

THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
16~04~2021	02-06~2021

CORAM

THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

O.P.No.71 of 2016

Mr. R. Venkataramaiah,
Plot No..79, New MLA & MP's Colony Road,
No.10C, Jubilee Hills, Hyderabad. ... Petitioner

.Vs.

1. The Southern Railway,
Rep.by Deputy Chief Engineer (Gauge Conversion)
Southern Railway, Tambaram-45.
2. Mr.B.Narasimha Rao (Arbitrator)
Financial Advisor & Chief Accounts Officer (Construction)
Southern Railway,Egmore,
Chennai 600008.
3. Mr.P.K.Mishra (Arbitrator)
Divisional Railway manager,
Chennai Division, Southern Railway,
Park Town, Chennai-600003.
4. Mr.T.M.Sridhar (Arbitrator)
CSTE (Planning & Project), Southern Railway
Park Town, Chennai – 600003. .. Respondents

Prayer: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Arbitration Award dated 15/12/2014 passed by the Arbitrators namely the Second, Third and Fourth Respondents and to pass a fresh Award allowing all the claims of the Petitioner.

For Petitioner : Mr. Amalraj S. Panikilapatti

For Respondents : Mr. P.T. Ramkumar
Standing Counsel for Railways

ORDER

Aggrieved over the Award passed by the Arbitration Tribunal consisting of three Members, the present Original Petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996.

2. Though the Award has been challenged on various grounds the main ground focused during the submissions before this Court is that the Award is in violation of principles of natural justice and the Arbitral Tribunal has been reconstituted after 17th hearing and the reconstituted Arbitral Tribunal has without giving any opportunities to the parties just sat on one hearing and passed an

Award which is against the fundamental policy of Indian Law and there is breach of principle of collegiality. The breach of collegiality will go to the root of the matter, the same will overlap the principles of natural justice and judicial infidelity.

3. It is further contention that the Award was passed with inordinate delay and the same is also one of the grounds which cannot be sustained in the eye of law. It is also contended that MSME procedures have not been followed. It is the further contention that even on merits the Arbitrators have never considered the relevant materials. There was no reason for not considering the admitted documents of the rider agreements. Therefore submitted that the Award is also affected by the illegality. Hence the same is liable to be set aside.

4. In support of his contention the learned counsel for the Petitioner relied upon the following judgments:

- 1. Abridgement of the Cases on the different branches of the
Common Law by Charles Petersdorff – Published in 1830.*

2. *Nand Ram & Anr. Vs. Fakir Chand* [7A.523 : A.W.N.[1885] 139]
3. *Abu Hamid ahiea Ala Vs. Golam Sarwar* [AIR 1918 cAL 865]
4. *Dhooli Atchyya & Anr Vs. Dhooli Peddenti & Ors.* [AIR 1928 Mad 983]
5. *Fazalally Jivaji Raja Vs. Khimji Poonja & Co.* [(1934) 36 BOMLR 1005]
6. *Patel Bros. Vs. Shree Meenakshi Mills Ltd.,* [(1942) 44 BOMLR 485]
7. *J.Kuppuswami Chetty Vs. B.V.Anbantharamier & Anr.* [(1947) 1 MLJ 297]
8. *Reserve Bank of India Vs. S.S.Investments & Ors.* [1992 ALL MR Online 633 (S.C.)]
9. *Gurmej Singh Vs. State of Punjab & Anr.* [Crl.Appeal No.992/2009 arising out of SLP [Crl.] No.6705/2006 Supreme Court Web site.]

10. *Union of India Vs. Bharath Builders & Contractors [2012 SCC*

Online Ker 8773 : 920120 2 KLT 812]

11. *Harji Engg Works Pvt.Ltd., Vs. M/s.BHEL & Anr. [OMP*

No.241 of 2006 Delhi High Court Web site]

12. *S.A. Fasludeen & Anr. Vs. Siyauddinn & Ors [OSA*

No.173/2014 Madras High Court Web site]

13. *Ganesh Babu Vs. M/s.Adventuries India & Ors. [OP*

No.182/2015 Madras High Court Web site]

14. *“Improper Deliberations in International Arbitration as a
Ground of Annulment” - Kluwer Arbitration Blog.*

5. The learned counsel appearing for the Respondent submitted that there is no violation of principles of natural justice. The Arbitral Tribunal has been reconstituted as per the GCC and the GCC provides the manner which the proceedings by the Arbitrator to be conducted. There is no necessity to give oral evidence even as per the Section 24 of the Arbitration and Conciliation Act and submitted that the delay is not applicable to the present case. After the

reconstitution of Tribunal the Award has been passed within a reasonable time. Hence submitted there is no merits in this application and the same is liable to be dismissed. In fact, Arbitrators considered the documents very well and relied upon the measurement took in the presence of the petitioner and passed an Award. Hence the same will not be interfered.

6. Before going to the merits of the Award, the following facts are necessary:

6.a. The petitioner was given contract dated 03.05.1995 vide Agreement No.44/CN/1995 for Gauge Conversion from Madras Beach – Tiruchirappalli – Villupuram – Trichirappalli Section - Earthwork in froming bank/cutting for widening the existing MG formation etc between Villupuram (excl) and Puvanur (incl)-Reach-I & II (Balance work). In respect of the above contract, the dispute arose between the Petitioner and the Respondent. By letter dated 05.07.2006, the Respondent General Manager constituted Arbitral Tribunal consisting of (i) Mr.P.K.Mishra, Presiding Arbitrator (ii) Mr.N.A.Murthy, Chief Signal & Telecommunication Engineer and (iii) Mr. B.Narasimha Rao are Arbitrators, to adjudicate the dispute between the Petitioner and the 1st Respondent. The above

three member Arbitral Tribunal conducted hearings for 17 sittings. First sitting was on 03.10.2007 and the 17th Sitting was on 03.05.2013. When the matter stood thus, the Arbitration Tribunal was reconstituted by the General Manager of the First Respondent vide letter dated 21.08.2014 wherein one of the members of the Arbitral Tribunal Mr.B. Narasimha Rao was appointed as Presiding Arbitrator and one Mr.T.M.Sridhar was inducted as another Member in place of Mr.N.A. Murthy. The reconstituted Tribunal held sitting on 15.12.2014 and delivered an Award in the 18th Sitting.

6.b. As per the Letter of Acceptance dated 09.06.1994 the contract has to be completed on or before 08.03.1995 at an agreement value of Rs.76,63,902/-. However, the above contract was terminated. Thereafter, open tender were invited. Again the Petitioner participated in the Tender and he being the lowest tenderer the Letter of Acceptance was again issued to him on 18.01.1995 at an agreement value of Rs.90,88,118.84. The work has to be completed within nine months i.e., by 17.10.1995. Agreement No.44/CN/1995 dated 03.05.1995 was entered between the contractor and the 1st Respondent. The cumulative payment made to the 21 bills was about Rs.2,30,95,332/- The work was completed on

30.06.1998. The contractor has claimed actual value of the work to the tune of Rs.2,97,90,249.43. Therefore, the differential value has been claimed under Claim No.1 for a sum of Rs.66,95,071/-. However, the Arbitral Tribunal Award is only Rs.11,76,048/-.

6.c. As per the Claim No.2 Amount reimbursable on account of risk and cost was Rs.16,91,500/-. However the same was negated by the Arbitral Tribunal. The Claim No.3 with regard to the idle charges for men and machinery is for a sum of Rs. 17,55,600/- was also negated by the Arbitral Tribunal. However, Claim No.4 for Refund of EMD/Security Deposit for a sum of Rs.1,50,000/- was allowed by the Tribunal. As against the Award the contractor is before this Court seeking remedy under Section 34 of the Arbitration Conciliation Act, 1996.

7. Much emphasis was made by the learned counsel for the Petitioner that the Award is vitiated by violation of principles of natural justice. After reconstitution of the Arbitral Tribunal no opportunities have been given to the parties and reconstituted award when the Tribunal has sat in only one sitting i.e.,

on 18th sitting on 15.12.2014 and just passed an Award. Though the Arbitral Tribunal was originally constituted on 05.07.2006 the very award itself indicate that before reconstitution of the present Tribunal two of the Members one Mr.P.K.Mishra was the Presiding Arbitrator and Mr.B.Narasimha Rao was one of the Members in the said Arbitral Tribunal. Whereas subsequently one Mr.T.M. Sridhar was reconstituted in the place of Mr.N.A. Murthy. This reconstitution made only on 21.08.2014. Though the Arbitral Tribunal was constituted on 05.07.2006 its first sitting was only on 03.10.2007 and concluding the final/17th sitting on 03.05.2013. It is also to be noted that the work was completed as early as 30.06.1998. The main dispute arose with regard to the execution of the work and value of the work which was completed in the year 1998. It appears that the Arbitration was delayed for some other reasons for departmental/CBI enquiries in this matter. Only for the first time on 05.12.2009 measurement was taken which was also objected by the petitioner. But the fact remains two rider agreements for the original agreement dated 03.05.1995 came to be executed for the value of Rs.2,98,00,00,000/- However, the rider agreement has not been discussed fully along with the original agreement dated 03.05.1995. Important documents have never been considered by the Arbitrators except mentioning them. Therefore, the

relevant documents which are omitted to be considered by the arbitrators will go to the root of the case. When the admitted documents which indicate the value of the work has not been taken into consideration this Court is of the view that the award definitely suffers.

8. When the Tribunal ignores the vital evidence in arriving at a decision same can be interfered under Section 34 of the Act on the ground of patent illegal. Though this Court cannot sit as a Court of Appeal, the errors cannot be corrected, however, once the Court finds that very vital documents were omitted or ignored by the Arbitrator in arriving a decision such award is liable to be set aside.

9. Similarly, it is also to be noted that the Arbitral Tribunal reconstituted only on 21.08.2014, prior to that 17 sittings have held by the earlier Tribunal. Of course two of the members are the same but the fact remains that the newly inducted member reconstituted Tribunal along with the existing two members held a sitting only once on 15.12.2014 and just passed an Award. It is to be noted that no opportunity whatsoever given to the parties to adduce submissions either orally or in written. Though the Tribunal has discretion to hold oral hearings for the

presentation of evidence or for oral argument, such discretion cannot take away the right of hearing. In fact the Tribunal shall hold oral hearings at an appropriate stage of the proceedings, on a request by a party unless the parties have agreed that no oral hearing shall be held. Similarly, parties also shall be given a sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of documents, goods or other property, as per Section 24 of the Arbitration and Conciliation Act. The very fact that newly constituted Tribunal held a sitting on 15.12.2014 to publish Award. There is no indication in the Award that proper notice has been given to the parties with regard to the meeting of the Tribunal. At any event, when the Arbitration Tribunal is reconstituted new inducted member should have been deliberated and involved in consulting process with others. He has not even heard any oral arguments also.

10. In “Abridgment of the Cases on the different branches of the Common Law by Charles Petesdorff” published in 1830, it is held as follows:

“2.DALLING V. MATCHETT M.T.1740. C.P.Barnes 56; S.C.Willes. 215. Matters in difference were by consent of the parties referred to three arbitrators so as they or any two of them make an award; and an award having been made by two in plaintiff's favour, defendant moved to set it aside

objecting that two had no jurisdiction without the third, and obtained a rule to show cause; upon showing cause, it appeared that the third arbitrator had sufficient notice of the meetings of the other two, and might have been present if he would. Per Cur. It is agreed by both sides, that if the third had met, two might have made an award; two had jurisdiction, but they ought to meet, pursuant to the rules of law. If the third had been present he might have altered the opinion of the other two; he is not therefore to be excluded by fraud, nor are the two to act without the third having an opportunity to be present; but where the third has sufficient notice, as in this case, and will not attend, the meeting of the two is regular and their authority sufficient – Rule discharged.”

11. In ***Abu Hamid Zahiea Ala vs. Golam Sarwar*** [1916 SCC Online Cal 183] it is held that an award made by a majority of arbitrators appointed by the parties without consulting the others is not a valid award, even when the reference authorises the arbitrators to make a majority award. In the above judgment the Court has also held that it is essential that there should be a unanimous participation by the arbitrators in consulting and deliberating upon the award to be made; the operation of this rule is in no way affected by the fact that authority

is conferred upon the arbitrators to make a majority award; even where less than the whole number of the arbitrators may make a valid award, they cannot do so without consulting the other arbitrators. The inference follows that in the present case there is no valid award.

12. In ***Dhooli Atchayaa and Anr. Vs. Dhooli Peddenti and Ors. [AIR 1928 Mad 983]*** it is held thus:

*“In this case the parties referred the disputes through Court to five arbitrators, it being agreed that the opinion of the majority should prevail. Two of the arbitrators did not act. In such a case the award is null and void if some do not act. This has been so well established that it is unnecessary for me to give the reasons of the rule. In each of the cases in ***Tahmmiraju v. Bapiraju [1889] 12 Mad.113***, ***Abdulla v. M.v.B.s.Firm and Sons A.I.r.1924 Angoon 153***; ***M.Appayya v. Y.Venkataswami [1918] 8 M.L.W.171***; and ***Sanjeevappa v. Venkatanarappa A.I.R.1927 Mad.436***, such an award was set aside by the High Court in the revision. The case in ***Dalling v. Matchett 94 E.R.804*** does not help the respondent. The order of the Court below is set aside and the suit will be restored to file and disposed of according to law. The petitioners will have costs of this petition and of the costs of the hearing of the application in the lower court to pass a*

decree in terms of the award. Other costs of the lower Court will abide the result of the suit.”

13. In ***Fazalally Jivaji Raja vs. Khimji Poonja And Co. [(1934)36 BOMLR 1005]*** it is held as follows:

“23. If there is one proposition which is firmly established by authorities more than any other in regard to arbitration, it is this that where there are several arbitrators, all must act together and each must act in the making of the award ; and this is not denied. Indeed Mr. Setalvad concedes it. Every stage of the proceedings must be in the presence of all, and every judicial act to be done by two or more must be completed in the presence of all who do it. In Morgan v. Boulton (1863) 11 W.R. (Eng.) 265, the facts were that the umpire and one of the arbitrators in the absence of the other arrived at a decision, though they informed him of it and afforded him an opportunity of objecting thereto before finally and formally making their award. The Court consisting of Cockburn C.J., Crompton and Blackburn JJ. observed as follows:

...it would be dangerous to allow an award to stand under such circumstances., It was not a mere

communication of the decision, which was sufficient, for it was not easy to eradicate an impression once produced and allowed to sink in the mind. There ought to have been a meeting of all three, for the purpose of mutual discussion of the matter, before arriving at any decision. It was essential to the right exercise of the judicial function by several persons, that there should be this joint consideration and discussion of the matter, before any of them arrived at a decision upon it. In this case the arbitrator of the applicant ought to have been allowed an opportunity of hearing what was urged by the other, and of making any answer to it, and urging any arguments in support of the opposite view before the umpire had formed an opinion upon the question. It would be a most dangerous precedent to allow an award to stand which had virtually been arrived at and resolved on by the umpire on the ex parts statements of one of the arbitrators, in the absence of the other. On that ground, therefore, the award must be set aside....”

In the above judgment it is further held as follows:

“I find the rule thus stated in Russell on Arbitration,

p. 209,-speaking of the duty of joint arbitrators,-'As they must all act, so must they all act together. They must each be present at every meeting; and the witnesses and the parties must be examined in the presence of them all; for, the parties are entitled to have recourse to the arguments, experience, and judgment of each arbitrator at every stage of the proceedings brought to bear on the minds of his fellow-judges, so that by conference they shall mutually assist each other in arriving together at a just decision: Re Flaws and Middleton (1845) 6 Q.B. 845; Little v. Newton (1841) 9 Dowl. P.C. 437 : 2 M. & G. 351 : 2 Scott N.R. 509; Stalworth v. Inns (1844) 13 M. & W. 466 : 2 D. & L. 428.'

14. In ***J.Kuppusamy Chetty vs. B.v.Anantharamier and Anr. [(1947) 1 MLJ 297]*** this Court has held that all the Arbitrators give their united consideration to all matters arising in the arbitration which has been referred to them.

15. In ***Gurmej Singh vs. Sate of Punjab and another [Crl.A.No.992 of 2009 arising out of SLP (Crl.)No.6705 of 2006 dated 28.04.2009]*** the Apex Court has held that the principles of natural justice are those rules which have

been laid down by the Courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights.

16. Therefore, when no opportunity has been granted and the newly inducted member who is participating in one sitting and passing an Award it cannot be said that there is a deliberation among all of them. It is highly difficult even to infer that newly inducted member gone through papers and passed an Award on the same day.

17. In a Kluwer Arbitration Blog it is indicated that the Spanish Supreme Court has held that the deliberations had been conducted contrary to the principle of arbitral collegiality. The Supreme Court held that a violation of the principle of collegiality was a violation of the right to a fair trial (Article 24 of the Spanish Constitution) and constituted a ground for annulment for public policy. In Sweden also the Court has held that absence of a proper deliberation on contentious issues has been relied upon as a ground for annulment as early as 1924 (see *Arsbackatravaruaktiebolag v. E.Hedberg*, NJA 1924 p.569). More recently,

the Award in Czech Republic v. CME was challenged, though unsuccessfully, on the basis of the alleged exclusion of an arbitrator from the deliberations (Svea Court of Appeals, Case No.T 8735-01).

18. From the above articles the uniform views taken by the Courts across the country indicate that when there is violation of principle of collegiality and the award cannot be sustained in the eye of law. In view of the above referred judgments and also the facts as narrated above, the opportunities have not been granted and there is no discussion nor any opportunity given to the parties by the newly constituted Tribunal besides Tribunal also ignored the vital evidence viz., rider agreements dated 5.3.1998 for the value of Rs.2,97,90,349. In view of the same, the Award is liable to be set aside. Accordingly, the same is set aside.

19. In the result, Original Petition is allowed. The Arbitral Tribunal can be reconstituted within a period of 60 days as per GCC. In the event of non constitution within the above period, then in accordance with Section 11 of the Arbitration and Conciliation Act, 1996.

02.06.2021

Index : Yes / No
Internet: Yes
speaking order / non-speaking order
ggs

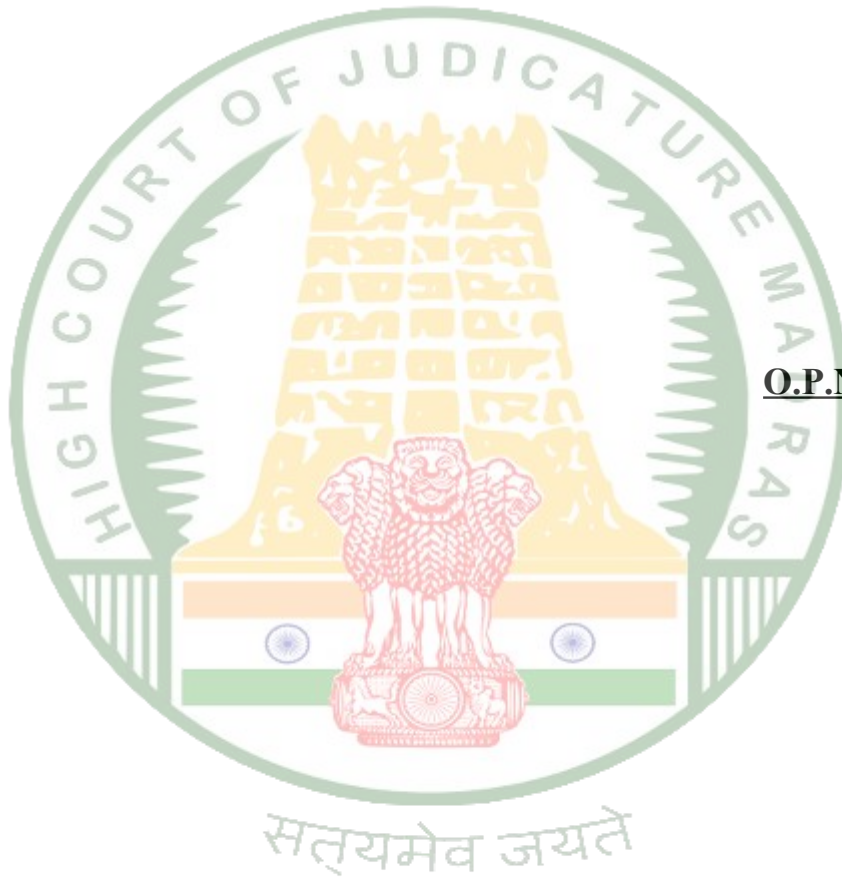
To

The Deputy Chief Engineer (Gauge Conversion)
The Southern Railway,
Southern Railway, Tambaram-45.



WEB COPY

N. SATHISH KUMAR, J.
ggs



order in:
O.P.No.71 of 2016

WEB COPY

02.06.2021