the vicinity of Sathanur Dam alone should be engaged. When the above specific terms were breached the respondent namely the claimant is not entitled for any compensation or return of money. Hence, it is his contention that the learned Arbitrator has beyond the terms of the contract. Therefore, the award passed by the learned Arbitrator is patiently illegal and against the fundamental policy of India and liable to be interfered.

WEB COPY

9. The learned Advocate General further contented that the award itself in violation of terms of contract and submitted that the award is liable to be set aside, whereas, the learned senior counsel appearing for the respondent would submit that the contract does not

http://www.judis.nic.in

stipulate that only the fisherman of Sathanur Dam alone to be engaged. Whereas contract stipulates that claimant should carryout physical activities only using the service of the share fishermen engaged by the Licensor irrespective of any geographical limits. Admittedly, the fisherman engaged by the Licensor and the share fisherman registered under the petitioners. Therefore, the petitioners cannot contend that the agreement is violated.

10. The learned senior counsel further contented that from the inception of contract, the claimant was not allowed to carryout his fishing activities as per the agreement. In fact, his activities have been totally stalled by the local people which resulted in filing writ petition seeking the direction from this Court.

11. This Court has also permitted the respondent to carryout the fishing activities with the help of the fisherman registered under the first petitioner Corporation and Mettur Dam Fisherman Society. Despite such direction by this Court, the petitioners did not allow him to permit to see the fruits of the agreement. Hence, it is his contention that the learned Arbitrator has considered the entire

http://www.judis.nic.in

aspects factually and passed an award in reasonable manner, the same cannot be interfered under Section 34 of the Act.

12. In support of his submissions he relied upon the following judgments:

i. (2019) 4 SCC 162 Pr.10 & 11 in the case of ***MMTC Ltd., Vs.M/s.Vedanta Ltd***., it is held as follows:

> *"11. As far as Section 34 is concerned, the position is wellsettled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii), i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury reasonableness.*

WEB COPY

http://www.judis.nic.in

Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.

It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)

(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See Associate Builders v. DDA, (2015) 3 SCC 49). Also see ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705; Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445; and McDermott International v. Burn Standard Co. Ltd., (2006) 11 SCC 181).

It is relevant to note that after the 2015 amendments to Section 34, the above position stands somewhat

WEB COPY

modified. Pursuant to the insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of Section 75 or Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Additionally, subsection (2A) has been inserted in Section 34, which provides that in case of domestic arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the same states that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.

14. It is equally important to observe at this juncture that while interpreting the terms of a contract, the conduct of parties and correspondences exchanged would also be relevant factors and it is within the arbitrator's jurisdiction to consider the same. (See McDermott International Inc. v. Burn Standard Co. Ltd. (supra); Pure Helium India (P) Ltd. v. ONGC, (2003) 8 SCC 593, D.D. Sharma v. Union of India, (2004) 5 SCC 325)."

WEB COPY

ii. Judgment of Hon'ble Delhi High Court in FAO (OS) No.115/2006 dated 29.07.2010 in the case of ***Union of India vs. Arctic India*** Pr.4, it is held as follows:

> *" 4. The interpretation or construction of a contract or a contractual clause is also the province of the Arbitrator to whom a dispute is referred for final determination by the parties. The construction imparted by the Arbitral Tribunal to a contract or a contractual clause should remain impervious to another view which may happen to be proffered by the Judge. Once there is no dispute as to the existence of a contract, the interpretation of clauses thereof is a matter for the Arbitral Tribunal to expound upon. Suffice it is to mention Sudarsan Trading Co. v. Govt. of Kerala, (1989) 2 SCC 38; Tarapore & Co. -vs- Cochin Shipyard Ltd. (1984) 2 SCC 680 and Numaligarh Refinery Ltd. -vs- Daelim Industrial Co. Ltd., (2007) 8 SCC 466 in reference to this settled position of law."*

iii. (1992) 4 SCC 217 Pr.10 in the case of ***Hindustan Construction Co. Ltd., Vs. State of Jammu & Kashmir***;

WEB COPY

http://www.judis.nic.in

iv. (1989) 2 SCC 347 in the case of ***Food Corporation of India vs. Joginderpal Mohinderpal and Another*** and (2018) 1 SCC 718 in the case of ***Sutlej Construction Limited vs. Union Territory of Chandigarh.,*** it is held as follows:

" 11. It has been opined by this Court that when it comes to setting aside of an award under the public policy ground, it would mean that the award should shock the conscience of the court and would not include what the court thinks is unjust on the facts of the case seeking to substitute its view for that of the arbitrator to do what it considers to be "justice." (Associate Builders v. Delhi Development Authority1)

12. The approach adopted by the learned Additional District Judge, Chandigarh was, thus, correct in not getting into the act of re-appreciating the evidence as 1 (2015) 3 SCC 49 the first appellate court from a trial court decree. An arbitrator is a chosen Judge by the parties and it is on limited parameters can the award be interfered with. (Sudarsan Trading Co. v. The Government of Kerala2; Harish Chander & Co. v. State of U.P.3 and Swan Gold Mining v. Hindustan Copper Limited4)."

WEB COPY

http://www.judis.nic.in

13. The relevant terms of the Licence Deed is necessary for disposal of this Original Petition, hence, Clause 12 and 13 is extracted below:

> " *12.The Licensee hereby agrees and undertakes to furnish the details pertaining to utilization of services of his own menials additionally, by the Licensee at his own cost for conservancy and handling of fish. However, the Licensee shall not be permitted under any circumstances, to avail the services of any share fisherman, other than the share fisherman provided/engaged by the Licensor.*
>
> *13. The Licensee hereby agrees and undertakes to conduct fishing only using the share fisherman, who are engaged in share fishing from time to time by the Licensor, and the number of share fisherman and mesh size regulation are based on fisheries management and the decision of the Managing Director in this regard shall be final and that no other fishermen shall be engaged for fishing by the Licensee for any reason whatsoever. The Licensee hereby agrees and undertakes that the fishing implements and fishing crafts approved by the Licensor shall alone*

WEB COPY

to be utilized by the Licensee for fishing and the said craft shall be used only for fishing activities."

14. Clause 12 and 13 makes it clear that the licensee shall carryout the Fishing activities only by using the share fisherman who are engaged in the share fishing by time to time engaged by the licensor. It does not confine only to the share fisherman of the particular locality.

15. The reading of Clause 12 and 13 makes it clear that what is required to be done by the licensee is to use the share fisherman engaged by the Corporation from time to time. There is no Geographical limits prescribed in the contract. It is also curious to note that the Tender-cum-Auction notice dated 03.09.2013 issued for the subsequent year namely 2013 and a specific clause has been inserted in Clause 41.

WEB COPY

"41. The licensee should conduct fishing by utilizing the fishermen who are nominated and entered an agreement with Tamil Nadu Fisheries Development Corporation on share wages basis. The fishermen who are

http://www.judis.nic.in

> *enrolled as member in the concerned local jurisdiction society, who are eligible for fishing in Sathanur Reservoir shall be nominated as share fishermen by TNFDC. The number of share fishermen and mesh regulations are based on fisheries management and the decision of the Managing Director in this regard is ultimate and final in the above matter. No other fisherman should be engaged for fishing by the successful tenderer at any cost and for any reason."*

16. Fisherman who were enrolled with the Corporation and fisherman who had enrolled as a Member in the local jurisdiction society should alone are to be used. This specific clause has been included from the year 2013. Such clause is specifically absent in the agreement of the year 2012. Making the specific clause including Geographical limits in the subsequent year, makes it very clear that the agreement of the year 2012 did not confine to the local fisherman alone. Previous agreement, there was no indication about the Geographical limits.

WEB COPY

17. In the above background, taking into consideration of the fact that despite the successful bidder, the claimant could not complete his contract and see the fruits of the contract, despite the

http://www.judis.nic.in

order of this Court in writ petition. The learned Arbitrator considered the entire facts and reasonably interpreted the contract and passed a reasoned order.

18. Though it is submitted by the learned Advocate General during his arguments, to the effect that the fisherman registered at Mettur Dam is not registered under the Corporation. The learned Arbitrator has considered these aspects and found that the allegations of the claimant made in this regard in the petition is not disputed by the Corporation and awarded the amount.

19. The power of the Court to set aside the Award would be exercised only in cases where the Court finds that the Arbitral Award is on the face of it erroneous or patently illegal or in contravention of the provisions of the Act. In the case on hand, considering the entire findings of the Arbitrators this court do not find any materials to show that this case requires interference under Section 34 of the Act. In **Swan *Gold Mining Ltd., v. Hindustan Copper Ltd reported in 2015(5) SCC 739*** the Honourable Apex Court has held as follows:

"12. Section 34 of the Arbitration and Conciliation Act,

WEB COPY

1996 corresponds to Section 30 of the Arbitration Act, 1940 making a provision for setting aside the arbitral award. In terms of sub-section (2) of Section 34 of the Act, an arbitral award may be set aside only if one of the conditions specified therein is satisfied. The Arbitrator's decision is generally considered binding between the parties and therefore, the power of the Court to set aside the award would be exercised only in cases where the Court finds that the arbitral award is on the fact of it erroneous or patently illegal or in contravention of the provisions of the Act. It is a well settled proposition that the Court shall not ordinarily substitute its interpretation for that of the Arbitrator. Similarly, when the parties have arrived at a concluded contract and acted on the basis of those terms and conditions of the contract then substituting new terms in the contract by the Arbitrator or by the Court would be erroneous or illegal."

"13. It is equally well settled that the Arbitrator appointed by the parties is the final judge of the facts. The finding of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him."

WEB COPY

"21. Mr. Sharan, learned senior counsel appearing for the appellant, also challenged the arbitral award on the ground that the same is in conflict with the public policy of India. We do not find any substance in the said submission. This Court, in the case of Oil and Natural Gas Corporation Ltd. (supra), observed that the term 'public policy of India' is required to be interpreted in the

http://www.judis.nic.in

context of jurisdiction of the Court where the validity of award is challenged before it becomes final and executable. The Court held that an award can be set aside if it is contrary to fundamental policy of Indian law or the interest of India, or if there is patent illegality. In our view, the said decision will not in any way come into rescue of the appellant. As noticed above, the parties have entered into concluded contract, agreeing terms and conditions of the said contract, which was finally acted upon. In such a case, the parties to the said contract cannot back out and challenge the award on the ground that the same is against the public policy. Even assuming the ground available to the appellant, the award cannot be set aside as because it is not contrary to fundamental policy of Indian law or against the interest of India or on the ground of patent illegality.

22. The words "public policy" or "opposed to public policy", find reference in Section 23 of the Contract Act and also Section 34 (2)(b)(ii) of the Arbitration and Conciliation Act, 1996. As stated above, the interpretation of the contract is matter of the Arbitrator, who is a Judge, chosen by the parties to determine and decide the dispute. The Court is precluded from re-appreciating the evidence and to arrive at different conclusion by holding that the arbitral award is against the public policy."

WEB COPY

20. The Honourable Apex Court in ***McDermott International Inc., v. Burn Standard Co.,Ltd., [2006 (11) SCC 181]*** 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

http://www.judis.nic.in

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.

21. A Division Bench of this Court in ***Puravankara Projects Limited v. Mrs.Ranjani Venkatraman Ganesh and Another [2018 (6) MLJ 588]*** also followed the above judgment of the Apex court and held that only in the circumstances envisaged under the decision of the Apex Court the Award can be interfered.

22. In a recent Division Bench Judgment of Delhi High Court reported in ***2018 (6) ArBiLR 478 : 2019 (256) DLT 42 : 2019 (1) R.A.J.66 [Wishwa Mittar Bajaj and Sons v. Shipra Estate Ltd and Jaikishan Estates Developers Pvt. Ltd.,]*** it is held that the Award cannot be interfered with unless it is patently illegal or opposed to the public policy of India.

WEB COPY
http://www.judis.nic.in

23. Looking up the entire award, this Court found that the learned Arbitrator has in fact considered the specific Clause 13 of the License deed and found that there is no description with regard to the Geographical area. The view of the Arbitrator in view of this Court is very reasonable and no circumstances as envisages under Section 33 of the Act to interfere the award.

24. In view of the above, the petitioners have not made out any ground to interfere with the well reasoned award passed by the Arbitrator.

25. The learned Advocate General also submitted that for certain period, the respondent/claimant has made a profits and the details of profits made by him also available on record. The learned Arbitrator has not considered the above aspect and passed an award ignoring the profits made by the petitioner, such contention has been raised for the first time during arguments. Therefore, without any foundation for such claim, now, this Court cannot appreciate the contention of the petitioner particularly under Section 34 of the Act.

WEB COPY

26. In view of the above, the petition is dismissed. No costs. Order of the learned Arbitrator continues.

21.06.2019

msv

Note:Issue order copy on 24.06.2019.

WEB COPY

N. SATHISH KUMAR, J.

msv

Pre-delivery order in:
O.P.No.480 of 2017

सत्यमेव जयते

WEB COPY

21.06.2019