

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	10.02.2021
Judgment pronounced on	22.04.2021

CORAM

THE HON'BLE MR. JUSTICE SETHILKUMAR RAMAMOORTHY

O.P.No.549 of 2016
and
A.No.8588 of 2017

Mohana Rao Dandamudi
No.51, Gambridge Avenue,
OAK BROOK, ILLINOIS 60523
USA.

... Petitioner

vs.

1.The Government of Tamil Nadu
Rep. by the Secretary to the Government
Information & Tourism (T3) Department,
Fort St. George,
Chennai – 600 009.

2.Tamil Nadu Tourism Development
Corporation Limited,
Rep. by its Managing Director,
Tourism Complex, No.2, Walaja Salai,
Chennai – 600 002.

... Respondents

This Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the Award dated 15.06.2016 of the Sole Arbitrator Hon'ble Mrs. Justice Chitra Venkataraman, retired Judge, High Court, Madras in the matter of disputes arising out of the Agreement dated 24.06.1985 read with the judgment dated

20.07.2009 of this Court in W.P.Nos.7162 of 1999 and W.P.No.5212 of 2000 and for costs.

For Petitioner : Mr.Satish Parasaran,
Senior Counsel
Assisted by
M/s.Preeti Mohan

For Respondents : Mr.P.H.Arvinth Pandian
Additional Advocate General
Assisted by
Mr.V.T.Aravind Gose
AGP(CS)

ORDER

The Arbitral Award dated 15.06.2016 is challenged in this petition under Section 34 of the Arbitration and Conciliation Act,1996(the Arbitration Act).

2. The Tamil Nadu Tourism Development Corporation Limited (the TTDC) intended to set up a tourist complex at multiple locations. In this connection, a preliminary agreement dated 04.12.1984 was executed by the Petitioner herein, who is a non resident Indian, and the Directorate of Tourism, Government of Tamil Nadu, with regard to the establishment of a youth resort at Muttukadu. Pursuant to an expression of interest by the Petitioner, the Government of Tamil Nadu issued G.O.Ms.No.625 on 31.12.1984 accepting the proposal of the

Petitioner for setting up an international tourist complex near Valluvar Kottam, Chennai. For such purposes, the Petitioner was requested to send detailed project reports with plans and estimates.

3. Thereafter, an agreement dated 24.06.1985 (the Agreement) was executed between the Government of Tamil Nadu and the Petitioner in respect of the establishment of five projects, namely, Thiruvидanthai International Beach Resort; Muttukadu Youth Resort; the Beach Resort at Mamallapuram; Valluvar Kottam International Tourist Centre; and a star hotel near Broadway. By the Agreement, the Petitioner and his associates agreed to subscribe to 25% of the equity share capital of the joint venture company to be established for the implementation of the above mentioned five projects. Clause 37 of the Agreement specified that the Petitioner shall be the sole representative of the second party and that all the constituents of the second party shall jointly and severally authorise him to act on their behalf. Such power included the authority to sue and be sued on their behalf for purposes of the Agreement. The Agreement also contained an arbitration clause. Thereafter, G.O.Ms.No.198 dated 28.04.1986 was issued whereby the proposal for the establishment of a joint venture company called the Tamil Nadu Tourism International Resort Limited (the JV Company) was approved. The said Government order also envisaged the transfer of the property owned by the TTDC at Mamallapuram to the JV Company. A further agreement dated

28.04.1986 was executed by the Petitioner and his associates, on the one hand, and the TTDC, on the other. This agreement pertained to the incorporation of the JV Company for purposes of establishing the beach resort.

4. Pursuant to the aforesaid agreements, the Petitioner and his associates undertook the task of preparing project reports, plans and proposals for establishing the ventures outlined above. In addition, a sum of about Rs.50 lakhs was invested as share capital in the JV Company. An operating lease was executed by the TTDC in favour of the JV Company with regard to the Mamallapuram Beach Resort. Pursuant thereto, the JV Company took over the operations of the beach resort at Mamallapuram some time in the year 1987 and continued to manage the said property until the end of March 1989. By G.O.Ms.No.130 dated 30.03.1989, the Government of Tamil Nadu terminated the lease with the JV Company and directed that the beach resort property should be recovered from the JV Company, namely, the Tamil Nadu Tourism International Resort Limited. Similarly, by G.O.Ms.No.131 dated 31.03.1989, the Government recalled its earlier orders with regard to the establishment of an international beach resort complex at Thiruvudanthai; the establishment of an international youth resort at Muttukadu; and a shopping complex with accommodation facilities near Valluvar Kottam. All these actions

resulted in disputes between the parties and the filing of writ petitions in relation thereto. Although several proceedings were initiated by the Petitioner herein, it is sufficient to draw reference to two cases, namely, W.P.No.7162 of 1999 and W.P.No.5212 of 2000. In W.P.No.7162 of 1999, by order dated 20.07.2009, this Court concluded that the Government may consider refunding amounts collected from the Petitioner towards the joint venture and also paying some amount towards compensation. Likewise, in W.P.No.5212 of 2000, by order dated 20.07.2009, this Court directed the Government to call the Petitioner for negotiations and refund the expenditure incurred on the project by adding something towards compensation. These orders were not carried in appeal and attained finality.

5. Pursuant to these orders, the Government, by G.O.Ms.No.85 dated 21.05.2010, offered the Petitioner a sum of Rs.55.08 lakhs as compensation in respect of the Mamallapuram Project. As regards the other projects, by G.O.Ms.No.86 dated 21.05.2010, the claims were rejected. Based on G.O.Ms.No.85, the Government issued a cheque to the Petitioner for a sum of Rs.55.08 lakhs; however, the Petitioner refused to accept this sum on the ground that it was inadequate. Eventually, a petition was filed under Section 11 of the Arbitration Act for appointment of an arbitrator and the Arbitral Tribunal was constituted.

6. The Petitioner made several claims before the Arbitral Tribunal for compensation both with regard to the Mamallapuram Project and the other three projects. Both the State Government and the TTDC were the respondents. Each of the respondents filed counter statements wherein they took identical positions. Both parties contended that the Government upon careful consideration agreed to pay a sum of about Rs.55 lakhs to the Petitioner but that the claims made in the arbitral proceedings were untenable. About 9 issues were framed by the Arbitral Tribunal upon consideration of the pleadings. Neither the claimant nor the respondents adduced oral evidence. Eventually, by Award dated 15.06.2016, the Arbitral Tribunal directed the Respondents to pay a sum of Rs.5 lakhs to the Petitioner with interest thereon aggregating to a total sum of Rs.12,68,452.05. The present petition is filed in the said facts and circumstances.

7. I heard Mr.Satish Parasaran, learned senior counsel, assisted by Ms.Preethi Mohan, learned counsel for the Petitioner; Mr.P.H.Arvinth Pandian, learned Additional Advocate General, assisted by Mr.V.T.Aravind Gose, learned Additional Government Pleader, for the Respondents.

8. Mr.Satish Parasaran contended that the Award is liable to be set aside on the ground of patent illegality and on the ground that it

violates public policy. He pointed out that by orders passed in W.P.No.7162 of 1999, this Court concluded that the Government was liable to pay compensation and reimburse the expenses of the Petitioner and his associates. Similarly, as regards the Thiruvидanthai, Valluvar Kottam and Muttukadu Projects, this Court by order dated 20.07.2009, in W.P.No.5212 of 2000, concluded that the Government was liable to reimburse the expenses incurred by the Petitioner and his associates and also pay compensation. Consequently, he contended that the scope of dispute before the Arbitral Tribunal was confined to the extent or quantum of compensation. His next contention was that the Government had agreed to pay a sum of Rs.55.08 lakhs in terms of G.O.Ms.No.85, dated 21.05.2010, and that the arbitration proceeding was a consequence of the refusal by the Petitioner to accept such sum. In these circumstances, he contended that the Award of a paltry sum of Rs.5 lakhs is clearly contrary to the pleadings and the evidence on record and amounts to an error apparent on the face of the Award. On this basis, he submitted that the Award is patently illegal.

9. His next contention was that the Petitioner was the authorized representative and agent of a whole group of NRIs. Even the investment in the JV Company was admittedly made not only by the Petitioner but also by these NRIs. Sufficient evidence was adduced

with regard to such investment and the learned Arbitrator also took note of the fact that the Petitioner and his associates invested a sum of Rs.50,07,209.20 towards the share capital of Tamil Nadu Tourism International Resorts Limited (the JV Company). In spite of noticing these aspects, he pointed out that the learned Arbitrator committed the patent error of concluding that the Petitioner had not established that the claim was made in a representative capacity. On this issue, he also pointed out that Clause 37 of the Agreement between the Government of Tamil Nadu and the Petitioner categorically specifies that the Petitioner shall be the sole representative of the NRI group, and that they would irrevocably constitute and authorise him to act on their behalf, including to sue and be sued on their behalf. After the learned Arbitrator noticed Clause 37 in paragraph 131 of the Award, he pointed out that the conclusion that the claim petition had not been filed in a representative capacity directly contradicts the facts and evidence on record.

10. As a consequence of concluding that the Petitioner had not established his right to make the claim in a representative capacity, Mr.Satish Parasaran contended that the learned Arbitrator proceeded to assess and determine the compensation payable to the Petitioner on the basis of the profits earned by the JV Company under the Petitioner's management. Such computation was made on the basis

that the Petitioner had contributed 33% to the share capital and was, therefore, entitled to 33% of the profits during the aforesaid period. Mr.Satish Parasaran further contended that such assessment and determination is also patently illegal because only the Petitioner's investment was reckoned as also because the expenditure incurred on the projects and the damages claim had been unjustly disregarded.

11. On the contrary, Mr.Arvinth Pandian, learned Additional Advocate General, submitted that the Petitioner made an exorbitant and completely baseless claim. By drawing reference to the claim statement, he pointed out that the Petitioner had claimed a sum of Rs.504.23 crores with regard to the Mamallapuram Beach Resort. In addition, with regard to the Thiruvidadanthai, Muttukadu and Valluvar Kottam projects, an aggregate sum of Rs.526.05 crore was claimed. None of these claims could be corroborated by the Petitioner and, therefore, the learned Arbitrator was fully justified in rejecting such claims.

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12. Mr.Arvinth Pandian emphasized that the projects were cancelled by the Government of Tamil Nadu in public interest because the Special Committee constituted to appraise the projects concluded that the projects were unviable on account of the undervaluation of the immovable properties of the Government/TTDC. Therefore, he

submitted that such cancellation was fully justified and was occasioned by the false project report that had been prepared by the Petitioner. He further submitted that the Arbitral Award is not liable to be interfered with on any of the established grounds for such purpose. In other words, he submitted that the learned Arbitrator duly examined the pleadings and appraised the evidence on record before drawing conclusions with regard to the compensation payable to the Petitioner. Such conclusions are based on appreciation of evidence, which is not liable to be interfered with under Section 34 of the Arbitration Act.

13. Upon considering the rival contentions, the question that arises for consideration is whether the Award is patently illegal or contrary to public policy. The contention that the Award is patently illegal was founded primarily on the ground that the conclusion that the claim statement had not been filed in a representative capacity by the Petitioner is patently illegal. Therefore, I propose to examine this question first. The Agreement between the Government of Tamil Nadu and the Petitioner was executed on 24.06.1985. The Government of Tamil Nadu is referred to in the Agreement as the party of the first part, and the Petitioner herein is referred to as the party of the second part. Clause 14 of the Agreement envisages that the contribution to the 25% equity share capital in the JV Company may be made not only by the Petitioner but also by his associates. The said clause is as

under:-

<https://www.mhc.tn.gov.in/judis/>

"14.The details of members who are the successors and/or associates of the Second Party and who have contributed with him towards equity share capital aggregating to 25% shall be furnished to First Party from time to time and any transfers/sales among them shall also be intimated to the First Party as and when such transactions are put through subject to the conditions in clause 15."

Clause 16 is also relevant and is as under:-

"It shall be open for the Second Party to arrange for subscription of the share capital of the company within the limit of 25% on the total equity capital, from such persons as may be willing to ratify and be bound by the terms of this agreement. The Second Party shall obtain suitable letters from such persons agreeing to be bound by the terms of the agreement and forward them to the First Party. Such persons who have agreed to be bound by the terms of the agreement, shall thereafter be deemed to be "Associates of the Second Party".

The next clause of relevance is Clause 37 which is as under:-

"For the purpose of this agreement Thiru Mohana Rao Dandamudi shall be the sole representative of the Second Party. All the constituent of the Second Party shall jointly and severally and irrevocably constitute and authorise

Thiru Mohana Rao Dandamudi, to do on their behalf all such acts and deeds as are necessary to implement and comply with the provisions of this agreement and he shall have the absolute authority to represent them including the authority to sue and be sued on their behalf for purposes of this agreement.”

14. The undisputed position that flows from the pleadings and documents on record is that the Petitioner and his associates invested a sum of Rs.50,07,209.20 in the equity share capital of the JV Company, which was established to implement the Mamallapuram Beach Resort Project. Such investment was made in a contractual context, wherein the Petitioner was empowered to represent his associates and sue on their behalf. The learned Arbitrator also adverted to the contribution by the Petitioner and his associates in paragraph 145 of the Award.

15. Upon perusal of the claim statement before the Arbitral Tribunal, it appears that the Petitioner herein has referred to the contribution made by the NRIs at paragraph 20. The relevant parts of paragraph 20 are as under:-

“...By 31.12.1987 the NRIs had also brought in the 25% capital of Rs.50 Lakhs.”

“....It is not out of place to mention here that the Claimant and his associates apart from bringing

25% capital contribution of Rs.50 lakhs had also already spent by that time US\$4,47,204 and Indian Rupees 4,37,400 towards all the areas of the Integrated Tourism Project which was also recorded in the Board Minutes of the Joint Venture company headed by the Government nominees.”

Paragraph 51 is also relevant and the said paragraph is as under:-

“The Claimant submits that the NRI associates also would have earned substantially by way of dividend income and by way of management fee under the agreements. Even at the projected and expected profits for the 10 years (after 3 years of breaking even) and on the same conservative rate the earnings would have been enormous.”

Paragraphs 52 and 53 which contain the claims in respect of the Mamallapuram project, and the other three projects, respectively, also make references to the claimant and his associates.

16. Upon perusal of the counter statements filed by the Government of Tamil Nadu and the TTDC, I do not find any denial of the right of the Petitioner to espouse the cause of his associates. The response to the assertion that “by 31-12-1987 the NRIs had also brought in the 25% capital of Rs.50 lakhs” is as under:

“An amount of Rs.50 lakhs had been invested by the Claimant and was retained in the new Company for which the Claimant was the Managing Director” (paragraph 13 and 15, respectively, of the counter statements of the Government and TTDC).

Even with regard to the assertion that the Claimant and his associates had incurred expenditure of US \$ 4,47,204 and INR 4,37,400, the response in the counter statement is as follows:

“...the First Respondent is not informed with the details of the expenditure of 4,47,204 US \$ alleged to be spent by the Claimant and a sum of Rs.4,37,400 alleged to be spent in Indian Rupees towards the integrated Tourism Projects at Thiruvudanthai, Muttukadu and Valluvar Kottam and the Claimant is put to strict proof of the same.” (paragraph 14 of the counter statement of the Government)

Indeed, on account of the fact that the espousal of the cause of his associates by the Petitioner was not refuted, the Arbitral Tribunal did not frame an issue as to whether the claim statement had been filed in a representative capacity.

17. In light of the aforesaid pleadings, especially when viewed in the contractual context of clauses 14, 16 and 37 of the Agreement, I find that the conclusion of the Arbitral Tribunal to the effect that the

Petitioner had not averred that the claim statement was filed in a representative capacity is patently illegal. Such patent illegality goes to the root of the matter inasmuch as it impacted the manner of adjudication fundamentally because the Arbitral Tribunal concluded that the claims can only be seen as having been made by the claimant in his individual capacity. Paragraph 139 of the Award is significant, in this regard, and is, therefore, set out below:-

"139. Thus, taking into account the above facts and in particular there being no material to hold that the claim is made in a representative capacity, the merits of the claim has to be seen as only made by the claimant in his individual capacity alone."

18. The second aspect to be considered is whether the conclusion that the Petitioner is entitled to a sum of Rs.5 Lakhs is sustainable. In order to arrive at such conclusion, the learned Arbitrator took into consideration the statements made in the claim statement of the Petitioner as regards the operating profit of the Mamallapuram Beach Resort under the Petitioner-Claimant's management. The aggregate operating profits over three years were computed at Rs.9 Lakhs and on the basis of the claimant's share in the total share capital of the JV Company, the learned Arbitrator determined that the Petitioner-Claimant is entitled to 50% of Rs.9

Lakhs, which was rounded off as Rs.5 Lakhs. This conclusion is riddled with several patent errors. If the compensation claim was to be computed on the basis of the Petitioner's individual share in the equity share capital, only Rs.3 Lakhs should have been awarded. Instead, without citing any reasons, a sum of Rs.5 Lakhs has been awarded. The other important aspect, on this issue, is that the pleading of the claimant with regard to the operating profits during the period when the JV Company was under the Petitioner's control was denied by the Respondents in their counter statements. Each of the Respondents had stated in their counter statements that the JV Company incurred a loss of Rs.80,000/- as on 30.06.1987; a loss of Rs.2,32 lakhs as on 30.06.1988; and made a meagre profit of Rs.0.80 lakhs for the period ended on 31.03.1989. Such denial has not been taken into consideration by the Arbitral Tribunal while granting a sum of Rs.5 Lakhs as compensation on a completely untenable basis.

19. The third aspect that should be considered is that the Government of Tamil Nadu under G.O.Ms.No.85 dated 21.05.2010 agreed to pay an aggregate sum of Rs.55.08 Lakhs as compensation to the Petitioner and his associates with regard to the Mamallapuram Project. This is also stated expressly in the counter statements filed by the Government of Tamil Nadu and the TTDC before the Arbitral Tribunal. For instance, the Government stated as under in paragraph 27 of the counter statement:

"27. It is submitted that the said fanciful representation of the Claimant claiming compensation of 604.55 lakhs USD was examined in detail by the Government. The relevant audited Books of Account of TTIR and other documents were also examined by the Government in this regard. After detailed examination of the same, speaking orders was issued by the Government vide G.O.Ms.No.85, dated 21.5.2010 for refund of a sum of Rs.19.06 lakhs towards the actual expenditure incurred by Thiru Mohana Rao Dhandamudi for upgradation of two Mamallapuram properties and compensation of interest to the tune of Rs.36.02 lakhs on the investment of Rs.19.06 lakhs made by him by reckoning interest at 9% per annum for a period of 21 years."

In spite of the admission of liability to the extent of Rs.55.08 lakhs, the Arbitral Tribunal has awarded only a sum of Rs.5 Lakhs and that too on a completely untenable basis.

20. For all these reasons, I am of the view that the Arbitral Award suffers from patent illegality and is unsustainable. In paragraph 15 of **ONGC v. Saw Pipes** [(2003) 5 SCC 705], the Supreme Court held that an arbitral award which is patently illegal is liable to be set aside. In **Associate Builders v. Delhi Development Authority** [(2015) 3 SCC 4], the Hon'ble Supreme Court concluded that an

Award is perverse if it disregards vital evidence and would, as a consequence, be liable to be set aside as being patently illegal. An arbitral award is liable to be set aside on this ground not only under Section 34(2-A), which was introduced by the 2015 amendment and, therefore, would not apply to this pre-amendment dispute but also under the law prevailing prior thereto. For reasons set out above, I am of the view that the Award under challenge is perverse because the conclusions are contrary to the pleadings and to the evidence on record, including undisputed evidence.

21. As a result, the petition is allowed and the Arbitral Award dated 15.06.2016 is set aside. The Petitioner shall be entitled to the benefit of Section 43(4) of the Arbitration Act with regard to the time taken to prosecute the Arbitral proceedings and the consequential proceedings before this Court in case the Petitioner initiates *de novo* arbitration proceedings. There will be no order as to costs. Consequently, the connected application is closed.

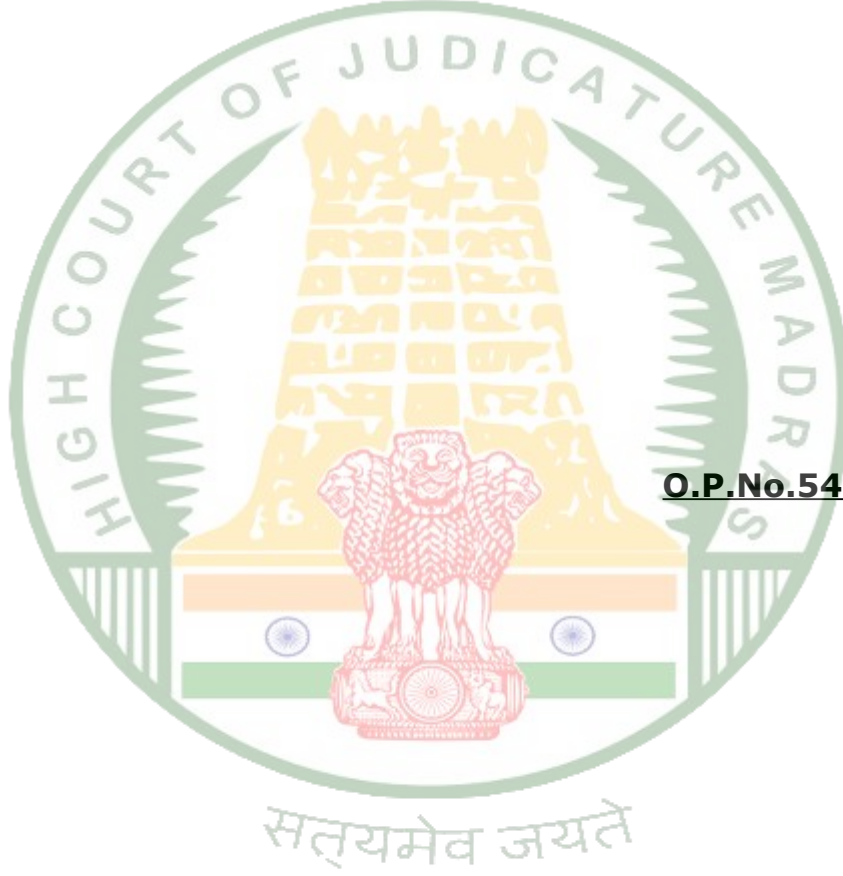
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SENTHILKUMAR RAMAMOORTHY, J.

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