IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:12.08.2020

CORAM:

THE HONOURABLE Mr.JUSTICE M.SUNDAR

O.P.No.510 of 2016 and
A.No.4036 of 2016 and
O.P.No.932 of 2016

O.P.No.510 of 2016:

Airports Authority of India
Chennai Airport,
Chennai – 600 027. ... Petitioner

Vs.

1.N.Thangarajan
2.K.S.Narayanan
Learned Arbitrator,
SH 7/9, TNHB Flats,
Thiruvalluvar Nagar,
Thiruvanmiyur,
Chennai – 600 041. ... Respondents

[Second respondent stands deleted by this Court vide order dated 12.08.2020]

Prayer: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the Arbitral Award dated 21.01.2016 made by the 2nd respondent in Arbitration Case No.CE/KSN/ARB/2013/01 in respect of Claim Nos.1, 3 (along with 10 and 11), 4, 6 and 7, in fixing the liability on the part of the petitioner and awarding interest.

For Petitioner : Dr.Fr Xavir Arul Raj
for Ms.A.Arul Mary
For respondent : Ms.Reshmi Christy

O.P.No.932 of 2016:

N.Thangarajan ... Petitioner

Vs.

The Airports Authority of India,
Chennai Airport,
Chennai – 600 027. ... Respondent

Prayer: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the award dated 20.01.2016 passed by the Sole Arbitrator as far as rejecting the claim Nos.2, 5 & 9.

For Petitioner : Ms.Reshmi Christy
For respondent : Dr.Fr Xavir Arul Raj
for Ms.A.Arul Mary

COMMON ORDER

Captioned two 'Original Petitions' ('OPs' in plural and 'OP' in singular for the sake of brevity) are applications under Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)' which shall hereinafter be referred to as 'A and C Act' for the sake of brevity and convenience.

2. Both OPs on hand are directed against an arbitral award dated 20.01.2016 made by an 'Arbitral Tribunal' (hereinafter 'AT' for the sake of brevity) and constituted by a sole arbitrator and this 'arbitral award

dated 20.01.2016' shall hereinafter be referred to as 'impugned award' for the sake of convenience and clarity.

3. As already mentioned supra, both the OPs are directed against impugned award, while 'O.P.No.510 of 2016' (hereinafter 'Senior OP' for the sake of convenience) has been preferred by the 'Airports Authority of India' (hereinafter 'AAI' for brevity), 'O.P.No.932 of 2016' (hereinafter 'Junior OP' for the sake of convenience) has been preferred by the contractor. The contractor was the claimant before AT and obviously AAI was the respondent. The contractor had made claims under nine heads, two heads of claim were allowed, four heads of claim were partly allowed and three heads of claim were negatived. In this backdrop, both AAI and contractor have filed independent OPs assailing the same impugned award. Therefore, the two OPs on hand are necessarily cross OPs.

4. In the web-hearing on a video-conferencing platform today, Dr.Father Xavier Arul Raj, learned senior counsel instructed by counsel on record Ms.A.Arul Mary on behalf of AAI and Ms.Reshmi Christy, learned counsel representing the counsel on record for the contractor are before me. Both sides agreed for main OPs being taken up for final

hearing. Therefore, both OPs were taken up for final hearing and were heard out.

5. To be noted, the sole arbitrator has been arrayed as respondent No.2 in both the OPs. As the hearing progressed, it emerged clearly that sole Arbitrator who constituted the AT is not necessary to be before this Court in the array of parties. Therefore, second respondent in both OPs shall stand deleted from the array of parties. This means, there will be a sole petitioner and sole respondent in both OPs.

6. Factual matrix in a nutshell will suffice as captioned OPs on hand are under Section 34 of A and C Act where the contours are limited. There shall be little elaboration on this aspect of the matter elsewhere infra in this order. Be that as it may, factual matrix in a nutshell is that there is an agreement dated 29.09.2004 (hereinafter referred to as 'said agreement' for the sake of brevity) between AAI and contractor; that this agreement is for construction of 14 quarters in all; that the 14 quarters, which are subject matter of said agreement are constituted by eight type-C quarters, two type-D quarters both at Chennai Airport and four type-C quarters near transit accommodation; that clause 25 of said agreement is an arbitration clause and therefore the same serves as an arbitration

agreement between AAI and contractor, being an arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act; that the site for construction was handed over to the contractor on 18.10.2004; that the contractor ought to have completed the construction within six months i.e., by 17.04.2005; that the contractor ultimately completed only on 15.06.2007; that final bill was made ready by AAI on 31.03.2009; that the final bill was signed by the contractor on 02.05.2011 and that the payment as per final bill was made to the contractor on 04.06.2011.

7. In the aforesaid factual setting, contractor made certain claims *inter alia* on the ground that AAI has delayed the final bill. AAI resisted these claims by saying that the delay qua final bill was owing to indifference on the part of the contractor and AAI is not responsible. This led to the arbitration agreement between the parties (clause 25 of the said agreement) being triggered by the contractor and the AT being constituted. As already mentioned supra, contractor is the claimant before AT and AAI is the sole respondent before the AT.

8. The nine heads of claim made by the contractor and the fate of the same before AT can be given as a tabulation as below:

Sl.No.	***Claim No. and nature***	***Outcome***	***Remark***
1	*Claim No.1: Interest @ 24% p.a. on late payment of final bill for the period of 15.06.2007 to 24.06.2011 Amount : Rs.925496.00*	*allowed*	*Rs. 06,94,107*
2	*Claim No.2: Interest @ 24% p.a. on late payment of left over measurement paid in the final bill for the period of 16.03.2005 to 15.06.2007. Amount: Rs.165913.00*	*Negatived*	*-*
3	*Claim No.3: Quantity executed, measured and recorded in M.B. But reduced in final bill. Amount: Rs.43754.00*	*Partly allowed*	*Rs. 31,003*
4	*Claim No.4: Steel reinforcement purchased and brought by agency a site & used in RCC work but not measured and also recovered at double the cost of material. Amount Rs.157369.00*	*Partly allowed*	*Rs.35,680*
5	*Claim No.5: Carriage charges of excavated earth to stack at the place directed by AAI official and to bring back the same for refilling. Amount*	*Negatived*	*-*

Sl.No.	Claim No. and nature	Outcome	Remark
	Rs.64431.00		
6	*Claim No.6: Compensation levied on account of EOT as delay was attributed to the AAI only. Amount:Rs.73410.00*	*allowed*	*Rs.73,410*
7	*Claim No.7: Interest on delayed payment for the period of 6 & ¼ years (16.03.2005 to 24.06.2011) on a/c of left over measurement. Amount Rs.279180.00*	*Partly allowed*	*Claimant made the claim of 24% p.a. interest with effect from 15.06.2007 on interest was awarded at 18% p.a. with effect from 15.06.2007*
8	*Claim No.8: Payment of Rs.942.00 on a/c of leftover measurement as per statement no.8*	*Partly allowed*	*838*
9	*Claim No.9: Work done but not measured, billed and paid. Amount is Rs.5925.00*	*Negatived*	-

9. To be noted, the cost of arbitration claimed by AAI has been treated as counter claim of AAI and AT has held that cost of the arbitration has to be borne equally by AAI and contractor.

10. It is in the aforesaid backdrop as mentioned elsewhere supra in this order both AAI and the contractor have preferred independent OPs and both are before me as captioned OPs on hand.

11. Learned senior counsel for AAI submitted that (as protagonist of senior OP and respondent in junior OP) his submissions are three fold and they are as follows:

a) Impugned award insofar as it went against AAI has travelled beyond the terms of said contract.

b) Delay in payment of final bill has been caused by the contractor and AAI is not responsible.

c) Junior OP filed by the contractor is time barred.

12. In response to the aforesaid submissions, learned counsel for [as protagonist of senior OP and respondent in junior OP] contractor submitted as follows:

a) Impugned award has not travelled beyond the terms of contract and the award of interest on delayed payments on account of leftover measurements have been made by drawing inspiration from a similar arbitral award made by another Arbitrator earlier.

b)The delay in payment of final bill was caused by AAI and the contractor is not responsible as alleged.

c)Delay in filing of junior OP was only five days and the same has been duly condoned by the Court, on an application by the contractor at the inception of junior OP itself .

13. This Court now proceeds to examine the rival contentions, set out its discussion and give dispositive reasoning for arriving at a conclusion in both OPs.

14. Before embarking upon the exercise of discussion and dispositive reasoning, this Court has reminded itself that an application under Section 34 of A and C Act is a delicate balance between sublime philosophy underlining minimum judicial intervention ingrained in Section 5 of A and C Act read with sanctity given to finality of arbitral awards ingrained in Section 35 of A and C Act on one side and sanctus judicial review forming part of substantive due process of law on the other side. From this principle, it follows as a sequitter that applications under Section 34 of A and C Act i.e., OPs of the instant nature are neither appeals nor revisions. They are not even full-fledged judicial reviews.

They are mere challenges to arbitral awards, which can be posited on 8 slots adumbrated in sub-section (2) of Section 34 and/or the exposition/illustration of the same made by Hon'ble Courts in various judgments. This Court has also reminded itself of the ***Fiza Developers*** principle [***Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited*** reported in ***(2009) 17 SCC 796]*** wherein Hon'ble Supreme Court held that Section 34 applications are summary procedures. To be noted, Fiza Developers principle was reiterated by Hon'ble Supreme Court in ***Emkay Global Financial Services Ltd. v. Girdhar Sondhi*** reported in ***(2018) 9 SCC 49*** as a step in the right direction and this was further recently reiterated in ***Canara Nidhi Limited*** case [***M/S. Canara Nidhi Limited vs M. Shashikala*** reported in ***2019 SCC Online SC 1244***].

15. This Court has also reminded itself about the time line and expeditious disposal of applications under Section 34 which has now found in statutory expression in sub-section (6) of Section 34. An observation in this regard has been made by Hon'ble Supreme Court in ***State of Bihar Vs. Bihar Rajya Bhumi Vikas Bank Samiti*** reported in ***(2018) 9 SCC 472,*** more particularly in Paragraph 26 thereunder. This

Court refrains itself from extracting paragraph 26 of ***Bhumi Vikas Bank*** case law with the intention of not burdening this order with settled position of law and thereby making this order verbose.

16. This Court now embarks upon the exercise of examining the rival contentions and setting out its discussion on the same after reminding itself of the aforementioned principles and by bearing in mind the aforementioned principles which govern applications under Section 34 of A and C Act. This Court deems it appropriate to take up the third point first as it pertains to limitation.

17. The third point is that junior OP is time barred. This Court had the benefit of perusing the case file. A perusal of the case file reveals that junior OP was filed with a delay of three days and the same was condoned by another Hon'ble single Judge as early as on 22.11.2016 by virtue of an order made on that day in A.No.5452 of 2016. As a delay condonation application has been taken out in the junior OP by the contractor, as the same has been duly considered by a Hon'ble Judge and a judicial order has been made on 22.11.2016 condoning the delay, this matter cannot be raised or revisited now as this order dated 22.11.2016

has been given legal quietus. To be noted delay condoned in any event is within the 30 days cap vide proviso to sub-section (3) of Section 34.

18. This takes us to the second point of contention or in other words, the bone of contention between the parties. A careful perusal of second point would make it clear that it turns entirely on merits. AAI and the contractor are making allegations and counter allegations about who is responsible for the delay. There is also no disputation or disagreement before me that oral evidence was let-in before AT and documents were marked. This Court is informed that an Engineer of AAI was examined on behalf of AAI and the contractor examined himself as a witness before AT. Documents were also exhibited before AT. It is also clear from the impugned award, more particularly paragraph 1.11 of the impugned award wherein AT has mentioned that the evidence adduced, exhibits filed, records submitted, submissions made and arguments advanced were all carefully examined. Therefore, who is responsible for the delay in payment of final bill turns completely on facts and AT has returned a finding on the same based on evidence before it. Under such circumstances, there can be no examination on merits of the matter by this Court under Section 34. To be noted, both

senior and junior OPs have been presented post 23.10.2015. Therefore, the second point of contention cannot be considered nay cannot even be countenanced as these are applications under Section 34 and this is more so in the light of ***Ssangyong*** principle laid down by Hon'ble Supreme Court in ***Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India*** reported in ***(2019) 15 SCC 131,*** wherein Hon'ble Supreme Court has said, review of an award on merits would be impermissible. It is also to be noted that there is no argument of perversity qua evidence that has been appreciated by AT for returning the aforementioned finding.

19. This takes us to the first point of contention, namely the argument that the award has travelled beyond the terms of the contract.

20. A careful perusal of submissions made before this Court brings to light one aspect of the matter. The dates, more particularly, the date of handing over of the site, the actual date of completion and handing over of the quarters, date of preparation of final bill, the date of signing of the same and the date of payment of the final bill are not in dispute. Now that the dates are not in dispute, this Court notices that there is no claim for alleged delay in completion of the construction. Though the

construction ought to have been completed by 17.04.2005, it was actually completed and handed over to AAI on 15.06.2007. Only the Contractor has raised a claim with regard to delay in payment of final bill. This Court deems it appropriate to bear this in mind. This Court has noticed the factual position or in other words, the factual setting in the cases on hand that the Contractor having completed the construction of quarters beyond the original time line of 6 months has not been put in issue and has not been submitted for arbitration before AT and on the contrary, what has been submitted for adjudication before AT is the delay in payment of final bill by the AAI.

21. In this backdrop, a careful examination of the records and the pointed submissions that have been made by learned counsel on both sides brings to light that this argument needs to be examined only with regard to Claim No.7. To be noted, Claim No.7 has already been set out. The fate of Claim No.7 has also been set out. Further to be noted, this has been done by way of a tabulation supra elsewhere in this order. However, for the purpose of clarity in this discussion and dispositive reasoning, it is deemed appropriate to set out that Claim No.7 pertains to interest at the rate of 24% per annum on delayed payment for a period of

6 quarter years on account of leftover measurement. The claim computed by adopting interest at the rate of 24% per annum was to the tune of Rs.2,79,180.00/- (Rupees Two Lakhs Seventy Nine Thousand One Hundred and Eighty only). This was party allowed by AT as AT allowed 18% per annum interest with effect from 15.06.2007, 15.06.2007 being the date on which the contractor admittedly completed all the 14 quarters and handed over the same to AAI.

22. This is comparable with that of Claim No.2. To be noted, Claim No.2 pertains to claim of interest at the rate of 24% per annum qua what according to the Contractor is late payment of leftover measurement paid in the final bill claimed for the period 16.03.2005 to 15.03.2007. The amount claimed is Rs.1,65,913/- (Rupees One Lakh Sixty Five Thousand Nine Hundred and Thirteen). This was negatived.

23. Learned Senior counsel for AAI drew the attention of this Court to Clauses 7 and 7A of said agreement, which read as follows:

> *'CLAUSE 7. No payment shall be made for work, estimated to cost Rs.20,000/- (twenty thousand) or less till after the whole of the work shall have been completed and certificate of completion given. For works estimated to cost over Rupees twenty thousand the interim or running account bills shall be submitted by the contractor for the work executed on the basis of such recorded measurements on the*

format of the Department in triplicate on or before the date of every month fixed for the same by the Engineer-in-Charge. The contract shall not be entitled to be paid any such interim payment if the gross work done together with net payment/adjustment of advances for material collected, if any, since the last such payment is less than the amount of Rupees twenty thousand only in which case the interim bill shall be prepared on the appointed date of the month after the requisite progress is achieved. Engineer-in-Charge shall arrange to have the bill verified by taking or causing to be taken, where necessary, the requisite measurements of the work. In the event of the failure of the contractor to submit the bills,Engineer-in-Charge shall prepare or cause to be prepared such bills in which event no claims whatsoever due to delays on payment including that of interest shall be payable to the contractor. Payment on account of amount admissible shall be made by the Engineer-in-Charge certifying the sum to which the contractor is considered entitled by way of interim payment at such rates as decided by the Engineer-in-Charge. The amount admissible shall be paid by 10th working day after the day of presentation of the bill by the contractor to the Engineer-in-Charge or his Manager Engineering/Assistant Manager Engineering together with the account of the material issued by the department or dismantled materials, if any. In the case of works outside the headquarters of the Engineer-in-Charge, the period of ten working days will be extended to fifteen working days.

All such interim payments shall be regarded as payment by way of advances payment only and shall not preclude the requiring of bad, unsound and imperfect work to be rejected, removed, taken *away and reconstructed or re-erected. Any certificate given by the Engineer-in-Charge relating to the work done or materials delivered forming part of such payment, may be modified or corrected by any subsequent such certificate(s) or by the final certificate and shall not by itself be conclusive evidence that any work or materials to which it relates is/are in accordance with the contract and specifications. Any such interim payment, or any part thereof shall not in any respect conclude, determine affect in any way powers of the Engineer-in-Charge under the contract or any of such payments be treated as final settlement and adjustment of accounts or in any way vary or affect the contract.*

Pending consideration of extension of date of completion, interim payments shall continue to be made as herein provided, without prejudice to the right of the department to take action under the terms of this contract for delay in the completion of work, if the extension of date of completion is not granted by the competent authority.

The Engineer-in-Charge in his sole discretion on the basis of a certificate from the Assistant General Manager Engg(C)/Senior Manager Engg (C)/Manager Engg (C)/Asst. Manager Engg (C) to the effect that the work has been complete upto the level in question can make interim advance payments without detailed measurements for work done (other than foundations items to be covered under finishing items) upto lintel level (including sunshade etc.) and slab level, for each floor working out at 75% of the assessed value. The advance payments so allowed shall be adjusted in the subsequent interim bill by taking detailed measurements thereof." The final bill *shall be submitted by the contractor within one month of the date fixed for completion of the work or of the date of the certificate of completion furnished by the Engineer-in-Charge and payment shall be made within three months if the amount fo the contract plus that of the additional items is upto Rs.2 lakhs and in 6 months if the same exceeds Rs.2 lakhs, of the submission of such bill. If ther eshall be any dispute about any item or items of the work there the undisputed item or items only shall be paid within the said period of three months or six months as the case may be. The contract shall submit a list of the disputed items within thirty days from the disallowance thereof and if he fails to do this, this claim shall be deemed to have been fully waived and absolutely extinguished.*

CLAUSE 7(A). "The final bill shall be submitted by the Contractor in the same manner as specified in interim bills within three months of physical completion of the work or within one month of the date of the final certificate of completion furnished by the Engineer-in-Charge, whichever is earlier. No further claims shall be made by the contractor after submission of the final bill and these shall be deemed to have been waived and extinguished. Payments of those items of the bill-in respect of which there is no dispute and of items in dispute, for quantities and rates as approved by Engineer-in-Charge, will as far as possible be made within the period specified here in under, the period being reckoned from the date of receipt of the bill by the Engineer-in-Charge or his authorised Assistant Manager Engineering complete with account of materials issued by the Department and dismantled materials.

i) If the Tendered value of work is upto Rs. 5 lakhs :

3 months

ii) If the Tendered value of work exceeds Rs.5 lakhs:

6 months.'

24. Adverting to Clauses 7 and 7A of said agreement, it was submitted by learned senior counsel that award of interest for what according to him is late payment for left over measurements is impermissible as the contract does not provide for the same.

25. A very interesting scenario emerges. A careful analysis of the impugned award and the finding returned by AT qua Claim No.2 brings to light that Claim No.2 has been negatived by AT on the ground that Clause 7 of said agreement does not provide for interest even if there is a delay. This is articulated in one paragraph in Claim No.2, which reads as follows:

> 'Interest @ 24% p.a. on late payment of left over measurement paid in the final bill for the period of 16.03.2005 to 15.06.2007. Amount: Rs.165913.00'

26. There are two aspects of the matter. One aspect is, AT has noticed that said contract does not provide for interest on leftover measurements and on this ground negatived Claim No.2. After all sauce

to Goose is sauce to Gander too. If Claim No.2 has to be rejected on the ground that the said contract does not provide for interest on claims of this kind, the same applies to Claim No.7 also. To this extent Claim No.7 being partly allowed, wherein and whereby AT has awarded interest at the rate of 18% per annum from 15.06.2007 as opposed to contractor's claim of 24% per annum, deserves to be set aside.

27. This takes us to the other heads of claim. With regard to other heads of claim, an argument was made by learned senior counsel that there could not have been any interest awarded for delayed payment of final bill. With regard to delayed payment of final bill, who is responsible for the delay, is a matter which turns on merits. After sifting through the oral / documentary evidence, arguments and submissions, AT has awarded interest to the contractor. This interest will not get neutralized by Clauses 7 and 7A of said agreement as this is interest, post completion of work under said agreement, as admittedly the quarters were completed on 15.06.2007, AAI has allotted the quarters to its employees and AAI had the benefit of quarters. Under such circumstances, if AT in its wisdom on merits has returned a finding that the contractor is entitled to interest which is not neutralized by clause 7 /

7A of the said agreement it cannot be interfered with by this Court in exercise of powers under Section 34 as Hodgkinson principle that AT is the best Judge of quantity and quality of evidence operates qua finding as to who is responsible for delay in payment of final bill. At the risk of repetition, this Court deems it appropriate to reiterate that the delay in completion of construction and handing over of the quarters was not put in issue and that was not the subject matter of submission to the arbitration. The subject matter of submission to arbitration was only delay in payment of final bill. Therefore, the argument posited on the said agreement not providing for interest clause does not hold water with regard to Claim pertaining to interest post operation of said agreement. With regard to other heads of claim virtually there is no contest before me.

28. This takes us to the question as to whether one head of claim can be set aside. The law in this regard was settled by Hon'ble Supreme Court in ***J.G.Engineers Private Limited Vs. Union of India*** and another reported in ***(2011) 5 SCC 758*** by holding that when there are several heads of claim where some have been allowed/negatived, some have been partly allowed when a court exercising jurisdiction under Section

34 A and C Act finds that some of the heads are vitiated by the vice of one or more slots adumbrated in sub-section(2) can be set aside allowing the other heads of claim to survive. The relevant portion in this regard in J.G.Engineers case law is contained in paragraph 25 and the same reads as follows:

> '**25.***It is now well settled that if an award deals with and decides several claims separately and distinctly, even if the court finds that the award in regard to some items is bad, the court will segregate the award on items which did not suffer from any infirmity and uphold the award to that extent....'*

29. In this view of the matter, this Court deems it appropriate to set aside the impugned award with regard to Claim No.7 alone. This means that senior OP is partly allowed.

30. For the same set of reasons, which have been set out thus far, as part of discussion and dispositive reasoning, this Court finds no ground to interfere with the impugned award in the junior OP. Therefore, junior OP fails and the same has to be dismissed. The following order is passed:

O.P.No.510 of 2016 is partly allowed to the extent that Claim No.7 captioned *'Interest on delayed payment for the period of 6&1/4 years (16-03-2005 to 24-06-2011) on a/c of left* *over measurement. Amount Rs.279180.00'* for which interest has been awarded at 18% from 15.06.2007 alone is set aside;

b) O.P.No.932 of 2016 stands dismissed;

Considering the nature of the matter and the kind of submission that were made before this Court, there shall be no order as to costs.

31. Both the OPs stand disposed of on above terms.

12.08.2020

Speaking order : Yes/No
Index : Yes/No
gpa/sgl

M.SUNDAR, J.

gpa/sgl

O.P.No.510 of 2016&
O.P.No.932 of 2016

12.08.2020