

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.08.2020

C O R A M

THE HON'BLE MR.JUSTICE N.SATHISH KUMAR

O.P. No. 282 of 2020

Tamil Nadu Road Sector Project-II,
Highways Department,
Government of Tamil Nadu,
171, South Kesava Perumalpuram,
Greenways Road, R.A.Puram,
Chennai-600 028.
Tamil Nadu
rep. by its Superintending Engineer.

... Petitioner

Vs

1. M/s.VDB Projects (P) Ltd.,
#842, 3rd Floor, Binnamangala,
100 ft. Road, Indira Nagar,
Bengaluru-560 038.
2. Mr. V.S.Karandikar,
Presiding Arbitrator,
Flat No.1702, Matoshree Heights,
DL Vaidya Road, Dadar (West),
Mumbai-400 028.

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3. Mr.D.Sree Rama Murthy,
Member Arbitrator,
Villa Grande, Villa No.10,
8-1-330 to 340, Tolichowki,
Shaikpet, Hyderabad-500008.

4. Mr.S.Saravanel,
Member Arbitrator,
No.281, First Main Road,
Balakrishna Nagar Sakthi Avenue,
Gerugambakkam,
Chennai-600 122.

Respondents

PRAYER : Original Petition filed under Section 14 and Section 15 read with Section 11 of the Arbitration and Conciliation Act, 1996, praying to terminate the mandate of the arbitral tribunal and reconstitute the arbitral tribunal by appointing a Retired High Court Judge as a sole arbitrator.

For Petitioner : Mr. Vijay Narayan,
Advocate General
assisted by Mr.Sricharan
Rangarajan

For Respondents

For R1 : Mr.P.Subba Reddy

ORDER

This Original Petition has been filed seeking to terminate the mandate of the Arbitrator who entered a reference in dispute emanated

from the agreement dated 11/2005-2006 consequent to the letter of acceptance issued by the 1st Respondent.

2. The petitioner has entered into an agreement of contract dated 29.07.2015 with the 1st respondent for upgrading Virudhachalam/ Parangipettai State Highways No.SH 70 for a contract price of Rs.165,41,09,975/-. The date of commencement of contract period is 33 months. On 23.7.2018 notice of termination was issued by the petitioner upon recommendations from the authority engineer on 11.6.2018. Thereafter, the dispute arose between the parties. The petitioner has invoked the bank guarantee, as against which a suit was filed by the 1st Respondent before the City Civil Court in O.S.No.7525 of 2018. Thereafter, Application under Section 8 of the Act was also filed by the Petitioner. Thereafter, the matter has been referred to the Arbitration. Subsequently, three member Arbitrators were appointed.

3. The first hearing of the arbitration was held on 14.02.2019, wherein the fees and other expenses were fixed by the Arbitral Tribunal. The Tribunal had fixed a sum of Rs.1,00,000/- per sitting per Arbitrator for internal meetings and site visits if any and the above fee

is restricted to the claim and it reserves the right for further counter claims, if any. The Arbitral Tribunal has also fixed reading charges of Rs.2 lakhs for each Arbitrator. Apart from that, a sum of Rs.1 lakh was fixed as incidental charges other than the meeting charges. Besides extra charges for days other than hearing/meeting fees subject to a maximum period of two days per occasion, a sum of Rs.20,000/- per day per arbitrator was fixed. That apart the charges for lodging, boarding and travel by Air as per actual on submission of supporting vouchers and other expenses also fixed by the Arbitral Tribunal.

4. It is an undisputed fact that about 32 hearings were conducted by the learned Arbitrators. Similarly, it is also undisputed that originally, the petitioner has filed its reply statement along with counter claim to the tune of Rs.1,16,89,716/-. Thereafter, they have amended and reserved their right to claim. Later stage, they have filed the counter claim and amended the claim for a sum of Rs.56,42,79,789/-. At this stage, the trouble started. It is also relevant to note that per day, two settings were conducted and sometimes, the learned Arbitrators have conducted one session in the morning and

other session in afternoon. Some of the sittings conducted in post lunch at 02.30 p.m. and thereafter, at 05.30 p.m. sittings conducted for another hearing. It is to be noted that for each hearings, separate fees directed to be paid by the parties. The minutes of the first and preliminary meeting of the Arbitral Tribunal dated 14.02.2019 indicates that there was direction to parties to pay the fees as aforesaid. The very nature of the minutes recorded by the Arbitral Tribunal indicates that fees is not fixed on arriving consensus between the parties. In fact, the Arbitral Tribunal directed the parties to pay the fees by both parties. Be that as it may. Subsequent hearings, particularly, 31st and 32nd hearings, the Arbitral Tribunal has recorded the minutes as follows:-

1. *“At the outset, the Tribunal brought to the notice of both the parties that substantial amounts against fees and expenses of the Arbitrators have not been paid by them. The claimant was asked, in case the respondent fails to make payment for fees for claims, whether the claimant would make the payment on behalf of the respondent, which would be granted to him in the award. The claimant assured the Tribunal that he would be making the payment*

for claims on behalf of the respondent, if such contingency arises however in such event he would not make any payment either of his own share or on behalf of the respondent for fees of counter claims.

2. It was clarified by the Tribunal to the respondent that unless the fees for counter claims have been paid, the Tribunal would not adjudicate the entire claims. It was also made clear that in case the Claimant refuses to make payment of claimant's share of fees for counter claims, then the same will have to be made by the respondent on behalf of the claimant, failing which the Tribunal would not adjudicate the counter claims.

3. It was made clear to both the parties that in case of non-payment of fees and expenses of the Arbitrators, the Tribunal may have resort to Sections 38 & 39 of the Arbitration and Conciliation Act, 1996.

4. The representative of the respondent informed that as regards travelling allowance and accommodation bill for the Presiding Arbitrator is concerned, the same has been sanctioned by the competent authority and will be paid in a day or two. He also informed that the issue regarding payment of fees of the Arbitrators have been referred to the Advocate General through higher authorities and he is likely to get his approval in a day or two after which the

payment will be made immediately. The Tribunal informed the respondent's representative that he will have to resolve the issues regarding the fees for counter claims before the next hearing, failing which the counter claims will not be adjudicated by the Tribunal.”

In fact, the Tribunal has indicated that they would not adjudicate the counter claim unless the fees directed by them is paid by the respondent. The nature of minutes recorded further indicated that the Tribunal has more interested in the fees rather than concluding the proceedings. Thereafter, this application came to be filed.

5. The learned Advocate General appearing for the petitioner would submit that the fees charged by the Arbitral Tribunal for every sittings conducted by them and the minutes recorded by the learned Arbitral Tribunal would clearly indicate that rather than disposing the matter, the learned Arbitrators are interested only for claiming exorbitant fees and the way in which, they have expressed their mind would also indicate that they become *de jure* to perform their duties. Therefore, when such intention has been expressed, the continuation of proceedings with the same Arbitrators will result in biased and

impartial award. The element of bias is always attached with such proceedings. Hence, his submission is that till now, more than Rs.75 lakhs have been paid to the Arbitral Tribunal by both sides and the above amount paid is against various provisions of the Act. Schedule IV of the Act prescribes the nature of the fees payable the maximum limit of the amount payable under Schedule IV, in any event, shall not exceed Rs.30 lakhs, whereas the nature of fees collected under various heads including hearing charges etc. makes it clear that the Arbitral Tribunal is unable to perform their duties without any bias. According to his contentions, mandate of Arbitrators to be terminated and a fresh arbitrator should be appointed to continue the proceedings from the stage, where the Arbitrators have left the proceedings.

6. Whereas, the learned counsel appearing for 1st respondent would submit that the fees has never been fixed by the respondent and 32 hearings went off very well. The Arbitral Tribunal demanding fees separately for the counter claim, is not prohibited under the statute. Section 38 of the Act gives such power to the Arbitral Tribunal to demand the fees for counter claim. Hence, his submission is that so

far, 32 hearings are over, only at the fag end of the proceedings, this petition has been filed and much water has already been flown in this matter; the Arbitrators are only technical persons, if they are removed at this stage, there will be a further delay in the proceedings. Hence, he has opposed for terminating the mandate of arbitrators.

7. Before going to the details of facts, it is relevant to note that the Hon'ble Apex Court in its judgement reported in **2019 SCC ONL SC 906** in the matter of **NHAI Vs. Gayatri Jhansi roadways Ltd.** has held in para 8 as follows :-

“8. Faced with this order, the respondent moved an application on 08.05.2018 under Section 14 of the Arbitration and Conciliation Act, 1996, to terminate the mandate of the arbitrators, inasmuch as, according to the respondent, the arbitrators had wilfully disregarded the agreement between the parties and were, therefore, de jure unable to act any further in the proceedings.”

8. The Hon'ble High Court of Rajasthan in its judgement reported in **2019 SCC ONL Raj 6** in the matter of **Doshion Pvt. Ltd. Vs. Hindustan Zinc Ltd.** at para 19, Hon'ble Judge has stated as

follows:-

“19. The above provisions provide for termination of mandate of the arbitrator if he becomes de jure or de facto unable to perform his functions. The phrase 'de jure or de facto unable to perform his functions' has not been defined and/or elaborated in any manner in the Act. However, in the opinion of this Court in case the events during the conduct of proceedings before the arbitrator leads to a doubt in the mind of a party regarding prejudice against it and qua the impartial conduct of proceedings before the arbitral tribunal, the said situation would fall within de facto inability of the arbitrator to perform his functions.”

9. This Court in a judgement reported in **2010 (2) CTC 357** in the matter of **Madras Fertilizers Ltd., Vs. SICGIL India Limited and others**, has held in para 23 and 24 as follows :-

“23. The words used in Section 14(1)(a) is that the mandate of an Arbitrator shall terminate if he has become de jure unable to perform his functions. (emphasis supplied). It is true that the second respondent is ready to go ahead with the proceedings,

but somehow, the proceedings got bogged down in the light of the controversy with regard to fixation of fees by the second respondent. The word "Perform his functions used in Section 14 (1)(a) will simply performing his functions effectively without any bias and with full confidence of both the parties. Performing this functions does not simply going through the motion without instilling confidence in the minds of the parties.

24. Now, if the mandate is not terminated and the second respondent is permitted to continue with Arbitration proceedings, it will amount to forcing a higher fee on the petitioner which they are not capable of paying. Further, after these controversies, disputes, exchange of correspondences, etc. with regard to fixation of fee, if the second respondent continues the Arbitration proceedings, the petitioner may not be in a proper frame of mind to proceed with the arbitration before the second respondent. They will definitely have some doubt as to the conduct of the Arbitrator and this doubt would certainly lead to loss of confidence. Therefore, such an unpleasant situation is to be avoided in the best interest of the parties including the Arbitrator."

10. Further, the High Court of Delhi in a judgement reported in **2018 SCC Onl Del 9241** in the matter of **Delhi State Industrial Infrastructure Development Corp. Ltd. Vs. Bawana Infra Development**, in paras 14 to 19 has held as follows :-

“14. Even in the general parlance, “sum in dispute” shall include both claim and counter claim amounts. If the legislature intended to have the Arbitral Tribunal exceed the ceiling limit by charging separate fee for claim and counter claim amounts, it would have provided so in the Fourth Schedule.

15. Proviso to Section 38(1) of the Act can only apply when the Arbitral Tribunal is not to fix its fee in terms of Fourth Schedule to the Act. It would not have any bearing on the interpretation to be put to the Fourth Schedule. It is noted that as regards fee even under the Amended Act, the Arbitral Tribunal is free to fix its schedule of fee in an adhoc arbitration which is conducted without the intervention of the Court. Even where the Arbitral Tribunal is appointed by the Court under Section 11 of the Act, in absence of rules framed under Section 11(14) of the Act, it is not in every case

that the Arbitral Tribunal has to fix its fee in accordance with the Fourth Schedule to the Act. Therefore, the proviso to Section 38(1) of the Act would have no bearing on the interpretation being put to the Fourth Schedule and the phrase “sum in dispute” therein.

16. An argument was made that the adjudication of counter claim would require extra effort from the Arbitrator and therefore, the Arbitrator should be entitled to charge a separate fee for the same. I cannot agree with this argument. The object of providing for counter claim is to avoid multiplicity of proceedings and to avoid divergent findings. Keeping the object of the amendment in view, the ceiling on fee as prescribed in Fourth Schedule of the Act cannot be allowed to be breached.

17. In view of the above, the Sole Arbitrator is requested to withdraw his order claiming separate fee for the amounts claims in the Statement of Claim and the counter claim. The amount of Rs.13,15,250/- deposited by the petitioner with the Registry of this Court in compliance with the order dated 22.02.2018 passed in I.A. No.2549 of 2018 in Arb. P. 420/2016 shall be refunded by the Registry of this Court to the

petitioner along with any interest accrued thereon.

18. I express my sincere gratitude to the assistance rendered by the learned Amicus.

19. The petitioner is disposed of in the above terms, with no order as to cost.”

11. In a recent judgement of the Delhi High Court in the matter of ***Rail Vikas Nigam Ltd. Vs. Simplex Infrastructure Ltd.*** in para 23 taking into the same issue, has held that the cap of Rs.49,87,500/- in Entry No.6 as the maximum fee, which can be charged per arbitrator under Schedule IV is reasonable and in furtherance of the recommendation made in the 246th Law Commission Report.

12. From the above position of law, makes it clear that the fees should be reasonable and should not be unreasonable one. The minutes of the Arbitrators from the beginning of first meeting dated 14.02.2019 indicates the charges for various heads. They have also directed the parties to pay advance fees. From the beginning, every minutes recorded, during the proceedings, this Court could find that there is a direction to the parties to pay the fees first. In the last minutes, the

Arbitrators expressed their view that they would not decide the counter claim, if the separate fees is not paid. It is also relevant to note that once the dispute is raised in a reference, the dispute includes the claim and the counter claim. Though Section 38 gives some power to fix fees for counter claim, it is to be noted that once the Arbitrators have entered a reference for adjudication, the dispute would mean not only dispute referred but also the counter claim. Therefore, directing the parties to pay such amount, otherwise the claims would not be entertained, in fact, it leads to a fact that fairness in the entire proceedings is absent from the very beginning. It is also to be noted that in every meetings and minutes the fees has not been paid by the consensus of the parties, rather it was only the direction by the Arbitral Tribunal. Therefore, it cannot be said that there was an agreement between the parties to pay such amount as contended by the respondent's counsel. The word "Perform his functions" as required under Section 14 of the Act includes, unbiased and impartiality in every action. When the proceedings of the Arbitral Tribunal gives any room towards bias or impartiality, the same will lead to only

conclusion that the Tribunal has become *de jure* and unable to perform its functions as required under law. The Tribunal constituted, cannot just simply perform the proceedings, it should remove all doubts, particularly, with regard to the bias and partiality etc. When such things indicate the element of doubt as to bias or towards partiality, the Court has to necessarily hold that the Tribunal become *de jure* and unable to perform the functions properly. The entire proceedings recorded from 14.02.2019 till 19.02.2020 indicates that there is only a direction to pay the amount. When the Tribunal allowed the applications to amend the counter claim and entertained the documents, ought to have decided the issue in the event and non-payment of any money, have been included as cost in the award, rather than indicating their mind not to take up the very issue, which is raised as one of the issue gives a reasonable doubt as to partiality. Therefore, this Court is of the view that in this case, the Aribtral Tribunal has become *de jure* and unable to perform their functions properly. Accordingly, their mandate has to be terminated.

13. At this stage, when the Court is about to terminate the

Arbitrators, the learned Advocate General and the learned counsel appearing for 1st respondent submitted that the Arbitrator can be substituted by new Arbitrators and continue from the stage where they left and they have also suggested that since the technical expert is also required in this matter, each side can nominate or suggest the name of the retired Engineers and one Presiding Arbitrator to be appointed by this Court, probably, from the retired High Court Judges list. Since the consensus reached between the parties with regard to terminating the mandate of the Arbitrators and substituting new Arbitrator viz., Hon'ble Mr. Justice N. Paul Vasanthakumar (Retd.), former Chief Justice of Jammu and Kashmir and expert retired engineers viz., Mr. M. Gnanasekaran, No.G2, Sai Sadhan Apartment, 19/4, Zacariah Colony 2nd Street, Choolaimedu, Chennai 600094 Mobile No.9444070166 suggested by the petitioner and Mr. Jayasingh Ashar, C-27, Navyug Mansion, Naushir Barucha Marg, Mumbai 400007 Phone No.02223850018 suggested by the respondent will be Arbitrators and the Presiding Arbitrar is Hon'ble Mr. Justice N. Paul Vasanthakumar (Retd.), Chief Justice of Jammu and Kashmir.

14. Further, taking note of the fact that both the parties have already paid more than Rs.75 lakhs and 75% of the proceedings already over and the matter is pending for hearing the arguments and passing award, this Court is of the view that flat sum of Rs.30 lakhs is fixed as the fee of Arbitrators and out of that Rs.30 lakhs, Presiding Arbitrator fee shall be fixed at Rs.15 lakhs and each member of the Arbitrators i.e., expert engineers fees is fixed at Rs.7.5 lakhs each. Apart from that, the incidental expenses i.e., place and travel expenses etc. shall be borne by both the parties.

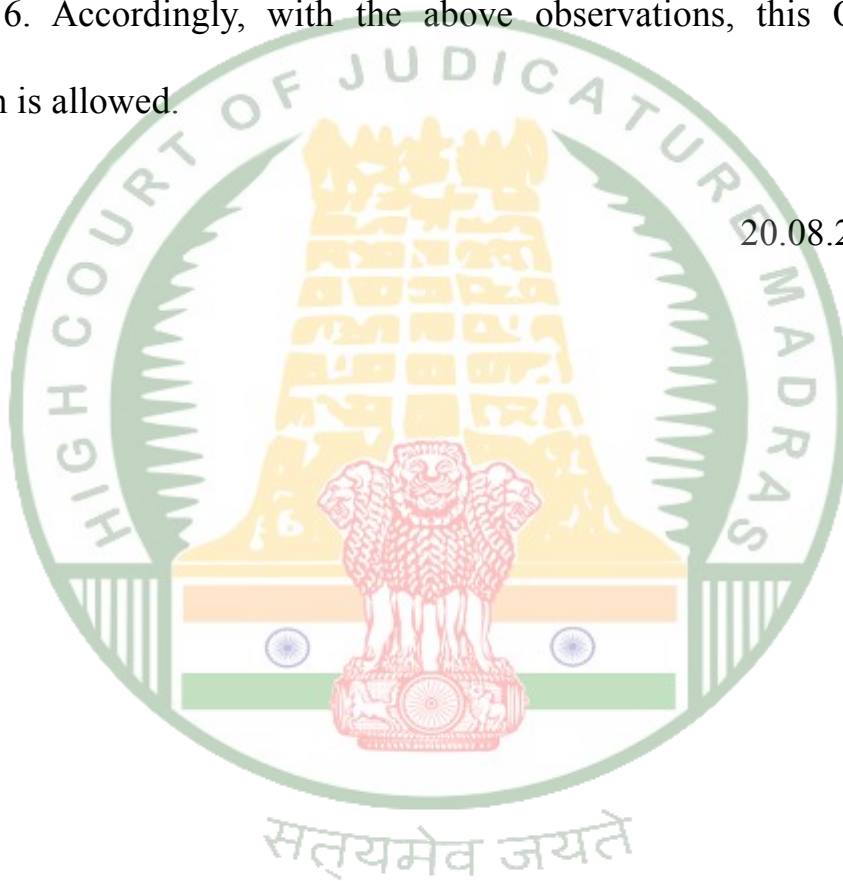
15. It is also made it clear that the newly constituted Arbitral Tribunal shall continue the proceedings from the stage where it was left by the then Arbitrators. The Minutes of meeting recorded on 19.02.2020, indicate that Government counter claim has been received and the documents on their side also marked as 104 and 105 and further affidavit also. In such view of the matter, the learned Arbitrators are requested to give one more opportunity to the respondents to confront the documents filed by the applicant pertaining to the amended counter claim. Thereafter, after hearing of

both parties, the Tribunal is directed to pass award, preferably within a period of four months from the date of receipt of the copy of this order.

16. Accordingly, with the above observations, this Original Petition is allowed.

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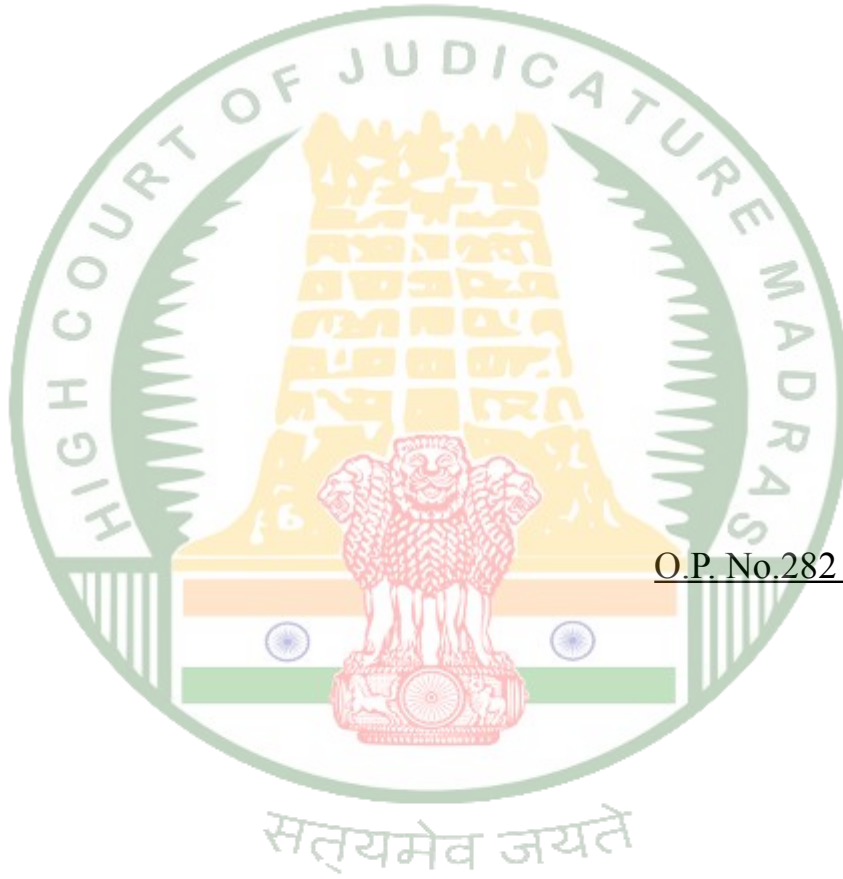


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