

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 16.03.2020

CORAM

THE HON'BLE Mr.JUSTICE **M.SUNDAR**

OP.No.585 of 2013

M/s.GVR Infra Projects Ltd.,
VBC Solitaire, 9th and 10th Floor,
No.47 & 49, Bazullah Road,
T.Nagar, Chennai-600 017.
Represented by its Resolution
Professional Ms.Vandana Garg.
(Amended as per order dated 12.02.2020 in
A.No.581 of 2020)

.. Petitioner

Vs.

1. M/s.Arul Jothi Constructions,
No.4/427, Kamatchi Colony 1st Street,
Tambaram Sanatorium,
Chennai-600 047.

2. Mr.B.K.Thanu Pillai
The Sole Arbitrator,
4-10-1, Arihant Majestic Towers,
Koyambedu, Chennai-600 107.

.. Respondents

This Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, praying to set aside the award dated 18.03.2013 in respect of all the claims/issues and the dismissal order dated 13.05.2013 passed

by the 2nd respondent and consequently, to pass a judgment or order and Decree in favour of the petitioner by allowing all the petitioners' claims.

For Petitioner : Mr.V.J.Arul Raj

For Respondents : Mr.G.Vijaya Kumar for R1
R2-Arbitrator

ORDER

Instant 'Original Petition' ('OP' for brevity) has been presented in this Court on 02.08.2013 over half a decade ago. Instant OP 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 and clarity.

सत्यमेव जयते

2. Challenge to an arbitral award under Section 34 of 'The Arbitration and Conciliation Act 1996' (hereinafter referred to as 'A and C Act' for brevity), going by the language in which Section 34 of A and C Act is couched, is by way of an 'application', but this Court is giving the nomenclature 'Original

Petition' ('OP' for brevity) for such applications under Section 34 of A and C Act. Therefore, this Court will continue to refer to instant matter as 'OP'. A OP under Section 34 of A and C Act is neither an appeal nor a revision. It is not even a full-fledged judicial review, but it is a limited judicial review within the contours and confines of Section 34 of A and C Act. By contours and confines of Section 34 of A and C Act, this Court refers to 8 slots adumbrated in Section 34 of A and C Act. This Court chooses to deploy the term 'slots' in preference to 'grounds', as instant OP is neither an appeal nor a revision and it is not even a full-fledged judicial review as already mentioned. 5 slots are adumbrated under Section 34(2)(a), 2 slots are adumbrated under Section 34(2)(b) and one slot figures under Section 34(2-A). To put it differently, instant OP is a mere challenge to an award. When it comes to 'challenge to an award', the principle is, if a petitioner/applicant is able to fit his case into any one or more of the eight slots snugly and neatly, the award will be dislodged/set aside. If that not be so, the award will not be interfered with. This is owing to 'minimum judicial interference' in 'Alternate Dispute Resolution' ('ADR' for brevity) mechanism, which is the sublime philosophy and salutary principle qua scheme of A and C Act. In this context, this Court chooses to describe the eight slots adumbrated in Section 34 as eight pigeon holes. To be noted, two of these pigeon holes i.e.,

conflict with public policy and patent illegality slots are even in the nature of keyholes/pinholes, as they have been further circumscribed by limiting factors, such as (a) not entailing review on merits, (b) making re-appreciation of evidence impermissible and (c) eliminating even erroneous application of law as a ground.

3. In the light of Sub Section (6) of Section 34 of A and C Act, instant OP is a vintage OP. To be noted, Sub Section (6) of Section 34 of A and C Act provides a time line of one year for disposal of applications assailing arbitral awards and the one year time line was emphasised by Hon'ble Supreme Court in *State of Bihar Vs. Bihar Rajya Bhumi Vikas Bank Samiti* reported in (2018) 9 SCC 472. To be noted, though *Bhumi Vikas* case law is an authority for the proposition that pre proceedings notice under sub-section (5) of Section 34 is only directory and not mandatory, there is an observation in the *Bhumi Vikas* case law that every endeavour should be made by courts dealing with Section 34 OPs to adhere to one year time line in sub-section (6) of Section 34. In any event, instant OP was filed prior to 23.10.2015. Therefore, the reckoning date can be the date of filing of instant OP. This Court is conscious of the fact that both Sub Sections (5) and (6) were inserted in Section 34 of A

and C Act on and from 23.10.2015, which is post presentation of instant OP. Without entering upon any discussion regarding applicability of amendments to pre 23.10.2015 proceedings, suffice to say that expeditious disposal is one of policies of 'Alternate Dispute Resolution' ('ADR') mechanism, this Court deems it appropriate to open with the observation that instant OP is a vintage OP.

4. **PREFATORY NOTE:**

Before proceeding further, it is necessary to make a small prefatory note regarding three facets of a petition assailing an arbitral award under Section 34 of A and C Act. The three facets are :

- (a) Scope;
- (b) Nature of disposal; and
- (c) Time line.

5. Having set out the scope, nature of disposal of instant OP and the time line, it is made clear that short facts shorn of elaboration will suffice.

6. With regard to facts, suffice to say that the same is captured in paragraphs 1.1 to 1.3 of the impugned award and this Court deems it appropriate to usefully extract the same:

1.1. *M/s.GVR Infra Projects Ltd, VBC solitaire, 9th & 10th floor, 47 & 49, Bazullah Road, T.Nagar, Chennai-600 017 (herein offer referred to as the claimant) has been obtained the contract for “Construction of Road over bridge in lieu of Existing LC.40 in between Vandalur and Guduvancheri Railway stations” from the Government of Tamil Nadu, Highways Department, represented by its Superintending Engineer, Projects Circle, H.R.S Campus, Chennai-600 025 (herein after referred to as the client). The contract Agreement was concluded on 12.11.2010 under agreement No.11/2010-11 for a contract value of Rs.14,64,51,953/- (Rupees Fourteen crores sixty four Lakhs fifty one thousands nine hundred and fifty three only). The period of contract fixed for completion was 24 Months.*

1.2.*The work was awarded to the claimant by the client based on prequalification eligibility criteria and the lowest bid price among the other participants in the Tenders.*

1.3. *The claimant has entrusted the above work to a Sub-contractor. M/s.Aruljothi constructions, No.4/27, Kamatchi Colony, 1st Street, Tambaram Sanatorium, Chennai-600 047, (herein after referred to as Respondent) on “Back to Back Basis” on 16.03.2011 as per Sub-Contract Agreement for a contract value of Rs.14,64,51,953/- (Rupees fourteen crores*

sixty four lakhs fifty one thousands nine hundred and fifty three only). But the period of contract fixed for completion was 20 Months.'

7. To be noted, impugned award is dated 18.03.2013 and it has been made by an Arbitral Tribunal constituted by a Sole Arbitrator.

8. There is no disputation or disagreement between the parties that Arbitration Agreement being an agreement within the meaning of Clause 12 (Captioned DISPUTES) of the Agreement captioned 'Sub Contract Agreement' dated 16.03.2011 entered into between the petitioner and first respondent. This Clause 12 reads as follows:

'12.DISPUTES: In case of any dispute arising between M/s.GVRIPL and the Sub-Contractor M/s.Aruljothi Constructions all efforts shall be made by mutual way of solution. If not the dispute shall be referred to arbitration as per arbitration and conciliation Act, 1996. The Sole Arbitrator shall be appointed by M/s.GVRIPL with the consent of the M/s.Aruljothi Constructions. The same shall be resolved in the jurisdiction of Court of Judiciary Chennai.'

9. Suffice to say that when disputes arose, initially, one Sole Arbitrator

was appointed and then there was a change of Sole Arbitrator. Petitioner made claims under seven heads, the details of which, as can be culled out from the impugned award are as follows:

'1.Claim for compensation for loss of profit and cost of materials issued to subcontractor @ 12.5% of the balance value of works arising out of the illegal termination of sub contract by respondent.

2.Claim for compensation of penalty due to the client @ 5% (Maximum) on the agreement value.

3.Claim for compensation of loss due to additional cost to be incurred for completion of balance works at the current market rates.

4.Claim for compensation of loss of overheads due to prolongation of contract period by 4 months.

5. Claim for recovery of balance of advance paid to respondent/AJC.

6. Claim for payment towards interest @ 18% on the claims.

7.Claim for compensation of cost of arbitration proceedings.'

10. The respondent before the Arbitral Tribunal (first respondent before this Court) made counter claims under five heads, details of which, as can be culled out from the impugned award, are as follows:

'18.The Respondent has submitted Five counter claims for adjudication by the Learned Arbitrator as detailed below:

COUNTER CLAIM NO.1:- Request payment for the work done by the Respondent i.e., formation of service Road to a Length of 365 M on A2

side Rs.5.00 Lakhs.

(i) The Respondent states that they have formed the service Road on A2 side to a length of 365M, in which the Respondent has received payment for the 50% of work and not paid for the balance 50% of work done; which works out to Rs.5.00 Lakhs. After the 7th R.A Bill, the claimant had received payment from the department and it has to be paid to the Respondent.

(ii) Therefore, the Respondent prayed that the Learned Arbitrator may be pleased to award a sum of Rs.5.00 Lakhs in favour of the Respondent in the interest of justice and equity.

COUNTER CLAIM NO.2:- Request payment of Rs.27,38,584/- which has been recovered excessively in the past 7 R.A. Bills.

(i) The Respondent states that in the 1st R.A.Bill to 7th R.A.Bill the claimant had recovered other than 12.5% recovery as detailed below:

1. Retention money	=Rs.11,24,168/-
2. Income Tax (TDS) 2%	=Rs. 3,93,458/-
3. Sales Tax (WCT) 2%	=Rs. 3,93,458/-
4. Departmental expenses	=Rs. 5,63,500/-
5. Difference in gross value and cheque value	=Rs. 2,64,000/-

Total =Rs.27,38,584/-

This excess recovery is against clause 2 of Sub-contract Agreement made by the claimant.

(ii) Therefore the Respondent prayed that the learned Arbitrator may be pleased to pass an award in favour of the claimant together with interest @ 18% per annum from 27-08-2011 date of realization in the interest of Justice and equity.

COUNTER CLAIM NO.3:- Request payment of Rs.1.241 crores due to prevention of profit earnings by the Respondent due to illegal Recovery made by the Claimant.

(i) The Claimant has totally recovered at 30.2% in each R.A.Bills as against clause 2 of Sub-Contract Agreement. The Respondent has requested the claimant to recover 10.16% against 30.2% recovery made.

(ii) The Claimant has not considered the above request of the Respondent vide EX-C05 & CO7 and stated on 24-08-2011 [EXC07] finally as follows:

“We can consider your request for reduction of GVR margin later provided that the work is successfully completed well within the stipulated period”.

(iii)The Respondent has not satisfied with the above conditions of the claimant and the claimant is not ready to keep up/maintain the reciprocal promises as per section 51 & 54 of Indian contract, 1872, the Respondent has no other way except to issue the orders of termination of Sub-Contract Agreement dated 16-03-2011 due to heavy Loss of finance.

(iv)Due to the claimant's conditional promise i.e., claimant will consider the request for reduction of their margin provided that the work is successfully completed well within the stipulated period, the Respondent has no other way except to Terminate the Sub-Contract Agreement dated 16.03.2011 since the Respondent was not willing to incur further Loss of finance. Thus the claimant has prevented the Respondent to carry out balance work.

(v)The Claimant has recovered 30.2% from each R.A.Bill which prevents the Respondent to earn 10% profit; which works out to Rs.1.241 crores.

(vi)Therefore the Respondent prayed that the learned Arbitrator may be

pleased to pass an award of Rs.1.241 crore in favour of the Respondent together with interest thereon@18% per annum from 27-08-2011 till the date of realization in the interest of Justice and equity.

COUNTER CLAIM NO.4:- Request payment of interest at the rate of 18% per annum from 27-08-2011 till the date of realization to the Respondent.

(i)The Respondent states that the claimant through acknowledging the Respondent's entitlements to the amounts claimed in the present counter claim, have unjustifiably withheld such amount thereby depriving the Respondent of the amounts with interest thereon at 18% per annum from 27-08-2011 till the date of realization.

(ii)Therefore the Respondent prayed that the Learned Arbitrator may be pleased admit the claim and pass an award for pament of interest there on at the rate of 18% per annum as per section 31(7) of Arbitration and conciliation Act, 1996 for the entire award amount from 27-08-2011 till the date of realization in the interest of Justice and equity.

COUNTER CLAIM NO.5:- Respondent claims the cost of these Arbitration proceedings.

(i) The Respondent confirmed that the question of cost is always at the discretion of the Arbitrator. However the Law on this subject can be found under section 35 of CPC and under section 31 (8) of the Arbitration and conciliation Act, 1996 and several decisions of supreme court and other High courts which mandate the Arbitrator to award costs.

(ii)Normally the cost follows the events. The principle is the successful party in dispute should get entire cost. Further the fee for the counsel, preparation of case papers, secretarial charges etc., will have to be incurred which is quite substantial and essential.

(iii) Therefore looking at every circumstances the Respondent prayed that

the learned Arbitrator may be pleased to Award reasonable amount of cost in favour of the Respondent and payable by the claimant in the interest of Justice and equity.'

11. After full contest, after detailed oral and documentary evidence, Arbitral Tribunal made the impugned award and relevant operative part has been summarised at the end of the award. The summation as can be culled out from the impugned award is as follows:

'AWARD OF THE ARBITRATOR

Whereas certain disputes arose between the claimant and the Respondent in respect of the Sub-Contract Agreement dated 16.03.2011; for the work of "Construction of Road over Bridge in Lieu of Existing Level crossing No.40 in between Vandalur and Guduvancheri Railway station" Whereas, I, B.k.Thanupillai Bsc (Engg) Chief Engineer, Highways, (Retired), 4.10.1, Arihant Majestic Towers, Koyambedu, Chennai-600 017, was appointed as Sole Arbitrar in accordance with clause 12 of the conditions of sub-contract agreement dated 16.03.2011. And whereas having held hearings on the disputes/claims/counter claims where the parties were duly represented during the hearings. Now, therefore, I the sole Arbitrator having taken upon the burden of reference and having heard both the parties on the disputes/claims/counter claims to their full satisfaction in all respects, having deliberated fully and considered thoughtfully various aspect placed before me by the parties having duly applied my mind in the matter in the light of the facts and circumstances of the case, I have

determined and decided them. I, sole Arbitrator, accordingly make my Award in respect of the claims/counter claims as under:

Claim No.1: *An award is passed rejecting the claim of the claimant as there is no loss of profit met with by the claimant and they are not entitled to receive the balance cost of materials from the Respondent since the materials were left at site due to the termination of Sub-Contract Agreement dated 16-03-2011 by the Respondent. Hence, I am not inclined to admit the amount of Rs.1.55 Crores claimed by the claimant.*

Counter claim No.1: *An award is passed rejecting the counter claim of the Respondent as there is no evidence submitted to substantiate the counter claim.*

Claim No.2: *An award is passed rejecting the claim of the claimant as the same is not susceptible for evaluation and assessment as to the reasonableness and correctness.*

Counter claim No.2: *An award is passed admitting the counter claim of the Respondent and directing the claimant to pay an amount of Rs.14,70,796/- (Rupees Fourteen Lakhs seventy thousand seven hundred and ninety six Only), towards the refund of Retention money, excess recovery and difference in expenses i.e., Gross value and cheque value.*

Claim No.3: *An award is passed rejecting the claim of the Claimant since this claim is not acceptable one.*

Counter Claim No.3- *An award is passed rejecting the counter claim of the Respondent since it is not admissible.*

Claim No.4: *An award is passed rejecting the claim of the claimant since it is not admissible.*

Counter claim No.4: *An award is passed directing the claimant to pay*

an interest at the rate of 12% per annum from 28.08.2011 till the date of realization for the awarded amount.

Claim No.5:- An award is passed admitting the claim of the claimant and directing the Respondent to refund an amount of Rs.6.00 Lakhs (Rupees six lakhs only) to the claimant towards the interest free advance balance amount.

Counter Claim No.5: An award is passed that the Respondent themselves will bear their costs.

Claim No.6: An award is passed rejecting the claim of the claimant.

Claim No.7:- An award is passed that the claimant themselves will bear their costs.

CONCLUSIVE AWARD:

(i)An award is passed admitting the counter claim No.2 of the Respondent for an amount of Rs.14,70,796/-

(ii)An award is passed admitting the claim No.5 of the Claimant for an amount of Rs.6,00,000/-

(iii) Balance awarded amount to be paid by the claimant to the Respondent is Rs.8,70,796/- (Rupees Eight lakhs seventy thousand seven hundred and ninety six only).'

12. Assailing the impugned award, instant OP has been filed.

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13. Mr.V.J.Arul Raj, learned counsel for petitioner in instant OP and Mr.G.Vijayakumar, learned counsel on record for first respondent are before this Court. Second respondent is Arbitrator, who made the impugned award.

14. Instant OP placed before this Court as part of case file reads as follows:

**'PETITION FILED UNDER SECTION 34 OF THE
ARBITRATION AND CONCILIATION ACT, 1996**

The petitioner above named begs to state as follows:

(1) The petitioner is M/s.GVR Infra Projects Ltd., VBC Solitaire, 9th and 10th Floor, No.47 & 49, Bazullah Road, T.Nagar, Chennai-600 017 duly represented by it's Resolution Professional Ms.Vandana Garg of Petitioner Company.

The address for service of all notices and processes on the Petitioner in the above petition is that of her counsel M/s.T.Mathi, V.J.Arulraj and Navaneethakrishnan, Advocates, 170 Law Chamber, High Court Campus, Chennai-600 104.

(2) The 1st Respondent is M/s.Arul Jothi Constructions, No.4/427, Kamatchi Colony 1st Street, Tambaram Sanatorium, Chennai-600 047.

The 2nd Respondent is Mr.B.K.Thanu Pillai, The Sole Arbitrator, 4-10-1, Arihant Majestic Towers, Koyambedu, Chennai-600 107.

The address for service of all notices and processes on the Respondents in the above petition are the same as stated above.

(3) The Petitioner begs to prefer this Arbitration Original Petition under Section 34 of the Arbitration and Conciliation Act, 1996 against the matter of sub-contract Agreement dated 16-03-2011 for "Construction of Road Over Bridge in lieu of the Existing LC No.40 between Vandalur and Guduvancheri Railway Stations" on back to back basis for a contract value of Rs.14,64,51,953/-(Rupees fourteen crore sixty four lakhs fifty one thousand nine hundred and

fifty three only). The Sub-contract agreement was executed at Chennai and the Sole Arbitrator passed the award on 18-03-2013. Section 33 Application for correction in the Award was filed on 16-04-2013 by the Petitioner which was disallowed on 13-05-2013.

(4) Brief Facts of the case:

The Petitioner is a Company duly incorporated under the Companies Act and actively involved in various Infrastructure Projects through-out India and has earned a very good name and reputation, goodwill and successfully completed many mega projects. The Petitioner was awarded the Project of "Construction of Road Over Bridge in lieu of the Existing LC No.40 between Vandalur and Guduvancherry Railway Stations "vide Letter No.1230/2002/LC 40/AE1 dated 07-10-2010 by the Superintending Engineer (Highway), Project Circle, Government of Tamil Nadu, Chennai-600 025. The Petitioner commenced the work as per the terms and conditions of the Project and later on the 1st Respondent was given a back to back sub-contract agreement dated 16-03-2011 to carry out the works. The 1st Respondent unilaterally terminated the agreement contrary to the provisions of the agreement and to resolve the disputes it was agreed between the Petitioner and 1st Respondent to appoint 2nd Respondent as Sole Arbitrator and after hearing both the parties passed an Award against the Petitioner and similarly dismissed Petitioner's Application under Sec 33 of Arbitration and conciliation Act on 13-05-2013. Five claims besides interest for claim amount and cost of Arbitration of the Petitioner were dismissed and Part counter claim of the first Respondent was allowed by the Arbitrator.

(5) Aggrieved by the said Award and dismissal of Sec 33 application, the Petitioner has no other remedy except to prefer this Arbitration Original Petition on the following among other

GROUND

- 1. The Award of the Sole Arbitrator is against the recitals of the Sub-contract Agreement clauses and provisions of law.*
- 2. The Arbitrator has failed to consider the terms and conditions of the Sub-Contract agreement and given the Award in total contravention of the clauses of the said Agreement.*
- 3. There is no dispute in execution of sub-Contract agreement between the parties and all the terms and conditions reduced in writing in the said Agreement are not only binding between the parties*

but also on the Arbitrator.

4. First Claim of Petitioner for compensation for loss of profit and cost of materials @ 12.5% of balance of work amounting to Rs.1.55 crore has been rejected by the Arbitrator on the ground that it is a new claim and initial mutual resolution was not resorted to and that materials has been left over by Respondent 1 at the work site. The Arbitrator has failed to consider the Sub-Contract agreement clause regarding the time frame and method of completion of the work. Regarding claim for compensation for loss of profit and cost of materials issued to the Sub-Contractor @ 12.5% of the balance value of works arising out of the illegal termination of Sub-Contract by 1st respondent, the petitioner has given elaborate reasons in the claim statement furnished to the Sole Arbitrator. The claim statement filed by the petitioner before the Sole Arbitrator may be read as part and parcel of this petition. The Sole Arbitrator has not appreciated the ground situations and loss occurred to the petitioner and has made an observation that the respondent has left the materials at the site which is contrary to the facts and such plea was not even raised by first Respondent as it is a fact that the materials supplied were consumed by first respondent and amounts were paid on the bills raised. The Arbitrator has not specifically pointed out in his award the exact quantity of materials, their cost left over at the site by the 1st respondent and has not passed a speaking order. Material being leftover is not at all found in the pleadings anywhere and it is an imagination of the Arbitrator that materials were left over.

5. The first claim is not a new one as four crore has been demanded earlier itself vide Exh.R12 and even assuming that it is a new claim petitioner is not debarred from claiming the same as per Sec 23 of the Arbitration Act. Section 23(3) of the Arbitration Act reads as follows:

“Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it”.

6. Prior to the unilateral and illegal termination of the sub-contract by first respondent there were correspondences and meetings between the parties and after such termination calling for mutual resolution after about five months is not legally tenable, mutual resolutions are possible prior to abrupt, sudden termination; but 1st

respondent simply walked out of the project even without any handing over and taking away the materials of the petitioner and such vital aspect has not been taken into consideration by the Arbitrator. The 1st respondent utilized most of the materials mobilized by the petitioner and balance materials also had been taken away by 1st respondent and the RA bills raised by 1st respondent has been duly paid as per cl.2 of the sub-contract agreement, hence 1st respondent is liable to pay 8.5% plus 4% of balance value of the work, to the petitioner. The Arbitrator has failed to consider the fact that value of the balance works at the time of termination of sub-contract agreement was Rs.12.5 Crores. Further the fact that the Petitioner had already incurred 8.5% of the contract value initially itself towards mobilization and site development etc, which has not been taken note of by the Arbitrator. Out of the 12.5% leaving a margin money of 4% to the claimant, the remaining 8.5% recoveries made by the claimant is for the overall expenses, materials purchased and stocked at site such as reinforcement steel, cement, etc as admitted by 1st respondent of 6.16% instead of 8.5% vide Exh C-02 enclosure "C". This aspect totally has not been taken into account by Arbitrator.

7. Moreover first stage of mutual resolution of dispute has not taken place is totally misplaced and contrary to various documents filed before the Arbitrator. Exh C-04 to Exh.C08 are documents to show mutual resolutions had occurred and even otherwise without mutual resolution Arbitration is appropriate as arbitrarily the sub-contract agreement had been terminated all of a sudden by the 1st respondent without any notice which the Arbitrator has not correctly assessed the above aspect and has passed an erroneous and one sided award in favour of the 1st respondent. The finding of the Arbitrator is against the legal provisions of Sec 23 and violation of dispute clause 12 of subcontract agreement.

8. Arbitrator holding that entire work not to have been sub contracted without the Highways department is beyond the scope of Arbitration as both the parties after fully aware of the main contract dated 12-11-2010 only executed the sub contract agreement dated 16-03-2011 and Arbitrator was to Arbitrate only based on sub contract agreement.

9. Claim No.2 i.e., Claim for compensation of penalty liable to be imposed by the client (Highway dept) on the petitioner @5% (Maximum) on the agreement value. The Petitioner had contended in their claim statement submitted before the Arbitrator that due to the

sudden and illegal termination of the sub-contract, the work was held up from 27-08-2011 and for remobilization of men, machinery and materials a minimum of 4 months period was required and this has ended up in shortfall of milestone achievement fixed by the Highways Department and inordinate delay was caused by the sudden and illegal termination of the sub contract. The levy of penalty on the Petitioner by Highway Department is solely, directly attributable to the illegal and sudden termination of the sub-contract agreement by the 1st respondent and petitioner is accordingly entitled to this claim amount.

10. The petitioner states that the claim for compensation of loss due to additional cost incurred for completion of the balance works at the current market rates has not been correctly considered by the Arbitrator. To complete the balance works at the site due to the sudden and illegal termination of the sub-contract agreement by the 1st Respondent the petitioner had to once again start for re-mobilization to avoid time delay and to carry out and complete works to the value of Rs.15.64 Crores as per the present escalated working cost against the BOQ value of Rs.12.5 Crores. As such the petitioner was put into a direct loss of Rs.3.14 Crores. Although there is price variation clause, it is to be noted that only when the contract is fulfilled within time the price variation clause could be applied. Due to sudden and illegal termination of the sub contract and the erroneous action of the 1st respondent, the petitioner was forced to spend at market rates in the interest of completion of the project. The petitioner had submitted a detailed working of the excess amount spent to the tune of Rs.3.14 Crores. The Hon'ble Sole Arbitrator's finding that it is a new claim and price variation is applicable is totally incorrect, and legally not sustainable.

11. Claim No.4: The Petitioner had categorically stated that that the BOQ rates quoted by them are the net rate including the basic cost and preliminaries that the contractor recovers the over-heads when they get paid for the works executed – spread over the contract period when the entire quantum of work is executed. In the instant case, the contract period has lapsed but works still remains to be completed due to delays directly and solely attributed to 1st respondent. The resulted in under recovery of Over Head costs and the loss has been calculated based on Hudson's Formula and this formula has been upheld in many cases by Hon'ble Supreme Court and other Courts. The sudden and illegal termination of the sub-

contract is the one and only reason for prolongation of the contract period for which the 1st respondent ought to have been ordered to compensate the petitioner.

12. Fifth claim for refund of Advance money has been allowed but was adjusted against counter claim of the 1st respondent.

13. The petitioner approached the Arbitrator under Section 33(3) of the Arbitration and Conciliation Act, 1996 to correct the award which was in total contravention to the clause 3 (relating to retention money) of the sub-contract agreement which was dismissed after receiving a reply from 1st respondent without even giving an opportunity to make a rejoinder to the reply of 1st respondent. Even without a personal hearing or receiving the rejoinder to 1st respondent reply the Arbitrator has hastily dismissed the application under Sec 33 violating the principles of natural justice and has condemned the petitioner without hearing which is unknown in the quasi-judicial process. Cl.3 is a specific and binding clause which says that retention money should be released after defect liability period is over on receipt of the same from the Highways Department, but Arbitrator has awarded the release of retention money now itself and that too with interest which is unsustainable as per Supreme Court Judgment reported in (2008) 13 Supreme Court Cases 80. The petitioner had strongly contented that award of Retention money with interest is against provisions of Cl.3 of the sub contract but Arbitrator overlooked the same. Picking up a part of the letter dated 24-08-2011 (Exh.C07) to award retention of money is totally unreasonable, unjust, improper as it is only an offer that in case of expediting work retention money would be returned but just after two days without accepting the offer the 1st respondent terminated the sub-contract (vide Exh.C-08) by rejecting the offer without any valid reasons or powers putting the entire project in jeopardy for which the petitioner has incurred huge monetary and other losses like goodwill, reputation not quantifiable in monetary terms. Once offer is rejected, there is no acceptance by 1st respondent, hence arbitrator cannot rely on C-07 for releasing retention money.

14. The Award passed by the Arbitrator is in violations of the provisions of Sec 23 of Arbitration Act by simply holding the Claims as claim which term is not found anywhere in the legal provisions or the sub contract agreement but on the other hand has upheld Counter claim 2 of 1st respondent.

15. 1st respondent's main grievance was 30.2% recoveries which

has not been established but on the other hand petitioner through Exh C-05 has given the entire calculation sheet i.e., all the amounts reflected which are in line with clause 2 (payment terms) of sub-contract and as such there was no grounds whatsoever to terminate the sub contract as 1st respondent does not have any powers to terminate under the said sub-contract.

16. 1st respondent has blown both hot and cold at the same time by insisting that Arbitrator has no Jurisdiction as per Main Contract (Cl.57 of Section II of GCC) as value of claim is more than two lakhs but submitted their counter claim and found success.

17. 1st respondent fully knowing all the provisions of the main contract executed the back to back basis sub contract agreement and cannot be allowed to disown the executed sub contract which is legal and binding.

18. 1st respondent miserably failed to establish their claim of excess recovery and there is no evidence to show that there was a fundamental breach on the petitioner side as all payments were being made in time without any delay and payment is the one and only reciprocal promise as per cl.2 of sub-contract. There was no delay whatsoever in releasing the payments due to 1st respondent and deductions for retention money, VAT, labour cess, TDS, IT, WCT, 12.5% recovery for expenses, salaries etc are in black and white as per agreed terms in cl.2,3 and 6 A of sub contract agreement.

19. 1st respondent totally misled the Arbitrator by stating that petitioner's claim are new and that mutual resolution was not resorted which are all not only baseless but contrary to the law on the subject and clauses in sub contract as Sec 23 of Arbitration Act is unambiguous in that claims can be made at any time.

20. The award passed is in total violation of Sec 23 of Arbitration Act and Clauses 2, 3, 12, 13 and 14 of sub contract agreement leading to miscarriage of justice and totally prejudicial to the rights and interests of the petitioner.

21. The award is against provisions of Sec 23 of Arbitration Act and also against the terms of the sub contract and patently illegal and is totally unjust and opposed to justice.

22. The award is nothing but a reward for illegal termination of sub contract by 1st respondent and for violating the clauses of the sub contract and unless the same is not set aside irreparable loss and prejudice would be caused to the petitioner.

23. Vide Para 31.1 Arbitrator has held that 30.2% recovery has

been made by petitioner against the terms and conditions of sub contract agreement and states that claimant also admitted the same is totally beyond the pleadings and submission of the petitioner. Exh-C-05 Annexure shows the detailed workings and it is only as per Cl.2 and no violation has been highlighted nor established. Such finding of Arbitrator is not supported by any evidence at all and in direct contravention to the pleadings of petitioner in their rejoinder dated 19-12-2012 page 11 and 12 refers.

24. Vide para 31.2 Arbitrator's finding that petitioner has not kept his reciprocal promise is totally baseless, as the promise is to pay as per cl.2 which was done in right earnest and no deviation or default or violation was made in payments, and transparent workings given vide Exh.C-05 and what mistake or wrong in Exh C-05 has not been pinpointed by either 1st respondent or the Arbitrator when cl. 2 is clear and unambiguous, having agreed to deductions 1st respondent is unilaterally claiming that it is excess is nothing but breach of contract on 1st respondent part and shifting it to petitioner is against the principles of law, equity, justice and fair play.

25. Vide para 30.2 of the Award, the Arbitrator has stated that during course of Arguments counsel for 1st respondent furnished excess recovery of IT and ST (Exh R 28) and not objected to be claimant (petitioner) is totally incorrect as no Exhibit was marked nor was any no objection given by claimant as can be confirmed by the minutes of hearing on the said date. Rejecting petitioners claim as new claim and admitting claim alleged to have been given during final arguments of 1st respondent, is unjust and miscarriage of justice when giving such finding that claimant not objected reflects the unfair and poor conduct of the proceedings when neither exhibit was marked nor no objection given.

26. Vide para 30.3 and 30.4 of the Award calculating the difference of 12.5 percent and 10.16 percent is contrary to agreed term of sub-contract cl.2. The Arbitrator award of Rs.2,64,000/- on calculation such difference (12.5% - 10.16%) is nothing but subverting the written sub contract agreement to that of the unilateral claim of 1st respondent and Arbitrator is duty bound by the written sub contract agreement and cannot award some fanciful, unsupported claim and that too in direct contravention of mutually agreed written clause 2 of sub contract agreement.

27. Arbitrator award suffers from a non-existing Exh R 28 and non-existing no objection of claimant (petitioner).

28. Higher Court Judgment given by the Petitioner to the Arbitrator has not been taken note of nor discussed at all and vital materials being left out and relying on non-existing Exh R28, non existing no objection (vide para 23 and 25 above) lead to a total miscarriage of justice and petitioner reserves the right to adduce further additional grounds/points in future if and when warranted.

29. The Sub-Contract agreement executed on 16-03-2011 between the Petitioner M/s GVR INFRA Projects Ltd and M/s Aruljothi Constructions are within the jurisdiction of this Hon'ble Court. The Parties to the Agreement are within the Jurisdiction of this Court as also the Arbitration proceedings and the impugned award passed were conducted within the Jurisdiction of this Court. Clause 12 and 13 of the sub contract agreement provide for resolving the disputes within the Court of Chennai Jurisdiction hence this Hon'ble Court has Jurisdiction under Arbitration and Conciliation Act, 1996.

30. The petitioner pays court fees for the award amount of Rs.8,70,796/- and pays the Court Fees under Article 1, Schedule II(M) Maximum of Rs.5000/-.

It is therefore most respectfully prayed that this Hon'ble Court may be pleased to set aside the award dated 18-03-2013 in respect of all the claims/issues and the dismissal order dated 13-05-2013 passed by the 2nd respondent and consequently to pass a Judgment or order and Decree in favour of the Petitioner by allowing all the Petitioners' claims and to pass such other order or orders as deemed fit under the circumstances of the case and thus render justice.'

15. From the extract supra, it emerges that instant OP does not mention any of the specific eight slots available under Section 34 of A and C Act.

16. Be that as it may, learned counsel for petitioner made submissions, the submissions are three fold and the same are as follows:

a. Arbitral Tribunal, has returned the impugned award contrary to the terms of the contract by terming certain claims as new claims and according to the learned counsel for petitioner, this is contrary to Section 23(3) of A and C Act.

b. Clause 2 of Sub Contract Agreement dated 16.03.2011 talks about intention and the findings of the Arbitral Tribunal is contrary.

c. Arbitration Agreement between the parties is multi tiered and that one cannot seek resolution after work is abandoned. In other words, it is the plea of the learned counsel for petitioner that petitioner is not resorted to the first tier of the multi tiered arbitration agreement cannot be put against the petitioner.

17. Responding to the aforesaid submissions, learned counsel for first respondent submitted that after arbitral tribunal entering upon reference, after change of Arbitrator, petitioner amended their claims and made several new claims, which are impermissible and therefore, making of such new claims

without taking leave of Arbitral Tribunal is opposed to Sub Section (3) of Section 23 of A and C Act. To be noted, Sub Section (3) of Section 23 of A and C Act reads as follows:

'Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.'

18. A careful perusal of Sub Section (3) of Section 23 of A and C Act reveals that it is open to the parties to amend or supplement the claims or defence. This is subject to two riders. One rider is, there being an agreement between the parties to the contrary. The second rider is unless the Arbitral Tribunal considers it inappropriate to allow such amendment or supplement the claim or defence. In the instant case, neither of the riders are present. There is nothing to demonstrate that there is an agreement to the contrary between the parties, in other words, there is no agreement prohibiting, amending, supplementing claims or defence. There is nothing to demonstrate that arbitral tribunal considered it inappropriate to allow the amendment.

19. Be that as it may, what is of significance is, there is no disputation or disagreement before this Court that Arbitral Tribunal has dealt with all the seven claims made by the petitioner as well as all the five counter claims made by first respondent on merits, though the Arbitral Tribunal has observed that they are new claims. Therefore, Arbitral Tribunal did not consider it inappropriate to allow the amendment or supplementing.

20. As Both the riders are absent, argument predicated on Section 23(3) of A and C Act fails. What is important is, it does not help the petitioner. While in the absence of an agreement to the contrary and the Arbitral Tribunal not having considered it inappropriate, it was well open to the claimant/petitioner to make a new plea which he did and all those pleas have been considered on merits and therefore, the arguments predicated on Section 23(3) and the rival submissions also predicated on Section 23(3) of A and C Act neither help the petitioner nor first respondent. This puts an end to the first ground of attack qua impugned award.

21. It takes us to the next ground of attack predicated on sub contract. Clause 2 of sub contract reads as follows:

'2.PAYMENTS: *Payments related to the work shall be released to the sub contractor M/s.Aruljothi Constructions as and when released by the Department. The work shall be completed in all respects to the satisfaction of the Department. TDS is applicable to M/s.Aruljothi Constructions. All the department recoveries like VAT, labour cess and other taxes if any shall be borne by the Sub contractor. In addition to the department recoveries, TDS, IT and VAT on WCT etc., applicable to Sub Contractor which will be deducted by M/s.GVRIPL and necessary certificates will be issued to the Sub Contractor. The sub contractor will execute the work on behalf of M/S GVRIPL at his own cost. An amount of 12.5% of the Gross bill amount will be recovered towards expenses from the Cheque value of the work carried out in each bill and the balance amount is payable to the sub contractor M/s ArulJothi Constructions within 5 days on receipt from Dept through RTGS.'*

22. With regard to clause 2, a perusal of impugned award reveals that the Arbitral Tribunal has dealt with the running account bills in detail and the relevant portions were contained in paragraphs 30.3, which reads as follows:

'30.3 That apart, the Respondent themselves had admitted that they are willing to pay the cost of expenses at 10.16% as against 12.5% recovery made by the claimant i.e., 4%+6.16%=10.16% (Ex-CO2) it works out to.

RA Bills	Gross bill value	Recovered 12.5%	Respondent agreed for @ 10.16%	Difference
1 st RA bill	Rs.3204038/-	Rs.400505/-	Rs.325530/-	Rs.74975/-
2 nd RA bill	Rs.2424162/-	Rs.303020/-	Rs.246295/-	Rs.56725/-
3 rd RA bill	Rs.4047850/-	Rs.505981/-	Rs.411262/-	Rs.94719/-
4 th RA bill	Rs.6273646/-	Rs.784206/-	Rs.637402/-	Rs.146804/-

<i>RA Bills</i>	<i>Gross bill value</i>	<i>Recovered 12.5%</i>	<i>Respondent agreed for @ 10.16%</i>	<i>Difference</i>
5 th RA bill	Rs.2318943/-	Rs.289868/-	Rs.235605/-	Rs.54263/-
6 th RA bill	Rs.1966666/-	Rs.245833/-	Rs.199813/-	Rs.46020/-
7 th RA bill	Rs.2248051/-	Rs.281006/-	Rs.228402/-	Rs.52604/-
Total	Rs.22483356/-	Rs.2810419/-	Rs.2284309/-	Rs.526110/-

The difference between 12.5% and 10.16% is Rs.526110/-.'

23. Therefore, any further examination of receipt would tantamount to examining the impugned award on merits and would make instant OP an appeal, which is clearly impermissible.

24. The last aspect of the matter pertains to the arbitration agreement between the parties being multi tiered.

25. Learned counsel for petitioner submitted that the petitioner/claimant should not have been found fault with for not resorting to an amicable resolution effort as according to the petitioner, the first respondent abandoned work and the question of amicable resolution does not arise.

26. In response to this, learned counsel for first respondent submitted

that arbitration agreement between the parties is not a multi tiered arbitration. To be noted, this Court already extracted the arbitration clause of sub contract the same being covenant no.12.

27. A perusal of covenant 12 would reveal that it is clearly a multi tiered arbitration. Therefore, the submission that it is not a multi tiered arbitration, in the considered view of this Court is plainly incorrect. However, what is of significance is, this multi tiered arbitration, the first tier not being resorted to by the petitioner and the observation made by Arbitral Tribunal in this regard in the impugned award does not carry the petitioner any further.

28. A perusal of impugned award reveals that though the Arbitral Tribunal has held that it is necessary to take mutual steps for resolution before invoking arbitration, the Arbitral Tribunal has not negated the claim of the petitioner. The Arbitral Tribunal has not dislodged the claim on the basis of the first tier of the arbitration agreement not been invoked. The Arbitral Tribunal has dealt with everyone of the claims made by the petitioner and everyone of the counter claims made by first respondent on merits. Therefore, the arguments predicated on multi tiered arbitration by the petitioner does not

carry the petitioner qua campaign of petitioner against impugned arbitral award. As all the three points projected by the petitioner do not find favour with this Court, this Court is left with the considered view that there is no ground to interfere with the impugned arbitral award. Instant OP fails and the same is dismissed. Considering the nature of matter, parties are left to bear their respective costs.

Index: Yes

Speaking Order

kmi

16.03.2020

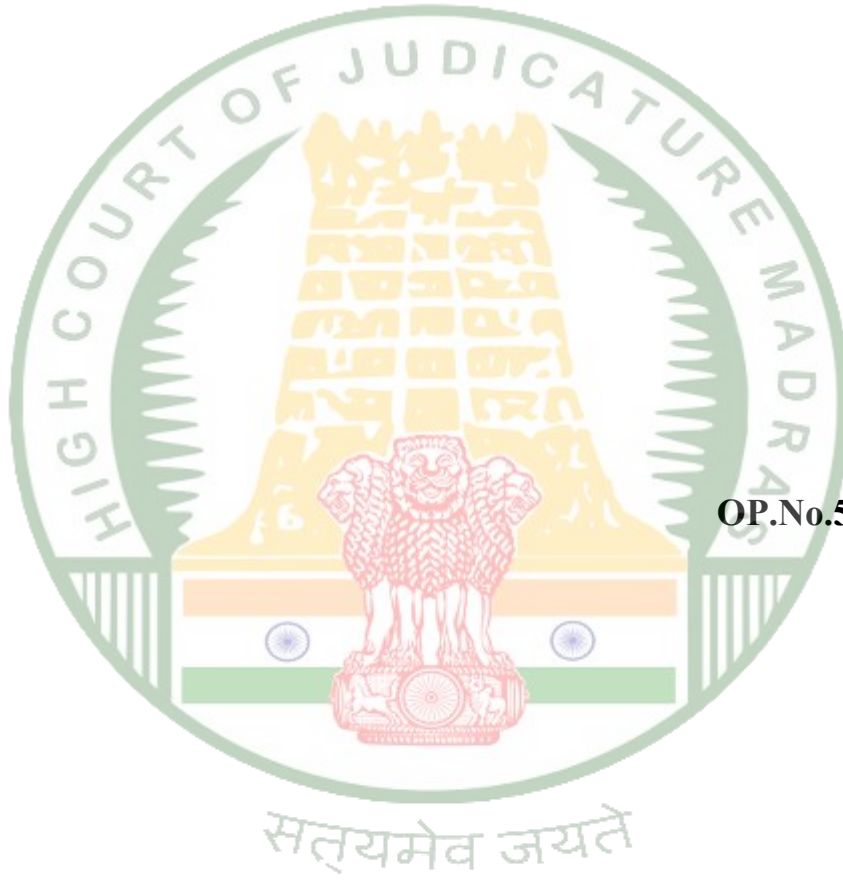


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