IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: **02.03.2020**

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

O.P.No.1046 of 2019

M/s.SICAL Multimodal and Rail Transport Ltd.,
having its registered office at
73, Armenian Street, Mannady
George Town, Chennai,
Tamil Nadu-600 001
represented by its Authorised
Signatory Mr.T.Subramanian .. Petitioner

Vs.

Central Warehousing Corporation
Represented by its Regional Director
No.485, North Avenue, Srinagar Colony
Saidapet, Chennai-600 015. .. Respondent

This Original Petition filed under Section 34 (2) of the Arbitration and Conciliation Act, r/w Order 14 Rule 8 of the O.S Rules 1996, praying to set aside the Award dated 28.09.2018 passed by the learned Arbitrator and allow the claim of the petitioner.

For Petitioner : Mr.Anand Sashidharan

For Respondent : Mr.Avinash Wadhwani

ORDER

Mr.Anand Sashidharan, learned counsel on record for petitioner and Mr.Mr.Avinash Wadhwani, learned counsel on record for sole Respondent are before this Court.

2. Instant 'Original Petition' (hereinafter 'OP' for the sake of brevity) has been filed under Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)' which shall hereinafter be referred to as 'A and C Act' for the sake of brevity, clarity and convenience.

3. The case file placed before this Court reveals that the instant OP has been filed under Sub Section (2) of Section 34 of A and C Act.

4. Before proceeding further with this matter, it is necessary to make it clear that challenge to an award i.e., an arbitral award, is by way of an application under Section 34, but, such an application is being given the nomenclature 'Original Petition' in this Court. To be noted, challenge to an arbitral award under Section 34 is neither an appeal nor a revision, but it is a

limited judicial review within the contours and confines of Section 34 of A and C Act.

5. When the above obtaining legal position was pointed out, Mr.Anand Sashidharan, learned counsel for the petitioner submitted that challenge to an arbitral award in the instant OP is predicated on Section 34(2)(b)(ii) and 34(2-A) of A and C Act. In other words, the arbitral award dated 28.09.2018, made by the sole arbitrator is in conflict with public policy of India and that it suffers from patent illegality appearing on the face of the award are the two points on which instant OP is predicated, though averments made / grounds raised in the case file are in the nature of a regular first appeal under Section 96 of 'The Code of Civil Procedure 1908' ('CPC' for brevity).

6. Therefore, challenge to an arbitral award in the instant OP has been laid under two pigeon holes i.e., Section 34 (2) (b) (ii) and Section 34 (2-A) of A and C Act.

7. This Court deems it appropriate to make it clear that hearing / disposal of an application under Section 34 of A and C Act has been held to be a summary procedure by Hon'ble Supreme Court in **Fiza Developers case [Fiza Developers & Inter – Trade (P) Ltd. Vs. AMCI (India) (P) Ltd.** reported in **(2009) 17 SCC 796].** Fiza Developers principle is to the effect that applications under Section 34 are to be disposed of by adopting summary procedures as Section 34 is a special remedy under a special enactment and expeditious disposal in Alternative Dispute Resolution (ADR) is one of the pillars of ADR mechanism.

8.Therefore, it is made clear that instant OP under section 34 is a summary procedure. To be noted, Fiza developers principle has been reiterated by Hon'ble Supreme Court in ***Emkay Global Financial Services Ltd. v. Girdhar Sondhi*** reported in **(2018) 9 SCC 49** wherein it was inter-alia held that Fiza Developers principle is a step in the right direction.

9. It is made clear that instant OP is tested within the contours and confines of the aforesaid Fiza developers principle as reiterated by Hon'ble Supreme Court in ***Emkay Global Financial Services Ltd. v. Girdhar***

Sondhi reported in **(2018) 9 SCC 49.**

10. This Court now proceeds to test the two points projected as challenge to the impugned arbitral award. For this purposes, short facts shorn of unnecessary particulars/details will suffice. Therefore, it will suffice to say that fulcrum of instant OP is constituted by two agreements, one is captioned 'Strategic Alliance Management Contract' (SAMC) dated 29.08.2003 between Sical Logistics Limited, formerly South India Corporation (Agencies) Ltd., and the respondent i.e., Central Ware Housing Corporation (hereinafter referred to as 'CWC' for brevity). The other is a tripartite agreement dated 20.09.2007 wherein Sical Logistics Limited assigned and transferred all its rights, interests and obligations to another company by name Sical Distriparks Ltd. This Court is also informed without any disputation that the petitioner subsequently merged with the Sical Distriparks Ltd., in terms of the order dated 19.07.2012 made by this Court (Company Court).

11. Therefore, the aforesaid SAMC and the tripartite agreement constitute the fulcrum of instant lis. Suffice to say that CWC is operating a

Container Freight Station (CFS) at Tuticorin. To be noted this Court is informed without any disputation that CWC is a Government of India Undertaking.

12. For the operation of CFS at Tuticorin, the aforesaid SAMC and tripartite agreements were entered into. The tenure of contract was 10 years and as part of the aforesaid agreement, bank guarantees and indemnity bonds were executed.

13. In the aforesaid backdrop, suffice to say that within the 10 year period, one import was made by an importer which goes by the name M/s. Baywood Exim. In other words, while it would be appropriate to describe the aforesaid SAMC and tripartite agreement as fulcrum of instant lis, the import by Baywood Exim can be aptly described as the epicentre of this lis. Customs Department initiated proceedings saying that Baywood Exim exported betel nuts under the guise of raw cashew nuts and replaced cargos while containers were transported from Tuticorin Port to CFS. A case was registered by the Directorate of Revenue Intelligence (DRI) for alleged irregularities and duty evasion. In this back drop, bank guarantee given by

the petitioner before this Court was encashed. In this regard, a communication dated 15.03.2014 by CWC to the Bank is relied on. There is no disputation that the actual payment was made on 20.03.2014 but this is the crux and gravamen of-bone of contention qua arbitral proceedings. The invocation of arbitral proceedings was made vide notice dated 15.03.2017 which is an electronic mail and therefore same is the date of commencement of arbitral proceedings within the meaning of Section 21 of A and C Act as receipt of electronic mails are instantaneous.

14. In the aforesaid background, the Arbitral Tribunal constituted by a Sole Arbitrator embarked upon the exercise of examining the arbitral dispute that had arisen between the parties. While the petitioner before this Court contended that invocation of bank guarantee is incorrect as there is no breach at all, it is the case of respondent CWC that they were having financial exposure of around 2.5 crores owing to the import made by the aforementioned Baywood Exim and proceedings were initiated by the customs department in this regard.

15. After holding several sittings, Arbitral Tribunal made an award, which is under challenge in the instant OP, returning a finding that the petitioner before this Court defaulted in performance of its duties and therefore, the invocation of the bank guarantee was in accordance with the terms of the contract. With regard to the counter claim, plea set up by petitioner is that it is barred by limitation and the same was rejected by the Arbitral Tribunal by saying that customs proceedings are underway, the same has not been completed and therefore, it is not barred by limitation.

16. The finding returned by the Arbitral Tribunal with regard to breach has been set out in paragraph 6.19 and the same reads as follows:

> '6.19 *In view of the facts stated above Tribunal is of considered opinion that Claimant has defaulted in the performance of his duties under the contact and action of invocation of bank guarantee by Respondent was in accordance with terms of contract'.*

17. The finding returned by the Arbitral Tribunal with regard to limitation as set out in paragraph 7.7 of impugned award reads as follows:

'7.7 The averment of Claimant that counter claim of Rs.5.2 crore has been raised after the tenure of contract and also it is time barred since no event has occurred within three years of filing the counter claim does not old any merit. Suffice here to say that Claimant himself has admitted that the investigating proceedings are going on and argued that only after the completion of proceedings the demand for such payments, if any, can arise. He thus cannot take a stand that the counter claim is barred by limitation.'

Ultimately, Arbitral Tribunal has summarised its decision in paragraph 8 of the impugned award under the caption 'Summarising the Tribunal's decision' which reads as follows.

'8.0 Summarising the Tribunal's decisions

8.1 Claim amounting to Rs.1,50,51,542/- raised by claimant is not tenable as encashment of bank guarantee by Respondent is within the precincts of contractual framework. (Ref paras 6.1 t0 6.19)

8.2 Counter claim amounting to Rs.5.20 crore raised *by Respondent is tenable as the Claimant has defaulted in fulfilment of his contractual obligations (Ref paras 7.1 to 7.11)*

8.3 Respondent has adjusted an amount of Rs.1,14,02,263/- (encashment of bank guarantee) and Rs.1,33,09,966/- (other payables) pertaining to a separate Vizag contract (also with Tribunal for adjudication). Tribunal is of considered opinion that both the contracts are separate and in the absence such a provision in the contract which entitles a party to do so no such adjustment can be effected. The SAMC Tuticorin contract has no such provisions. In this context Award of SAMC Vizag may also be referred.

8.4 After adjusting the encashed bank guarantee amount of Rs.97,73,729/- Claimant is liable to pay an amount of Rs.4,22,26,271/- (Rupees four crore twenty two lakh twenty six thousand two hundred and seventy one only). Payment should be made by Claimant within sixty days of receipt of the Award otherwise the Claimant shall have to *pay simple interest @ 10% per annum also on the awarded amount, to the Respondent after the lapse of first sixty days.*

8.5 Both the parties to the disputes will bear their own costs. Arbitration fees to be shared equally by both the parties.'

18. As already alluded to supra, instant O.P is predicated on two grounds namely arbitral award is in conflict with public policy and that it is vitiated by patent illegality.

19. In this regard, the question as to whether limitation would be an issue which will fall within the ambit of public policy is of relevance. Though not cited by learned counsel appearing on either side, this Court took it upon itself to refer to a judgment of Hon'ble Supreme Court in **N.Balakrishnan vs. *M.Krishnamoorthy*** reported **in (1998) 7 SCC 123,** wherein Hon'ble Supreme Court has held that limitation is founded on public policy. Therefore, the issue of limitation will certainly qualify qua public policy plea.

20.This Court now embarks upon the exercise of testing the issue of limitation. The petitioner contended that the date on which counter claim was made should be taken as the reckoning date. However, learned counsel appearing for CWC submitted that the date of commencement of arbitral proceedings within the meaning of Section 21 of A & C Act is the reckoning date. Saying so it was submitted that 15.03.2014 should be taken as reckoning date with regard to limitation. Considering the peculiar facts and circumstances of this case, it is necessary to look at what would be the starting point of limitation. Starting point of limitation is clearly the date of invocation of bank guarantee dated 15.03.2014 as pointed out supra. The payment was made only on 20.03.2014. Therefore, the plea of limitation does not carry the petitioner very far in the instant OP. It has not been articulated with clarity and specificity in terms of date and applicable article in limitation act in the award .

21. Be that as it may, fact that limitation is 3 years is not in dispute. Though the petitioner would predicate his plea on article 30, the respondent would predicate it on article 27.

22. This takes us to the issue of public policy.

23. The term 'public policy' was not defined or explained under A and C Act prior to 23.10.2015. Post 23.10.2015, expression 'conflict with public policy of India' stood statutorily explained. Explanation 1 to Section 34(2)(b)(ii) reads as follows:

> 'Explanation 1. - For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,
>
> (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or
>
> (ii) it is in contravention with the fundamental policy of Indian law; or
>
> (iii) it is in conflict with the most basic notions of morality or justice'

24. It will suffice to make it clear that vide Explanation 2 to Section 34(2)(b)(ii) it has been mandated that the test as to whether an

award is contravention with the fundamental policy of Indian Law shall not entail a review on the merits of the dispute. This takes us to elucidation of conflict with public policy of India qua an arbitral award.

25. Two judgements of Hon'ble Supreme Court are of immense value namely **ONGC Limited vs. Western Geco International Limited** reported in **(2014) 9 SCC 263** and **Associates Builders vs. Delhi Development Authority** reported in **(2015) 3 SCC 49** and both these judgments were rendered prior to 23.10.2015, i.e., prior to the date on which the term 'conflict with public policy of India' was statutorily explained. What is of relevance is, post 23.10.2015, in **Centro Trade Minerals and Metal Inc. vs. Hinduston Copper Ltd.,** reported in **(2017) 2 SCC 228** Hon'ble Supreme Court reiterated Western Geco and Associate Builders principles. A careful reading of these judgements would reveal that Hon'ble Supreme Court had culled out three distinct juristic principles qua public policy. They are:

a) Judicial approach

b) Natural Justice Principle ('NJP' for brevity) and

c) irrationality/ perversity

26. Hon'ble Supreme Court has also laid down litmus test for each of the three juristic principles. Judicial approach should be tested by examining whether there is fidelity of judicial approach. With regard to NJP, it should be tested on the philosophy of *audi alteram partem* and with regard to the third juristic principle of irrationality / perversity, Hon'ble Supreme Court held that the same should be tested on the touchstone of the Wednesbury principle of reasonable tests.

27. To be noted, these principles were laid down by Hon'ble Supreme Court in aforementioned *Western Geco* case law and reiterated in Associate Builders, both of which were rendered by Hon'ble Supreme Court prior to 23.10.2015 and prior to the term 'conflict with public policy of India' being statutorily explained. Be that as it may, this principle continues to govern the field post 23.10.2015 also as the *Western Geco* principle more particularly the three distinct juristic principles culled out by the Hon'ble Supreme Court and reiterated in Associate Builders case were reaffirmed by Hon'ble Supreme Court in **Centro Trade Minerals and Metal Inc. vs. Hindustan Coppr Ltd.,** reported in **(2017) 2 SCC 228**.

28. This Court therefore carefully applied the aforesaid three juristic principles that have been culled out by Hon'ble Supreme Court for testing the award qua public policy.

29. The discussion of the Arbitral Tribunal as would be evident from the impugned award is contained in paragraphs 7.1 to 7.11. For the purpose of avoiding this order becoming verbose, this Court refrains itself from extracting these paragraphs. Suffice to say that a careful perusal of paragraphs 7.1 to 7.11, this Court is of the considered view that no case has been made out qua fidelity of judicial approach or *audi alteram partem.*

30. With regard to patent illegality plea, it has to be borne in mind that a mere application of law and reappreciation of evidence stand excluded while testing the impugned award for patent illegality. Absent to these two aspects of the matter, a careful perusal of the impugned award and more particularly aforementioned paragraphs 7.1 to 7.11 leaves this Court with the considered view that there is no patent illegality. To be noted nothing to the contrary has been highlighted in the submissions before this Court.

31. In the light of the aforesaid narrative, this Court is of the considered view that no ground is made out to interfere with the impugned award under Section 34 of A and C Act.

Instant OP stands dismissed. There shall be no order as to costs.

02.03.2020

Speaking order: Yes/No
Index: Yes / No
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M.SUNDAR, J.
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O.P.No.1046 of 2019

02.03.2020