IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
18~07~2019	24~07~2019

CORAM

THE HONOURABLE MR.JUSTICE **N. SATHISH KUMAR**

O.P.No.28 of 2017
and A.No.2755 of 2019

M/s. Suvidha Parklift Ltd.,
Rep.by its Managing Director,
#206 South Ex, Plaza I
#389 Masjid Moth, NDSE-II
New Delhi - 110049. .. Petitioner/Respondent

.Vs.

M/s. National Company
Rep.by its Managing Partner
Mr.D. Arjun A. Raja,
#9 Kandasamy Street
Mylapore,
Chennai 600004. .. Respondent/claimant

Prayer: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 r/w Order 14 Rule 8 of the O.S.Rules to set aside the Award dated 23.08.2016 corrected Award dated 14.09.2016 passed by the Sole Arbitrator in the dispute between the Petitioner and Respondent.

For Petitioner : Mr.M.K. Kabir
Senior Counsel for
M/s. Vijayalakshmi K.Rajarathnam

For Respondent : Mr. P. Giridharan

ORDER

This Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the Award passed by the sole Arbitrator in favour of the claimant.

2. The brief facts leading to file this Original Petition is as follows:

2.(a) The Respondent/Petitioner is agreed to construct puzzle parking in the multi-storied commercial complex belongs to the claimant/Respondent. The Respondent agreed to put up 212 car parking puzzle system at the rate of Rs.1,80,000/- per car space, in all aggregating to Rs.3,81,60,000/-. The contract value included price value upto 5% of the new material during the project execution period. The Petitioner has agreed to build the entire system by May 2009. The terms of payment was that the claimant should pay 5% advance along with the Purchase Order, a further payment of 25% before or by May

1, 2008 and on the balance 70% consideration, 60% against delivery and 10% against installation and commissioning of the systems. Systems were to be delivered in lots/batches, spread over 6-9 months and the delivery period was to start from the date of report of the confirmed order along with advance and Letter of Credit. In the contract, it is agreed that installation of the system should be completed by end of May 2009.

2.(b) However, there was some delay in handing over the site due to heavy rains in Chennai till May, time schedule was postponed by three months. The respondent has sought for payments split into two parts as 10% payment immediately and 15% by May, 2008. Despite receiving of the amount the Respondent was not completed the project even after the tripartite agreement entered between the parties. The Petitioner/Respondent committed breach. Therefore, the claimant has claimed damages as follows:

S.No.	Particulars	Amount
1	Additional Costs/Expenses incurred to the claimant for installation and commissioning	7,85,935/-
2	Loss of Rental Income for the period from October, 2010 upto June 2011	3,00,38,096/-

S.No.	Particulars	Amount
3	Interest @ 18% per annum on the above amounts contained in para 1 to 2 i.e, (Rs.3,08,24,031/- from 15.10.2010 till the date of filing of Statement of Claim i.e., 05.10.2015)	
4	Total	5,85,65,658/-
5	Refund of Annual Maintenance Charges collected from the claimant	15,26,400/-
	Total	6,00,02,058/-
6	Interest @ 18% on the above amount contained in para 5 above from 14.10.2015 till realisation of the payment in full.	

3. It is the contention of the Respondent that the contract specified the delivery period of puzzle parking system spread over to be 6 to 9 months and the system were to be delivered in batches. The system had to be installed in the basement which pre-supposed the completion of civil and electrical works by other contractors and handing over the site to the petitioner for their execution. It is their contention that as the site was not handed over, delivery could not be made. It is their further contention that tripartite agreement dated 13.09.2010 between the claimant, petitioner and Kocon India Ltd.,the amount payable to the Petitinerwas Rs.98,00,000/-. To avoid the payment of balance amount, the claimant engaged another contractor on 27.01.2011 by paying a paltry amount of Rs.7,24,000/-and terminated the contract with the petitioner on 28.01.2011. In a

nutshell, it is the contention of the Respondent that the claimant has not handed over the site as per the agreement within the stipulated time. Even after the completion of the 10 systems, the claimant expressed its inability to take charge of the same, as the site was not ready to put the system into operational condition. Besides, they entered into contract they have also filed counter claim towards compensation and damages to the tune of Rs.5,99,74,747/-.

4. Based on the pleadings of both the parties, the learned Arbitrator has formulated the following issues:

i) Who committed breach of contract?

ii) Whether consequent to entering into Tripartite Agreement dated 13.09.2010, the Respondent agreed to complete the project by 15.10.2010?

iii) Whether the claimant had a right to claim damages if the project was not completed by 15.10.2010?

iv) Whether the non-compliance of the parking lot for 212 cars resulted in delay in opening of the mall of the claimant?

v) Whether the claimant had diligently mitigates its losses by appointing a third person namely M/s.SunmaFabs on 27.01.2011 to complete the puzzle parking system?

vi) Whether the claimant is entitled to claim damages for delay in commissioning of the puzzle parking system?

vii) Whether the claimant is entitled to claim as damages from the respondent additional costs/expenses incurred for installation and completion of the car parking system?

viii) Whether the claimant is entitled to claim loss of rental income from 15.10.2010 (cut off dated for completion of the car parking system under Tripartite Agreement dated 13.09.2010) upto June 2011 (actual date of completion of the car park system)?

ix) Whether the claimant is entitled to relief of the compensation as prayed for?

x) Whether the claimant is entitled to claim interest on additional costs and loss of rental income at 18% p.a.?

xi) Whether the claimant is entitle to refund of Annual Maintenance Charges amounting to Rs.15,26,400/- under AMC Contract 04.10.2007 due to non-completion of puzzle parking system?

xii) Whether the claimant is entitled to interest of AMC dated 04.10.2007?

xiii) Whether the termination of the contract is valid?

xiv) Whether the respondent is entitled to the amounts claimed in the counter claims?

xv) Whether the Respondent is entitled to interest on the counter claims?

xvi) To what reliefs the parties are entitled?

5. After considering the entire evidence the learned Arbitrator arrived at a finding that the claimant is entitled to compensation for breach of contract to the extent of Rs.1,36,80,000/- and interest at the rate of 18% on Rs.7,85,935/-from 27.1.2011 to 12.10.2015 at the rate of 13% p.a. which comes to Rs.4,44,171.70 and Awarded a total sum of Rs.1,49,10,107/- with 18% interest from the date of the Award till the date of payment. Aggrieved over the same the Respondent/Petitioner has filed the present Original Petition.

6. Learned Senior Counsel appearing for the Petitioner submitted that Learned Arbitrator has not considered the entire evidence properly and in fact having found that the claimant has delayed in handing over of the site for more than two years which led to delay in supply of materials. Learned Arbitrator ought not to have awarded the compensation. It is his contention that when the site has not been handed over, the question of supplying the material within the time as agreed in the contract does not arise at all. Hence it is his contention that the learned Arbitrator's reasoning is not on proper application of mind and the entire finding is unreasonable. Hence, it is his contention that when the Civil Work has not been completed by the the claimant himself and the site has not been handed over and breach on the part of the claimant has been clearly established on facts. The question of awarding the damages by the learned Arbitrator does not arise at all. Hence, he submitted that the Tribunal has ignored the factual aspects and awarded compensation which is unreasonable and such award is liable to be set aside. In support of his contention he relied upon the following judgments:

1. McDermott International Inc. vs. Burn Standard Co.Ltd.and others [(2006) 11 SC 181]

2. Associate Builders v. Delhi Development Authority [(2015) 3 SCC 49]

7. The learned Counsel for the Respondent submitted that the learned Arbitrator made threadbare analysis and considered the factual matrix and gave a reasoning for every issues. Therefore, when the learned Arbitrator arrived a finding on factual matrix and the findings also reasonable and possible and plausible view, the same cannot be interfered by re-appreciating the entire evidence by this Court. Hence, he prayed for dismissal of the claim.

8. In support of his contention he placed reliance of the following order of this Court:

1. M/s. Bharat Heavy Electricals Ltd., v. M/s.Everett (India) Private Limited [O.P.Nos.146 & 147 of 2017 dated 14.03.2019 Madras High Court]

9. It is well settled that the scope of interference of the Award under Section 34 of the Arbitration and Conciliation Act is very limited. The Supervisory role is to kept minimum level and the interference of the award is possible only when the ground set out in the section 34 of the Act is made out.

10. The scope of interference of the Award is dealt by the Apex Court in the following judgments:

10(a) 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 Honoruable 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; or

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.

10(b). 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 Arbitrator 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, 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."

"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 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."

10(c). 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 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.

10(d). 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.

10(e). In ***Associate Builders Vs. Delhi Development Authority reported in (2015) 3 SCC 49***, the Honourable Apex Court has held as follows:

'42. In the 1996 Act, this principle is substituted by the 'patent illegality' principle which, in turn, contains three sub-heads:

42.1.(a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:

'28.Rules applicable to substance of dispute._ (1) Where the place of arbitration is situated in India_

(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India.' 42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality _ for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.

42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

> "28. Rules applicable to substance of dispute._ (1)-(2) (3) In all cases, the Arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

This last contravention must be understood with a caveat. An arbitral tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do.'

11. Admittedly, there was some delay in handing over the site to the petitioner by the claimant. This fact is not in dispute. Total contract price was a sum of Rs.3,81,60,000/- i.e., Rs.1,80,000/- per car space. As per the Agreement the site had to be handed over the Petitioner on or before 3.10.2007. However, the site was given to the Petitioner only in June 2009. The parties have in fact consciously agreed for extension of further time. Thereafter, they have also entered into a tripartite agreement on 30.09.2010 between the Claimant, Respondent and Kacon India Limited to complete the project before 15.10.2010. The learned Arbitrator has factually found that even after the tripartite agreement, the petitioner did not complete the project. Contrary, the petitioner diverted the materials purchased for the claimant's project, to their other projects. Learned Arbitrator also found that stoppage of materials by M/s. Kacon India Ltd was solely due to the respondent's attitude and not fulfilling its obligation to the sub-contractor as regards the payment.

12. In para 90 of the Award the learned Arbitrator factually

found that a sum of Rs.1.14 crores was received in the month of May 2009 itself even before supply of any materials. However, the raw materials were purchased out of the advance taken from the claimant diverted to some other project of the Respondent. In para 123 of the Award, the learned Arbitrator factually found that though there were initial delay in handing over the site, even after the extended period there was no active steps taken by the respondent to complete the project. The learned Arbitrator has dealt with every documents and correspondence and found that despite shifting of the execution dates the petitioner/respondent never performs his obligation. The learned Arbitrator also factually found 40% of the payment on the contract of Rs.3,81,60,000/- was received by the petitioner/respondent. Having received 40% the respondent admittedly did not use the money for the claimants project, on the other hand sought increase in the raw materials price. Considering the entire evidence the Arbitrator has found that even after commissioning some machines which are found to be defective. Accordingly learned Arbitrator allowed the claim only to the tune of Rs.1,36,00,000/- apart from Rs.7,24,000/- and dismissed the claim for damages.

13. The entire findings of the Arbitrator is based on the facts and such view is certainly possible and plausible one. Therefore, it cannot be said that merely there was initial delay in handing over the site, damages cannot be awarded as against the Petitioner. Learned Arbitrator has analysed the entire facts particularly documents and the conduct of the parties and passed the Award on the basis of the materials before him. Such a view is very reasonable. Therefore, it cannot be said that the Arbitrator has arrived the conclusion without any reasonableness. In the entire Award this Court is unable to find that the finding of the Arbitrator is unreasonable and without any materials. Every issue has been dealt elaborately by the Arbitrator, all the correspondences subsequent to the agreement have been analysed threadbare and learned Arbitrator has arrived at a finding and found that though there was initial delay in handing over the site for which the claimant is responsible. It was specifically recorded by the Arbitrator that the delay in handing over of the site apparently would have no negative effect on the respondent performing his contractual obligation of the delivery of materials. Learned Arbitrator considered

various documents even after the contract period and found that the delay in supplying materials only by the Respondent in fact the Respondent having received the amount and diverted the same to some other work, therefore awarded damages. The Award based on the discussions of various documents and evidence, therefore it cannot be said that such an Award falls within the mischief of unreasonableness to interfere the same. In view of the same the Original Petition is liable to be dismissed. Accordingly, it is dismissed.

14. In the result, Original Petition is dismissed. Consequently connected Application is closed. No costs.

24.07.2019

Index : Yes / No
Internet: Yes
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To
M/s. National Company
Rep.by its Managing Partner
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N. SATHISH KUMAR, J.

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