

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

**Dated : 17.03.2020**

**Coram**

**THE HONOURABLE MR. JUSTICE M.SUNDAR**

**O.P.No.52 of 2015**

P.Harivardhan

Petitioner

**Vs.**

1. The Director  
Nittany Creative Solutions (P) Ltd.,  
141, Prakash Towers  
2<sup>nd</sup> Floor  
Old Mahabalipuram Road  
Kottivakkam, Chennai – 41

2. Mrs.T.Thirupurasundari  
Advocate (Sole Arbitrator)  
411, New Addl. Law Chambers  
Chennai – 600 104

Respondents

...

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 08.08.2014 made in A.P.No.30/NCS/2014 by the 2<sup>nd</sup> respondent.

For Petitioner : Mr.B.Srinivasan

For Respondent : Mr.K.Newlin Frederick for R1

**ORDER**

Instant 'Original Petition' ('OP' for the sake of brevity) was presented in this Court on 10.11.2014 (more than half a decade ago) laying a challenge to an 'arbitral award dated 08.08.2014 bearing reference A.P.No.30/NCS/2014' ('impugned award' for brevity) made by an Arbitral Tribunal constituted by a sole Arbitrator.

2. Today, Mr.B.Srinivasan, learned counsel for petitioner and Mr.K.Newlin Frederick, learned counsel for contesting first respondent are before this Court. To be noted, the sole Arbitrator (a Member of this Bar), who constituted the Arbitral Tribunal, has been arrayed as second respondent. Considering the grounds of challenge qua impugned award, this Court deletes the second respondent from the array of respondents in instant OP. Therefore, from hereon, contesting first respondent becomes sole respondent in instant OP.

3. Short facts shorn of elaboration or in other words, a thumb nail sketch of facts imperative for appreciating this order are that there was an 'employment agreement dated 27.09.2013 between the petitioner and the

respondent' (hereinafter 'said contract' for clarity); that the respondent company, which this Court is informed, is providing Business Development service to various international companies in several domains, appointed the petitioner before this Court as Call Centre Executive on and from 27.09.2013; that the petitioner absented himself from 30.01.2014 without prior intimation or sanctioned leave; that the respondent company sent a show-cause notice dated 17.03.2014 to the petitioner; that there is an arbitration clause in said contract and therefore, respondent company invoked the arbitration clause making a total claim of Rs.1,30,500/- under five different heads; that the total claim of Rs.1,30,500/- was made with a prayer for the same with interest at the rate of 12% per annum from 27.09.2013 to the date of actual payment; that the first respondent company appointed a member of this Bar as sole arbitrator; that the sole arbitrator entered upon reference and passed the impugned award after full contest; that the impugned award is now under challenge in instant OP under Section 34 of A and C Act.

4. From hereon for the sake of convenience and clarity, now sole respondent company shall be referred to as 'said company' and likewise petitioner shall be referred to as 'said employee', both for the sake of clarity and convenience. To be noted, said employee is petitioner before

this Court in instant OP and he was the sole respondent before the Arbitral Tribunal. Likewise, said company, which is the sole respondent now in instant OP before this Court, was the lone claimant before the Arbitral Tribunal.

5. From the submissions made by learned counsel for said employee, it came to light that challenge to impugned award fits into Section 34(2)(b)(ii) read with Clause (ii) of Explanation 1 of A and C Act. In other words, challenge to impugned award fits into the slot of being in conflict with public policy of India owing to being in contravention with fundamental policy of Indian law.

6. To be noted, as already mentioned supra, instant OP was presented in this Court on 10.11.2014, which is before 23.10.2015 amendment to A and C Act. To be noted, on and from 23.10.2015 expression 'conflict with the public policy of India' stood statutorily explained vide Explanation 1 to Section 34(2)(b)(ii) of A and C Act. However, the slot of 'being in conflict with public policy of India' is available to said employee (for assailing impugned award), who is the petitioner before this Court. This takes us to how Hon'ble Supreme Court of India explained the expression 'conflict with public policy of

India' prior to 23.10.2015. Two lead judgments in this regard are **ONGC Ltd. v. Western Geco International Ltd.**, reported in **(2014) 9 SCC 263** and **Associate Builders Vs. Delhi Development Authority** reported in **(2015) 3 SCC 49**. The principle regarding public policy laid down in **Western Geco** case was reiterated by Hon'ble Supreme Court in **Associate Builders** and the relevant paragraph in Associate Builders case law (as reported in SCC) is Paragraph 28, which reads as follows:

*28. In a recent judgment, ONGC Ltd. v. Western Geco International Ltd. [(2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , this Court added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Court held: (SCC pp. 278-80, paras 35 & 38-40)*

*“35. What then would constitute the ‘fundamental policy of Indian law’ is the question. The decision in ONGC [(2003) 5 SCC 705 : AIR 2003 SC 2629] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression ‘fundamental policy of Indian law’, we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian*

*law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a 'judicial approach' in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.*

*38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in*

*accordance with the principles of natural justice. Besides the celebrated audi alteram partem rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.*

*39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)] principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are*

available.

40. *It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest."*

7. To be noted, **Western Geco** case was rendered on 04.09.2014 and **Associate Builders** case reiterating **Western Geco** was rendered on 25.11.2014, both of which are prior to 23.10.2015. From a careful perusal of instructive illustration of the expression 'conflict with public policy' by Hon'ble Supreme Court, it emerges clearly that Hon'ble Supreme Court has culled out three distinct juristic doctrines qua public policy and has also laid down three distinct tests for testing each of those juristic doctrines when it comes to challenge to an arbitral award.

8. The three distinct juristic doctrines are a) judicial approach, b)'Natural Justice Principles' ('NJP' for brevity), and c) Irrationality / perversity.

9. Hon'ble Supreme Court, while applying these three doctrines to test whether an arbitral award is in conflict with public policy, has laid down that the tests are a) fidelity of judicial approach, b) *audi alteram partem* and c) time honoured *Wednesbury* principle of reasonableness respectively. In other words, the juristic doctrine of judicial approach is to be tested on the touchstone of fidelity of judicial approach, NJP doctrine has to be tested on the bedrock of *audi alteram partem* philosophy and irrationality/perversity doctrine has to be tested by applying the time honoured *Wednesbury* principle of reasonableness. This Court will now be setting out the grounds of challenge qua impugned award in instant OP infra.

10. Suffice to say that from the grounds of challenge to the impugned award, one of the three juristic doctrines laid down by Hon'ble Supreme Court, namely judicial approach to be tested on the touchstone

of fidelity of judicial approach falls for consideration in the instant case.

The ground of challenge as articulated by petitioner is as follows:

*'1. The 2<sup>nd</sup> Respondent herein ought not to have hurriedly proceeded with and passed an award dt. 8.8.2014.*

*2. The 2<sup>nd</sup> Respondent ought to have granted some more opportunity to the petitioner by issuing further notice for passing the award.*

*3. The 2<sup>nd</sup> Respondent ought to have seen that the petitioner also appeared and engaged his counsel, considering the nature of situation, the 2<sup>nd</sup> Respondent ought to have given opportunity to the petitioner to contest the matter.*

*4. The petitioner further submits that the petitioner has not filed any similar petition so far. The fault of the counsel may not be allowed to suffer the petitioner. The petitioner is ready and willing to contest his case. The petitioner pays a court fee of Rs.585/-'*

11. To be noted, said company has made a claim of Rs.1,30,500/- under five heads, break up of which reads as follows:

|                                              |                     |
|----------------------------------------------|---------------------|
| <i>' Loss of Profits and opportunities</i>   | <i>Rs.63,000/-</i>  |
| <i>Training alternate person</i>             | <i>Rs.10,500/-</i>  |
| <i>Training cost of the Respondent</i>       | <i>Rs.31,500/-</i>  |
| <i>Compensation in lieu of notice period</i> | <i>Rs.10,500/-</i>  |
| <i>Arbitration Cost</i>                      | <i>Rs.15,000/-'</i> |

12. In the discussion part of the impugned award it has been set out in an uncertain terms/categorically that, three of the aforementioned five heads, namely Rs.63,000/- (Rupees Sixty Three Thousand only) towards loss of profits and opportunities, Rs.10,500/- (Rupees Ten Thousand Five Hundred only) towards training alternate employee and Rs.31,500/- (Rupees Thirty One Thousand Five Hundred only) towards training cost of said employee were negatived. Two of the aforementioned five heads, namely Rs.10,500/- (Rupees Ten Thousand Five Hundred only) towards compensation in lieu of notice period and arbitration cost of Rs.15,000/- (Rupees Fifteen Thousand only) alone were granted / acceded to. Therefore, out of a total claim of Rs.1,30,500/-, only Rs.26,000/- was awarded, but in the operative portion of impugned award, a sum of Rs.57,000/- (Rupees Fifty Seven Thousand only) with future interest of 8% per annum has been awarded by including Rs.31,500/- (Rupees Thirty One Thousand Five Hundred only) towards training cost also. Learned counsel for said company tried to explain this away by saying that this is a typographical error and that the same subsequently stood corrected by taking recourse to Section 33 of A and C Act.

13. This Court is unable to accept this submission of learned counsel for respondent for two reasons. One reason is, there is no

material placed before this Court regarding Section 33 or correction of the award under Section 33. This Court is of the view that grant of time to place before this Court a corrected award copy by the respondent at this distant point of time will clearly militate against the time line drawn up for disposal of OPs under Section 34. To be noted, one year time line has been drawn vide sub-section (6) of Section 34 and Hon'ble Supreme Court in *Bhumi Vikas* case [*State of Bihar Vs. Bihar Rajya Bhumi Vikas Bank Samiti* reported in (2018) 9 SCC 472], more particularly in Paragraph 26 has made an observation that every Court dealing with Section 34 petition shall make every endeavour to dispose of applications within one year. Though, sub-section (6) was introduced in the statute books only on and from 23.10.2015, expeditious disposal being one of the pillars of 'Alternate Dispute Resolution' ('ADR') mechanism, the time line cannot be given a go by. As already alluded to supra, this OP is already half a decade old.

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14. The second reason is, a careful perusal of the impugned award leaves this Court with the considered view that there are other points which turn on judicial approach and the test for judicial approach, namely fidelity of judicial approach and therefore this incongruity

between discussion and decision part of impugned award is not going to be the clincher.

15. This Court notices at least three points (other than the aforementioned incongruity) and they are as follows:

a) Vide the impugned award, in the concluding paragraph it has been held that the arbitral proceedings stand terminated under Section 32(1) of A and C Act. Termination of arbitration under Section 32(1) is altogether a completely different concept entirely different from passing an award under A and C Act. To be noted, Section 32 of A and C Act reads as follows:

*' 32. **Termination of Proceedings** (1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).*

*(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where-*

*(a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute.*

*(b) the parties agree on the termination of the proceedings, or*

*(c) the arbitral tribunal finds that the continuation of the*

*proceedings has for any other reason become unnecessary or impossible.'*

A perusal of Section 32 captioned '**Termination of Proceedings**' brings to light that impugned award resorting to sub-section (1) of Section 32 is completely misplaced and misconceived. Even if it is construed as Section 32 as a whole, a perusal of Section 32 will reveal that impugned award is no case of termination. Therefore, this Court finds that there is clear lack of judicial approach in making the award. In other words, the impugned award in one breath accedes to two out of five slots of claim made by said company and passes an award in favour of said company, but concludes by saying that arbitration proceedings are terminated by Section 32(1) of A and C Act. To be noted, this aspect of impugned award has been tested on a demurrer by accepting (without acceding) Section 33 and correction of impugned award plea propounded by said company.

b) The second point noticed by this Court is the extract of the arbitration clause in the impugned award. The arbitration clause has

been extracted in the impugned award and the extract reads as follows:

*'...The said clause runs as follows:*

*“Arbitration: The terms of this employment.... held at Chennai..... provisions of Arbitration and Conciliation Act, 1996...reference.”*

*The petitioner has invoked this provision in the Employment agreement dated September 27, 2013, appointed the sole arbitrator and made A REFERENCE OF THE DISPUTE FOR RESOLUTION.'*

Arbitration agreement between the parties being arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act, (which is in the form of a covenant in said contract in instant case), is all too crucial, as the Arbitral Tribunal itself is creature of contract. In other words, absent arbitration clause within the meaning of Section 2(1)(b) read with Section 7,, there is no Arbitral Tribunal at all. The manner in which the arbitration clause has been extracted and reproduced in the impugned award leaves this Court with the considered view that the impugned award is vitiated by lack of judicial approach.

c) The third point noticed by this Court is repeated reference to Presenting Officer. There can be a counsel for a

claimant, but Presenting Officer gives an impression that the Arbitral Tribunal has dealt with the matter as if it is an enquiry in Service jurisprudence. This again cast a cloud over judicial approach.

16. Having set out three points noticed by this Court, this Court deems it appropriate to elaborate little more on one of the three doctrines enunciated by Hon'ble Supreme Court in Associate Builders case i.e., judicial approach and test for the same, namely fidelity of judicial approach. With regard to fidelity of judicial approach, this Court takes recourse to the celebrated Rojer Mathew Case [**Rojer Mathew case Vs. South Indian Bank Ltd.** reported in 2019 SCC OnLine SC 145] and Paragraphs 45 and 46 thereunder, which reads as follows:

*45. Subsequently, in L. Chandra Kumar v. Union of India, a Constitution Bench of seven judges of this Court examined reports of expert committees and commissions analysing the problem of arrears. The Malimath Committee Report (1989-1990) was also referred to, wherein it was found that many Tribunals failed the test of public confidence due to purported lack of competence, objectivity and judicial approach. This Court thus called for*

*drastic measures to elevate the standards of Tribunals in the country.*

*46. It was also reiterated that the exclusion of judicial review by High Courts was impermissible and providing direct statutory appeals to the Supreme Court impeded the common litigant from exercising his right to appeal because the appellate forum, being situated in Delhi, was inaccessible to many. While criticising the short terms of members and the lack of judicial experience of non-judicial members, this Court observed a need for establishment of an oversight mechanism to review the competence of all persons manning Tribunals. Thus, it was suggested that all Tribunals be brought under a 'Single Nodal Ministry', most appropriately the Ministry of Law & Justice, for overseeing of working of Tribunals. Liberty was however, granted to the Ministry to appoint an independent supervisory body to delegate the aforesaid functions. Further, the court noted that the procedure of selection of members of Tribunals, allocation of funds and all other intricacies would have to be culled out by such an umbrella organisation.*

17. Rojer Mathew Case was entirely pertaining to Tribunalisation.

A reference to Paragraphs 45 and 46 has been made only to emphasis the importance of judicial approach. Fidelity of judicial approach has been explained by jurists that it is not merely a case of moral philosophy test, but it is a case of objectivity and it is a case of a deep-rooted device.

**18. CONCLUSION:**

This Court makes it clear that the impugned award has been tested qua judicial approach by this Court by adopting the tests laid down by Hon'ble Supreme Court (alluded supra) in the aforesaid manner. To be noted, as already alluded to supra, impugned award has been tested by accepting (albeit on a demurrer) that it stood corrected regarding incongruity between discussion and decision by resorting to Section 33 of A and C Act. From the narrative thus far, this Court is left with the considered view that the impugned award is certainly vitiated by lack of judicial approach and therefore, impugned award cannot, but be set aside.

Resultantly, instant OP is allowed and the impugned award dated 08.08.2014 made in A.P.No.30/NCS/2014 is set aside. However, considering the nature of submissions made at the Bar today, this Court refrains itself from imposing costs.

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Speaking order: Yes/No

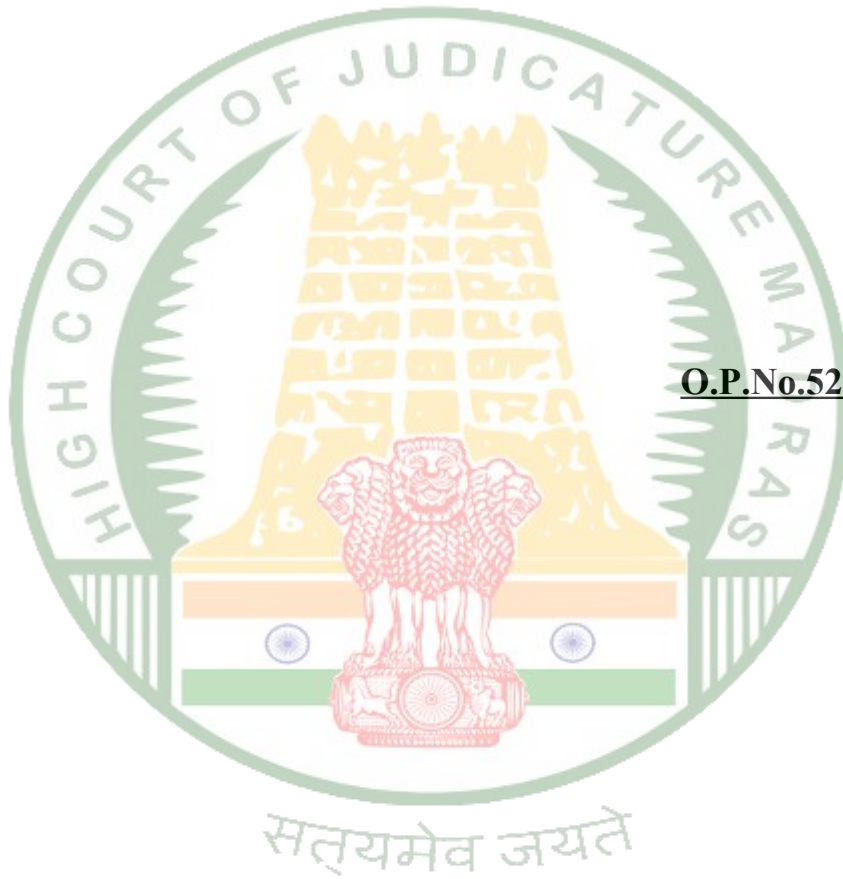
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