IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.06.2019

CORAM :

THE HONOURABLE MR. JUSTICE N.SATHISH KUMAR

Original Petition No.56 of 2017 &
Application No.231 of 2017

Union of India,
Rep. By the Executive Engineer,
Chennai Central Electrical Division 0 IV,
CPWD, Govt. of India, GPRA Campus,
K.K.Nagar, Chennai - 600 078. .. Petitioner

Vs.

M/s.Superior Aircon Pvt. Ltd.,
Kailash Complex, Model Tower,
Panipet – 132 103. .. Respondent

PRAYER: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the arbitration Award dated 20.09.2016 received on 29.09.2016 in arbitration proceedings ref: ARB/RK/SR(E)/116/2014/411, dated 20.09.2016, made by Sole Arbitrator Shri Rajiv Kumar M/o.U.D., Mumbai pertaining to Contract Agreement No.22/CCEDIV/2012-2013; Constructive of Administrative Building Block A and B for Indian Maritime University, Uthandi, Chennai SH: Providing, Central Air Conditioning System with respect to the award in favour of the respondent.

Petitioner : Mr.V.Chandrasekaran,
Sr. Panel Counsel

Respondent : Mr.Karthik Sundaram,
for M/s.Deepika Murali

ORDER

Challenge has been made in this petition as against the award passed by the Sole Arbitrator dated 20.09.2016.

2. The brief facts leading to the filing of this Original Petition is as follows :

The main contention of the learned counsel for the petitioner is that Section 29(A) of the Amended Act has not been followed by the Arbitrator while passing the Award. Further, it is his contention that when the work stipulated in the contract is not completed within 24 months, the earnest money has to be forfeited. The petitioner has performed their part of the obligation. However, the respondent has not approved the drawings and site was not handed over till the date of termination of the contract. Therefore, when the contract stipulates forfeiture of the earnest money, the learned Arbitrator ought not to have passed the Award.

3. The learned counsel for the respondent would contend that Section 29(A) of the Amended Act cannot be pressed into service since the reference in this case is of the year 2012, much prior to the Amendment. Section 29A of the Amended Act has been amended only with effect from 23.10.2015 and Section 26 of the Amended Act apply to the arbitral proceedings commenced in accordance with the provision of section 21 of the Principal Act, before the commencement of this Act. Further, it is the contention of the learned counsel

that the Arbitrator analysed the entire evidence and factually found that the delay was on the part of the petitioner in handing over the site. Even after termination of the contract, sites were not ready without fixing air conditioners. Hence, submitted that the reasoned Award cannot be interfered.

4. It is now well settled that the award can be interfered only when the grounds set out under Section 34 of the Arbitration Act is made out. On a perusal of the entire award, it is seen that there is no patent illegality which goes into the root of the matter. Similarly, to contend that there is violation of public policy, I find no materials available on record. 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 Honourable 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.

5. In a subsequent judgment in ***McDermott International Tnc., v. Burn***

Standard Co.,Ltd., [2006 (11) SCC 181] when the Apex Court 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.

6. 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.

7. 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."

8. A perusal of the entire Award makes it very clear that the Arbitrator had factually found that the sites were not made ready and handed over to the respondent and complied its obligation of fixing the air conditioners. In fact, the Arbitrator has relied upon the letter of the petitioner dated 08.05.2012 and come to the conclusion that the site was handed over to the respondent on 08.05.2012, much after the period of the contract. That apart, the petitioner is

not able to prove when the other part of the site has been handed over after carrying out their obligation to the respondent. Further, the Arbitrator has also factually found that the evidence adduced, namely photographs prove that even after the termination of the contract, the work has not been completed and site has not handed over to the respondent. The Arbitrar having found that the delay was to be attributed only to the petitioner and not on the respondent and therefore, held that forfeiture of the earnest money is not correct.

9. Further, as far as the contention of the learned counsel that Section 29A of the Arbitration and Conciliation Act is concerned, the same has no legs to stand since this reference is much prior to the Amended Act and Section 26 of the Amended Act makes it clear that the amendment will not apply to the pending proceedings. When the Arbitrator has taken a reasonable decision considering the facts and circumstances of the case, this Court cannot re-appreciate the entire evidence once again as the Court of first appeal. The finding of the Arbitrator is, infact, reasonable based on the factual matrix. In view of the above, the entire delay is attributable to the petitioner. Hence, the Order passed by the Arbitrator is well reasoned and there is no patent illegality or violation of public policy in the Award and there is no merits in this petition.

10. Accordingly, this Original Petition is dismissed. Consequently, the connection application is closed. No cost.

19.06.2019

Index : Yes/ No

Internet : Yes

Speaking/Non-speaking Order

vrc

To

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N.SATHISH KUMAR, J.

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