IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.03.2020

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THE HONOURABLE MR.JUSTICE M.SUNDAR

O.P. No.176 of 2015

Union of India,
represented by Chief Engineer,
MTP (Railways),
Egmore,
Chennai – 600 088. ... Petitioner

Vs

1. B.Engineers & Builders Limited,
72-A, Maheswar Industrial Estate,
Bhubaneswar, 751 101.

2. T. Jayam

3. B.Srinivasan
4. B.N.S.Chalam,
Senior Divisional Engineer / South,
Southern Railway,
Madurai
(Arbitrator) .... Respondents
(R2 to R4 deleted vide this order)

Original Petition filed under Section 34 of the Arbitration and Conciliation Act to set aside the award dated 07.04.2011 as confirmed by the order in the application under Section 33 of the Act, dated 18.05.2011 made in relation to disputes arising out of Agreement dated 20.06.2000 bearing No.MTP/Civil/357/2000 in so far as that portion of the award disallowing the claims of the petitioner and the award in relation to claims 3 and 8 are concerned.

For petitioner : Mr.P.T. Ramkumar
Standing Counsel

For respondents : Mr. A. Manoj Kumar
Mr.M.Balaji for R1
R2 to R4 – deleted

ORDER

Mr.P.T.Ramkumar, learned Standing counsel for Southern Railways on behalf of petitioner and Mr.Manoj, learned counsel for the first respondent are before this Court.

2. To be noted, respondents 2 to 4 are three individuals who constituted a three member Arbitral Tribunal which made an Arbitral Award dated 21.01.2010 (hereinafter 'impugned award' for the sake of brevity and clarity) which has been called in question in the instant Original Petition (hereinafter 'OP' for brevity).

3. It is made clear that challenge to an Arbitral award under

Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)' {'A and C Act' for the sake of brevity} is neither an appeal nor a revision. It is a mere challenge to an award within the contours of the eight pigeon holes set out in Section 34 of 'A and C Act'.

4. With the aforesaid prefatory note, this Court proceeds to examine instant OP, which was presented in this Court nearly a decade ago. To be precise, instant OP was presented on 08.09.2011 and ultimately a number was assigned only in 2015. In this regard, this Court deems it appropriate to refer to the observation made by Hon'ble Supreme Court in the case of ***State of Bihar vs. Bihar Rajya Bhumi Vikas Bank Samiti*** reported in ***(2018) 9 SCC 472.*** Though Bhumi Vikas Bank is an authority for the broad proposition under Sub section (5) of Section 34 of the Act which is directory and not mandatory, it was observed in Paragraph 26 of Bhumi Vikas Bank case law that every Court hearing applications/petitions under Section 34 shall make an endeavour to dispose of petitions under Section 34 of A and C Act within one year, time frame prescribed in sub-section (6) of Section 34. This means that one year time frame for disposal of petitions under Section 34 has immense sanctity. For the sake of convenience and clarity sub section (6) Section 34 of A and C Act is extracted and

reproduced infra.

34. Application for setting aside arbitral award. –

(1).....

(2) .....

(3) ....

(4) ......

(5) .....

(6) An application under this Section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.

It has become necessary to refer to Bhumi Vikas Bank case and observation therein, in the light of instant OP being presented in this Court in 2011 numbered in 2015 and ultimately being heard out in 2020.

5. Be that as it may, owing to the scope of Section 34 (alluded to supra) instant OP has to be tested by perambulating within the contours and confines of Section 34 of A and C Act and the proceedings in instant OP is a summary procedure as laid down by Hon'ble Supreme Court in the case of ***Fiza Developers case Fiza Developers and Inter-Trade Private Limited vs AMCI (India) Private Limited reported in (2009) 17 SCC 796***. Fiza Developers

principle is to effect that petitions 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. To be noted, this Fiza Developers principle was reiterated by Hon'ble Supreme Court subsequently in ***Emkay Global Financial Services Limited Vs. Gindhar Sondhi reported in (2018) 9 SCC 49***. In Emkay Global, Hon'ble Supreme Court held that Fiza Developers principle is a step in the right direction.

6. This Court now straight away embarks upon the exercise of examining instant OP. Instant OP, as alluded supra, is one challenging an Arbitral Award dated 21.01.2010. The fulcrum of the arbitration proceedings is a contract (hereinafter 'said contract' for the sake of convenience and clarity), which is described as follows :-

> "Contract Agreement No.MTP/Civil/357-2000 dt.20.6.2000 executed the parties hereto for the work of "MRTS – Phase II – Thirumylai-Velachery Stations Building Works – Pile foundation and General RCC works in columns, beams, slabs etc., of the station buildings at Thiruvanmiyur"

7. Certain disputes arose between the Contractor and the Railways qua said contract resulting in arbitration clause being invoked and the same culminated in the impugned award. A careful perusal of the impugned award reveals that both contractor i.e., first respondent before this Court as well as Southern Railways i.e., petitioner before this Court had made 9 claims before the Arbitral Tribunal. Two claims made by the Contractor were allowed and 5 claims made by the Railways were allowed. Instant OP is directed against the four claims of Railways that were negatived and the two claims of the contractor that were allowed.

8. A summary of the award which is culled out from the impugned award reads as follows :

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12-1

SUMMARY OF THE AWARDS

RAILWAYS'S CLAIM AND AWARDED AMOUNT

Claim No.	Description of claim	Amt claimed by Railways	Amt awarded by the Arbitral Tribunal (Rs)
1.	Recovery towards shortage of cement to the tune of 2499 bags.	7,05,790/-	3,35,241/-
2.	Recovery towards shortage of steel to the tune of 63.89 MTs	21,22,505/-	10,61,304/-
3.	Recovery towards shortage of empty gunny bags	72,414/-	NIL
4	Use of 12mm liner instead of 8 mm liner for piles stiffeners	6,07,919/-	NIL
5.	Restricting the cement content for M20 concrete to 422 Kg	37,675/-	NIL
6.	Recovery towards insurance for the machinery procured against machinery advance given by the Railways	59,575/-	NIL
7.	Recovery towards non-conducting of permeability test	65,000/-	65,000/-
8.	Recovery towards non-conducting of chemical test for the aggregate	18,600/-	18,600/-
9.	Recovery towards non-conducting of chemical test for coarse aggregate	18,600/-	18,600/-
	TOTAL AMOUNT AWARDED		Rs.14,98,745/-

CONTRACTOR'S CLAIM & AWARDED AMOUNT

Claim No.	Brief description of the claims	Amt claimed by the contractor	Amt awarded by the Arbitral Tribunal (Rs)
1	Refund of Sales Tax	Rs.10,00,000/-	NIL
2	Extra rate for doing increased depth in the foundation	Rs.10,25,000/-	NIL
3	Balance value of work executed but not paid after the last on account bill	Rs.5,34,000/-	Rs.2,49,130/-
4	Extra length of 1025 running meter	Rs. 57,65,625	NIL
5	Extra work for additional work executed detailed to be furnished	Rs.7,00,000/-	NIL
6	Enhanced rate for value of work executed beyond the original currency period of 27.4.01 during extended currency upto 31.1.2003	Rs.1,07,43,225/-	NIL
7	Idle hire charges towards machinery	Rs.1,24,80,000	NIL
8	Refund of SD	Rs.28,61,770	Rs.28,61,770
9	(a) Interest 18% per annum for above claim from 1.2.03 to 13.7.03	Rs.34,75,852/-	NIL
	(b)Future Interest at 18% per annum on all claims from 15.3.03	to be quantified by the Tribunal	
	TOTAL AMOUNT AWARDED		Rs.31,10,900/-

(T.JAYAM) 7/4/2011 (B.SRINIVASAN) (B.N.S.CHALAM)

9. A perusal of the summary of the impugned award reveals that claims Nos.3 & 8 of the contractor / first respondent have been allowed and the claims 3 to 6 of the Railways have been negatived. The reason for either allowing or negativing the same and the quantum have been given in a tabular form in the award and relevant portions with regard to the claims 3 & 8 of the contractors, which were allowed can be usefully extracted and it reads as follows :-

Claim No.3	Balance value of work executed but not paid after the last on account bill	Though the Contractor initially claimed an amount of Rs.5,34,000/- they have agreed for an amount of Rs.2,49,130/-	Railways had also accepted the balance amount available as Rs.2,49,130/- and they submitted this amount has not been released since the contractor is due to return 2499 bags of cement and 69.83 MT of steel.	Tribunal directs that this amount due to contractor may be paid after recovering the dues from contractor as per this award.	5,34,000
Claim No.8	Refund of SD	Contractor requests refund of SD to be paid by the Railways.	Railways have accepted that an amount of Rs.[illegible] is available with Railways and was not refunded due to the non settlement of final bill and non return of cement and steel.	On account of the fact [illegible] both Railways and contractor have agreed regarding the final bill amount [illegible] balance of cement and steel available with the Railways. Tribunal orders that the amount of SD can be released after making final bill payment and adjusting the dues recoverable as per this award.	

10. To be noted, 7 columns are captioned likewise with regard to four claims of Railways, which were negatived namely claims 3 to 6 single arrow page 10- 6

Claim No.	Details of Claim	Submission of Railways	Submission of contractors	Tribunal's decision	Claim amount Rs.	Award amount Rs.
3	Recovery towards shortage of empty gunny bags	Railways have argued that the recovery is towards non recovery of cost of empty bags not returned.	Contractor argued that cement register file did not show whether the cements issued were paper bags or polythene bags and hence the recovery not accepted by the contractors	Tribunal on hearing and perusing the records submitted noted that the contractor has not objected to the recovery on for made in their bills and also notes that the argument of the contractor regarding non establishment whether the empty cement bags due to be returned are of gunny bags or cement paper bags. In the absence of sufficient proof to establish of the bags due to be returned are jute bags the claim of the railways is rejected.	72,4[illegible]	Nil
4	Use of 12mm liner instead of 8 mm liner for piles stiffeners	Railways in their submission stated that these recoveries were of the result of CVC's inspection.	Contractor argued that contractor supplied and used 12mm liner instead of 8 mm as per the direction of site engineer incharge and recovery can not be made at a distance date based on the recommendations of the CVC.	Tribunal observed that contractor has executed the work as per the directions of engineer incharge and certified as completed and payment has also been made for 12mm. Hence it is not appropriate to recover the difference in cost as higher thickness material has been used and certified. Tribunal noted that contractor can not be penalised for CVC's pointed out recoveries as he has executed the work as per directions of engineer in charge. Hence this claim of Railways is disallowed.	5,77,015/-	Nil
5	Restricting the cement content for M30 concrete to 422 Kg	Railways in their submission stated that these recoveries were of the result of CVC's inspection.	Contractor argued that he has executed the work as per the direction of site incharge and cement was issued for the work by the site incharge hence recoveries cannot be made now for excess qty of cement used and certified by the engineer.	Tribunal observed that contractor has executed the work as per the directions of engineer incharge and certified as completed and payment has also been made for actual quantity of cement used. Hence it is not appropriate to recover the difference in qty. Tribunal noted that contractor can not be penalised for CVC's pointed out recoveries as he has executed the work as per directions of engineer in charge. Tribunal also noted that qty of cement used have been recorded and accepted by both the parties. Tribunal had also allowed railways claim for shortage of 2499 bags. Hence this claim of Railways is disallowed.	[illegible],875/-	Nil

(T. JAYAM) 7/4/2011 (K. SRINIVASAN) (B.N.GOTHALAM)

6	Recovery towards insurance for the machinery procured against machinery advance given by the Railways	Railways during their presentation submitted that insurance for the machinery purchased by the advances granted by Railways have not been done by the contractor. This was detected by the CVC during their inspection and hence proposed to be recovered.	Contractor argued that advance granted by Railways have been recovered and there have been no default by contractor. machinery has been left at site. Hence recovery can not be enforced at this distance date.	Tribunal observed that the contractor has not taken insurance only for the extended period of currency between 4.10.01 & 30.4.07 and tribunal also noted the work was abandoned by the contractor beyond 31.5.07. Though it is mandatory that insurance shall be current till final completion of work, since contractor abandoned the work and contractor has not taken back the machinery recovery of insurance for this period is not justified. Recovery is against natural justice.	59,875/-	Nil
7	Recovery towards non-conducting of permeability test.	Railways submitted that these recoveries are based on CVC's inspection.	Contractor argued that in as much as railways have not insisted for these tests and certified the work and payment made for this, insisting as works for which the test certificate is required. Hence this amount should not be recovered.	Tribunal noted that these are mandatory tests as per the agreement and contractor by default should have conducted those tests and submitted the test certificates in respect of their claim for the items of work which require these certification. Recovering amount which include cost of these tests without actually doing the tests is violation of contractual obligation and have to be recovered from the contractors dues.	85,000/-	85,000/-

(T. JAYARAM) (B. SRINIVASAN) (B.N.S.C. PALANI)

11. Having perused the most relevant claims which constitute the crux and gravamen of the instant OP, this Court now embarks upon the exercise of examining if challenge to impugned award falls under any one of the eight pigeon holes under Section 34. A careful perusal of the relevant claims which constitute the crux of instant OP leaves this Court with the considered view that it does not fall under any of the 8 pigeon holes. To be noted, it is nobody's case that sufficient opportunity was not given or any of the party was under any incapacity qua arbitral tribunal. Likewise, it is nobody's case that the

arbitration agreement is not valid, with regard to public policy, three juristic principles, culled out by Hon'ble Supreme Court in Western Geco case was noticed. To be noted, for testing an Arbitral Award qua public policy, Hon'ble Supreme Court culled out three juristic principles in Western Geco case being ***ONGC Limited Vs. Western Geco International Limited reported in (2014) 9 SCC 263***. Those three juristic principles are a) judicial approach, b) natural justice principles (NJP) and c) irrationality / perversity. Not only did the Hon'ble Supreme Court cull out three distinct juristic principles, but it also laid down the touch stone on which these three juristic principles have to be tested in a Section 34 OP. With regard to judicial approach, the touch stone is fidelity of judicial approach; With regard to NJP, the acid test, is audi alteram partem and with regard to irrationality / perversity the litmus test is time honoured Wednesbury principle of reasonableness. To be noted Western Geco and Associates builders cases were rendered by Hon'ble Supreme Court prior to 23.10.15 i.e. prior to the date on which the term 'public policy' was statutorily explained in A and C vide Explanation 1 to Section 34 (2) (b) (ii). Associate Builders case is ***Associate Builders vs. Delhi Development Authority*** reported in ***(2015) 3 SCC 49.*** However, post 23.10.15, these three juristic principles and the touch stone acid test and litmus test laid down by Hon'ble Supreme Court in Western Geco and reiterated in Associates Builders case was reaffirmed by Hon'ble Supreme Court in ***Centro trade Minerals and Metal Inc Vs. Hindustan Copper Limited reported in (2017) 2 SCC 228***. Therefore, these three juristic principles hold the field when it comes to testing an arbitral award qua public policy.

12. This Court on a careful perusal of instant case file finds that the instant OP is more in the nature of a regular first appeal under Section 96 of 'The Code of Civil Procedure, 1908' ('CPC' for brevity) and it does not bring the challenge to the arbitral award within the ambit of any of the eight pigeon holes adumbrated in Section 34 of A and C Act and/or elucidative principles laid down by Hon'ble Supreme Court in this regard.

13. Before parting with this case, it becomes necessary to notice that the nature of OP as well as the arguments advanced before this Court makes it clear that no malafides whatsoever have been alleged against the three Arbitrators, who constituted the three member Arbitral Tribunal, which made the impugned award. Therefore, adopting the well established principle laid down in decision of

Division Bench of Delhi High Court dated 03.09.2008 in LPA No.313 of 2007. Respondents 2 to 4 stand deleted from the array of parties

14. In the light of the narrative thus far, instant OP is dismissed but considering the nature of the submissions advanced, parties are left to bear the respective costs.

15. After order was dictated, learned counsel for petitioner made a request qua post award interest. A perusal of the impugned award brings to light that the Arbitral Tribunal has awarded Simple Interest at the rate of 12%. This is articulated in penultimate paragraph of the impugned award which reads as follows:

> *This award shall be honored by both the parties within 45 days from the date of this award failing which simple interest at the rate of 12% is applicable for both the parties for their respective award payments.*

16. Mr.P.T. Ramkumar, learned standing counsel for petitioner / Railways made a request that considering the length of time between the impugned award and the date of disposal i.e., today (02.03.2020), this Court may consider holding the rate of interest alone to be 9%

instead to 12%. Reacting to this, on instructions from Mr.P.Sankara Narayanan, Director, Projects, B.Engineers & Builders Ltd. / first respondent Company, who is present in Court, learned counsel for the first respondent submitted that the first respondent consents for this scaling down of interest to 9% subject to this order of this Court not being subjected to further challenge. In other words, if this order is carried in appeal, it should be left open to first respondent to insist on 12% interest. Therefore, by consent, interest of 12% awarded qua impugned award will now stand scaled down to 9% subject to aforementioned rider.

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Index: Yes/ No
Internet: Yes/No
Speaking Order/Non-speaking Order
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