IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:13.08.2020

CORAM:

THE HONOURABLE Mr.JUSTICE M.SUNDAR

O.P.No.431 of 2012

SOWiL Limited
formerly Sir Owen Williams Innovestment Ltd.,
2, Esha Ekta Apts
Campa Cola Compound
B G Kher Marg
Mumbai – 400 018
Represented by its Vice Chairman ... Petitioner

Vs.

1. Tamil Nadu Road Development Company Ltd.,
   II Floor, Sindur Pantheon Plaza
   346, Pantheon Road, Egmore
   Chennai – 600 008.
2. Mr.S.P.Krishnamoorthy
   Presiding Arbitrator
   E-2, Adyar Apartments
   Chennai – 600 085.
3. Mr.P.M.Joseph
   27, Thirunarayana Avenue
   Off New Avadi Road
   Kilpauk Garden
   Chennai – 600 010
4. Mr.M.Venkatesan
   34, Josier Street
   Nungambakkam, Chennai -600 034.

... Respondents

Prayer: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside an arbitral award dated 16.12.2011 passed by the Arbitral Tribunal.

For Petitioner : Ms.Janani Shankar
for Mr.R.Parthasarathy

For Respondents : Mr.S.R.Rajagopal
Additional Advocate General
for Mr.M.Sivavarathanan

ORDER

Captioned 'Original Petition' ('OP' for the sake of brevity) is an application 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 and convenience.

2. In the web-hearing today on a video-conferencing platform, Ms.Janani Shankar, learned counsel representing the counsel on record for sole petitioner and Mr.S.R.Rajagopal, learned Additional Advocate General appearing on behalf of Mr.M.Sivavarathanan, counsel on record for contesting first respondent are before me. Learned counsel on both sides agreed that captioned 'OP' can be taken up for final disposal. Therefore, this Court proceeded to take up captioned 'OP' for final disposal and the same was heard out.

3. An 'Arbitral award dated 16.12.2011' (hereinafter 'impugned award' for the sake of convenience and clarity) made by a 'three member

Arbitral Tribunal' ('AT' for the sake of brevity) by 2:1 majority has been called in question or in other words is being sought to be set aside in captioned 'OP'. Three individuals, who constituted the AT, have been arrayed as respondents 2 to 4 in captioned 'OP'. After hearing learned counsel on both sides for some time, this Court is of the considered view that the three individuals, who constituted the AT, need not be part of the array of parties and therefore I direct that respondents 2, 3 and 4 be deleted from the array of parties. Therefore, contesting first respondent now becomes the sole respondent. For the sake of convenience and clarity, petitioner shall be referred to as 'SOWiL' and the sole respondent (now) shall be referred to as 'TNRDC'. This Court is informed that work, which subject matter of lis before AT, was done by TNRDC for CMDA (Chennai Metropolitan Development Authority).

4. Short facts shorn of unnecessary particulars/details are that the nucleus of the lis between the parties before AT is a 'Consultancy Contract dated 04.02.2004' (hereinafter 'said contract' for the sake of convenience and clarity); that said contract is effectively a Consultancy Contract for development of outer ring road in Chennai Metropolitan area; that the said contract was in five milestones, which has been

adumbrated *inter alia* in a covenant in said contract; that there was a percentage of the contract price to be paid qua every milestone; that this Court is informed that the value of said contract or in other words, the contract price for all the five milestones put together is little over Rs.47 lakhs (Rs.47,59,000/- to be precise); that out of this contract price of Rs.47.59 lakhs, Rs.4,75,900/- which is the fee payable for milestone No.4 alone ran into rough weather; that the payments for remaining milestones have been made by TNRDC to SOWiL; that the *lis* between the parties before AT pertains to non-payment of this Rs.4,75,900/- for milestone No.4, interest on what according to SOWiL is delay in payments for other milestones and damages claimed by SOWiL albeit under the caption 'Actual Office Expenditure' for a specified period; that there were other heads of claim before AT, but what falls for consideration in captioned 'OP' is only these three heads of claim; that the disputes between the parties stood referred to AT before seven heads of claim, namely (a) to (g) made by SOWiL and counter claim made by TNRDC; that there was no oral evidence before AT, but as many as 11 documents on the side of SOWiL (which were given serial numbers with alpha 'C' prefix) and 10 documents on the side of TNRDC (which were given serial numbers with alpha 'R' prefix) were marked; that AT made impugned award by a 2:1 majority wherein all heads of claim were negatived by the majority, but claims under heads (a), (b) and (c) besides (g) were acceded to by the minority view; that instant OP was presented in this Court on 14.03.2012 assailing the impugned award.

5.Having set out the factual matrix in a nutshell, it is necessary to set out the heads of claim as can be culled out from the claim petition of 'SOWiL' and the same reads as follows:

'A & B Outstanding Amount as on 21.10.2010		*Rs.4,75,747= 00*
	Interesting Amount as on 21.10.2020	*Rs.7,39,759=00*

	Total	*Rs.12,15,518=00*
C	*Actual Office Expenditure for period 21.9.2004 to 31.10.2004*	*Rs.6,78,465=00*
	Monthly Expenditure of office for period 1.11.2004 to 30.9.2006 @ 87400/p.m	*Rs.20,10,200=00*

Total		*Rs.26,88,665=00*
Add: 65% Contribution to Overheads		*Rs.17,47,632=00*
Add: 35% Profit		*Rs. 9,41,032=00*
Total		*Rs.53,77,329=00*
Interest as on 21.10.2010		*Rs.34,20,864=00*

Total		*Rs.87,98,193=00*
D. Loss of CV Value		*Rs.15,00,000=00*
Loss of profit on DPR Contractor @ 25% of 57,26,000/-		*Rs.14,31,500=00*

Total		*Rs.29,31,500=00*

E. Loss of Corporate credentials for three projects 15 lakhs	*Rs.45,00,000=00*
F. Damages for breach of IPR rights	*Rs.40,00,000=00'*

6. To be noted, (g) is the claim for cost of arbitration. The fate of heads of claim vide impugned award have already been set out supra.

7. This takes us to the rival submissions that were made before this Court. A summation of the submissions of learned counsel for petitioner are as follows:

a) Milestone 4, which is the crux and gravamen of lis before AT, consists of several special actions and the impugned award has negatived SOWiL's claim solely on non-delivery of model

b) There is a provision for interest on delayed payments, AT did not consider a vital document and thereby negatived SOWiL's claim for interest on delayed payment

c) As a sequitur to the aforesaid two submissions, claim for damages ought to have been acceded to.

d) The aforementioned submissions expressed in legal parlance would translate to challenge to impugned award under Section 34(2)(b)(ii) read with clause (ii) of Explanation 1 thereat and patent illegality.

8. Elaborating her submissions on the aforesaid lines, learned counsel for petitioner submitted that milestone 4, which talks about approval of full scale model by itself is made up of several parts and delivery of full scale model is only one of those parts, the model was no doubt made, but it was on the delivery aspect that there was some disagreement between SOWiL and TNRDC, which is evidenced by communications, which have been overlooked. AT therefore has missed vital evidence and has negatived SOWiL's claim with regard to this aspect of the matter, is learned counsel's say. In this regard, attention of this Court was drawn to communication dated 13.04.2009 from SOWiL, wherein there was a request to release a certain sum of money to maker of the model on delivery of the table top model. With regard to interest on delayed payment, attention of this Court was drawn to Clause 6.5 of said contract which provides for interest on delayed payments and it was

submitted that AT had not noticed that TNRDC has not raised the issue of delay for a considerable length of time. On damages, it was submitted that it is a sequitur submission.

9. With regard to legal submissions, it was submitted that both the grounds namely conflict with public policy and patent illegality essentially turn on perversity plea.

10. Submissions made by learned Additional Advocate General in response to the aforementioned arguments can be summed up and set out as follows:

a) The issue is whether SOWiL complied with Milestone No.4 and it is not open to SOWiL in a Section 34 application to dissect further as AT is the best Judge of the evidence before it.

b) With regard to delay, AT has returned a finding based on evidence before it that the delay was not on account of TNRDC and therefore SOWiL is not entitled to interest.

c) As damages is essentially a sequitur claim on milestone No.4 being held against SOWiL, the question of damages does not arise.

d) With regard to legal submissions, it was submitted that perversity cannot be presumed for the asking and SOWiL has not demonstrated perversity or in other words, SOWiL has not demonstrated that the majority view of AT qua the impugned award is completely implausible.

11. Elaborating on the aforementioned submissions learned Additional Advocate General drew the attention of this Court to clause 1.1.(k) of said agreement, clause 6(I) of Appendix A, clause (e) of Appendix B to said agreement captioned 'Reporting Requirements' which read as follows:

'1.1. (k) "Services" means the work to be performed by the Consultants pursuant to this Contract as described in Appendix A'

'6.....

(I) Phasing of the Consulting Assignment

The consulting assignment would be implemented in two phases – Phase I and Phase II. This Terms of Reference pertains to scope of services in Phase I of the assignment. It may also be noted that Phase II is dependent on the outcome of Phase I and that the Client/CMDA retains the right to conclude the assignment upon completion of Phase I itself, if it so desires and *may not proceed with Phase II.'*

'(e) Draft Report: The Consultant shall submit ten copies of draft report within four months of commencement of consulting services, giving complete details of method followed by the Consultant and their findings and recommendation, and five copies of modified/revised draft report shall be submitted after incorporating the comments/suggestions of the Technical Committee.

A full scale physical model showing the key features of the project including alignment, junction improvements, typical cross sections, land use plan, commercial development of land adjacent to the carriageway etc. shall be submitted. A simulated computer model shall also be submitted.'

12. Adverting to the aforesaid provisions, it was submitted that SOWiL had not adhered to the requirements under said Agreement and therefore, it cannot now be heard to contend to the contrary.

13. On interest, as already alluded to supra, it was submitted that the findings of AT that TNRDC is not responsible for the delay is based on evidence before it and it was pointed that damages is only a sequitur submission.

14. On the legal submission turning on perversity, learned Additional Advocate General placed substantial, emphatic reliance on

Hodgkinson principle, submitted that there was sufficient evidence before AT and AT is the best Judge of quantity and quality of evidence before it. It was also pointed out that no case of perversity has been made out and to buttress this argument, celebrated ***Associate Builders [Associate Builders Vs. Delhi Development Authority]*** judgment of Hon'ble Supreme Court reported in ***(2015) 3 SCC 49*** was relied on, besides an order made by me in ***Sheladia Associates Inc. Vs.Tamil Nadu Road Sector Project II, Represented by its Project Director*** reported in ***2019 SCC Online 17883 (Mad.).***

15. In addition to this, the original English Judgment, namely ***Hodgkinson Vs. Fernie [140 ER 712]*** was also placed before me to buttress the submission that the ***Hodgkinson*** rule reiterated by Hon'ble Supreme Court in Associate Builders case qua evidence before AT is of relevance.

16. Having set out the rival submissions, this Court now embarks upon the exercise of discussion on rival submissions and giving its dispositive reasoning for the purpose of arriving at a conclusion.

17. Before this Court proceeds with discussion, it is to be noticed that learned counsel for petitioner argued that the minority view qua

impugned award has to be sustained. This will also be dealt with in the course of discussion and dispositive reasoning infra.

18. This Court now looks at the five milestones as can be culled out from clause 6.4 of said agreement which reads as follows:

> '6.4 Payments shall be made according to the following schedule:
> Phase I

Sl.No	*Description of Milestone*	*Percentage of contract price at each stage*
1	Approval of Inception Report and Submission of Bank Guarantee equivalent to 5% of contract price	10%
2	Approval of Interim Report	30%
3	Approval of Draft Report	30%
4	Approval of Full Scale Model	10%
5	Approval of Final Report	20%

19. As already alluded to supra, it is only milestone 4 which deals with approval of full scale model, which ran into rough weather. As fairly submitted by both sides, this approval of full scale model is not one step, but it is made up of several constituent steps such as making of the model, display and delivery of the same. It was also fairly submitted that delivery of model is what ran into rough weather.

20. This takes us to how the impugned award has dealt with this

aspect of the matter. The majority view of the impugned award has dealt with claims (A) and (B) together. Ideally it could have been dealt with separately, but in this regard the AT cannot be completely found fault with as the claimant by its own volition in the claim statement has chosen to club claims (A) and (B) together as would be evident from the extract from the claim statement, which has been reproduced supra. As claims (A) and (B) have been clubbed together in the claim statement itself, what is relevant is, AT has proceeded more on the delay in payments aspect of the matter at least as far as the majority view is concerned and has negatived (A) and (B) together. However, as already alluded to supra, there is no disputation or disagreement before me that it was only the delivery of the full scale model which ran into rough weather. In this regard, this is well articulated in paragraph 2.1.6 of the minority view wherein the learned Arbitrator, who dissented, has clearly held that submission of the model for inspection and approval by the respondent was at the model makers workshop and delivery of the model had to take place later. As there is no disputation on this aspect of the matter, i.e., the factum of non-delivery of the model, it may not be necessary to dilate further into this aspect of the matter. AT, in its wisdom on appreciation of the documentary evidence before it, has come to the conclusion that SOWiL is not entitled to the little over Rs.4.75 lakhs claim for Milestone No.4 and there is nothing to demonstrate that this is perverse. To be noted, there will be little elaboration on what is perversity infra in this order.

21. With regard to interest on delayed payment, as already alluded to supra, the relevant clause is Clause 6.5 in said agreement which reads as follows:

> '6.5 Interest on Delayed Payments
> If the Consultant has discharged the obligations under this Contract without any default to the satisfaction of the Client and still the Client has delayed payments beyond forty five (45) days after the due date stated in the SC, interest shall be paid to the Consultants for each day of delay at the rate stated in the SC.'

22. This Court is informed that SC contained in clause 6.5 stands for a schedule which has been drawn.

23. This takes us to how the AT has dealt with the claim for delayed payment of interest. After referring to the rival submissions before it and after adverting to the documents before it, more particularly

letter dated 06.04.2006 (Ex.R31), besides Ex.R30, AT vide the majority view has come to the conclusion that payments were withheld only towards the activities which have been performed to the subjective satisfaction of TNRDC as stipulated in the contract. This is contained in paragraph 9.4.9 of the majority view of the impugned award, which reads as follows:

> *'9.4.9: Findings of the Tribunal: Taking into account the conditions of contract and the relative contentions of the parties to the dispute, the documents filed by the parties, the arguments advanced, the Tribunal finds and holds that there is no merit in the stand of the Claimant that there was delay on the part of the Respondent in releasing the payments. The payment withheld is only towards the activities which have not been performed to the subjective satisfaction of the Respondent as stipulated in the contract. Consequently, the Claimant is not entitled for the relief claimed under this head of claim.'*
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> ***(Underlining made by this Court to highlight)***

24. As already set out supra, damages is only a sequitur claim.

25. This takes us to the question of evidence before AT. In this regard, ***Hodgkinson*** principle laid down more than one and half century ago by a English Court is of relevance and the same is reported in 140 ER 172 (**Hodgkinson Vs. *Fernie***). This **Hodgkinson** principle was

referred to/reiterated by Hon'ble Supreme Court in the celebrated ***Associate Builders*** case and subsequently in ***Sheladia Associates*** case, I have laid down a legal theorematic proposition by a combined reading of **Hodgkinson** principle and the ratio of Hon'ble Supreme Court in ***MMTC Limited Vs. Vedanta Limited reported in (2019) 4 SCC 163***. This aspect of the order made by me in the aforesaid case is contained in paragraphs 28 to 30, which read as follows:

> *'28 In this view of the matter, learned State counsel, i.e., counsel for RSP submitted that the entire lis boils down to issue Nos.1,2 and 4 supra and it stands narrowed down to the scope of interpretation of clauses 2.3, 6.2.1 and 11.2. Furthering his submission in this direction, learned State counsel pressed into service a very recent judgment of Hon'ble Supreme Court in **MMTC Ltd. Vs. Vedanta Ltd**. reported in **(2019) 4 SCC 163** for the proposition that interpretation of the term of contract, conduct of parties and correspondence exchanged are within the Arbitrator's jurisdictional domain. **Vedanta** judgment was pressed into service to emphasis that even with regard to construction of terms of agreement, if the view taken by the AT is a possible view based on reasonable construction of terms of contract, High Courts exercising its power under Sections 34 and 37 of A and C Act will be slow to exercise judicial*

intervention. Relevant paragraphs are paragraphs 26 and 16 which reads as follows :

*"**26.**Based upon the above discussion, in our opinion, the view taken in the majority award, as confirmed by the High Court in the exercise of its powers under Sections 34 and 37 of the 1996 Act, is a possible view based upon a reasonable construction of the terms of the agreement dated 14-12-1993 between the appellant and the respondent and consideration of the material on record. We are also of the opinion that the dispute was covered under the agreement between the appellant and the respondent dated 14-12-1993, and as such the dispute is governed by the arbitration clause under the said agreement. Thus, we find no reason to disturb the majority award on the ground that the subject-matter of the dispute was not arbitrable.*

***16.**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. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181]; Pure Helium India (P) Ltd. v. ONGC [Pure Helium India (P) Ltd. v. ONGC, (2003) 8 SCC 593] and D.D. Sharma v. Union of*

India [D.D. Sharma v. Union of India, (2004) 5 SCC 325] .] "

29 A careful examination of the impugned order and the manner in which documentary evidence before AT has been appreciated, leaves this Court with the considered opinion that interpretation of clauses 6.2.1 and 2.3 in the Appendix to said contract made by AT is clearly a possible view based on reasonable construction / interpretation and therefore, it is a fit case for this court to refrain from exercising judicial intervention under section 34 of A and C Act.

30 This Court has also reminded itself of Hodgkinson principle. *Hodgkinson principle has been explained by Hon'ble Supreme Court in the oft-quoted and celebrated Associate Builders case being* ***Associate Builders Vs. Delhi Development Authority*** *reported in* ***(2015) 3 SCC 49****. Hodgkinson principle in simple term means that AT is the best judge with regard to quality and quantity of evidence before it. This coupled with* ***Vedanta*** *principle if put in the form of a theorem would translate into 'as long as interpretation of covenant in a contract by AT is a possible view and as long as it is based on reasonable construction, the Court will not interfere under* *section 34'. In this view of the matter, this court is unable to persuade itself to believe that there is infarction of sub section (3) of section 28. To put it differently, this Court is unable to persuade itself to hold that AT has not decided in accordance with the terms of contract. As answer to infarction of section 28(3) is not in the affirmative, it may not be necessary to go into the question as to whether the impugned award is in conflict with public policy of India, as the stated position of contractor and pointed submission of learned counsel for contractor is to the effect that there is infarction of section 28(3) of A and C Act and therefore, that has resulted in impugned award being in conflict with public policy of India. When answer to the infarction of section 28(3) itself is in the negative, it would be otiose and a completely superfluous exercise qua adjudication in instant O.P to examine whether such infarction in the factual backdrop of this case can be elevated to saying that it has resulted in impugned award being in conflict with public policy of India.'*

26. This Court is informed that to the best of the research, there is no intra-Court appeal thus far against the aforesaid ***Sheladia Associates*** case. Having set out the ***Sheladi Associates*** principle, this Court is left with the considered opinion that the view take by the majority of the AT

is not implausible. A caveat on Sheladia principle. The simplified legal theoram that ***Hodgkinson*** principle in effect means that a arbitral Tribunal is the best judge of quantity and quality of evidence before it is not absolute Rule which neither admits of any exception nor permits being qualified. It depends on the facts circumstances and more importantly nature of evidence before the tribunal and the manner in which the same has been sifted/scrutinized by the tribunal.

27. This takes us to the question of minority view. As already delineated and alluded to supra, the minority view articulates well about the sub stages of milestone 4, but the question of upholding the minority view may arise only when this Court comes to the conclusion that the majority view is implausible and the same is liable to be set aside. Therefore that question does not arise in the instant case.

28. This takes us to the interest aspect of the matter, as already alluded to supra vide the majority view in paragraph 9.4.9 of impugned award, AT on appreciation of evidence has come to the conclusion that withholding of payment was only owing to non-performance by SOWiL to the subjective satisfaction of TNRDC. In this regard this Court has also noticed the submission of State counsel that TNRDC is in turn

working for CMDA and it has to be to the satisfaction of CMDA.

29. As this Court finds that there is no ground to dislodge the majority view with regard to the aforesaid two heads of claim, the same not being implausible it follows as a sequitur that there is no ground to dislodge the majority view of AT on damages it is only a sequitur prayer.

30. With regard to grounds in legal parlance, the entire exercise turns on perversity. With regard to 'perversity', Hon'ble Supreme Court in celebrated Associates Builders case has laid down a good working test for what is perversity by relying on two earlier case laws viz., ***Gopi Nath's*** case [***Excise and Tazation Officer-cum-Assessing Authority V. Gopi Nath & Sons*** reported in ***1992 Supp (2) SCC 312***] and ***Kuldeep Singh's*** Case [***Kuldeep Singh V. Commissioner of Police*** reported in ***(2012) 1 SCC 594***]. The relevant paragraph in Associate Builders case is paragraph 32 which reads as follows:

> ***32.****A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [1992 Supp (2) SCC 312] , it was held: (SCC p. 317, para 7)*
>
> *"7. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously*

defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.”

In Kuldeep Singh v. Commr. of Police [(1999) 2 SCC 10 : 1999 SCC (L&S) 429] , it was held: (SCC p. 14, para 10)

“10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.”

31. Therefore if the working test qua perversity is to be applied, this Court should come to the conclusion that the view taken by AT, is such a view that no reasonable person would take such a view and it should be so implausible that it deserves to be set aside. In the instant case, as this Court is unable to convince itself that the majority view taken by the AT is not implausible though AT could have dealt with claims (A) and (B) separately, this Court is unable to convince itself that the majority view is hit by the vice of perversity.

32. Before parting with this case, one aspect of the matter that was highlighted by Additional Advocate General has to be recorded for the purpose of ease reference in days to come. This Court is informed that a search on the various websites for **Hodgkinson** invariably leads one to a Judgment of the Hon'ble Supreme Court of Canada rendered in 1994. This Canada Supreme Court Judgment is in **Hodgkinson *Vs. Simms***. Therefore, for the purpose of clarity, it is made clear that **Hodgkinson** principle referred to herein in ***Sheladia Associates*** supra by me is **Hodgkinson** principle as laid down by a English Court in ***Hodgkinson Vs. Fernie*** reported in ***140 ER 712.*** To be noted, 'ER' stands 'English Reports'. This Court considers it unnecessary to burden this order with extracts from **Hodgkinson**'s case as the simplified theorematic version of **Hodgkinson** principle laid down by the English Court and as instructively elucidated by Supreme Court has been given by me in ***Sheladia Associates*** case, relevant paragraphs of which have been extracted and reproduced elsewhere supra in this order.

In the light of the narrative thus far, the inevitable conclusion that one is drawn to is that no ground has been made to set aside or dislodge the impugned award rendered by a 2:1 majority. Consequently, instant OP fails and the same is dismissed. There shall be no order as to costs.

13.08.2020

Speaking Order: Yes/No

Index : Yes/No

gpa/sgl

M.SUNDAR, J.

gpa/sgl

O.P.No.431 of 2012

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