

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 16.02.2021

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.859 of 2016

Best Cast Constructions Pvt. Ltd.,
Rep. By Mr.N.Venugopal (President)
No.9, 6th Street
T.N.Nagar, Palanipet
Arakkonam – 631 002
Vellore District
Tamilnadu State

.. Petitioner

vs.

1. The Union of India
Represented by the General Manager
Southern Railway
Head Quarters Office
Park Town
Chennai – 600 003
2. The Chief Engineer
Construction
Southern Railway, Egmore, Chennai – 600 008
Now @ Ernakulam, GCDA Towers
Eastern Entry Tower
1st Floor, Karshaka Road
Ernakulam (South Railway Station)
Kochi – 682 016
Kerala State

3. The Deputy Chief Engineer

Construction, Southern Railway
First Floor, Railway Station Building
Cannanore (Kannur) – 670 001
Kannur District, Kerala State

... Respondents

Petition filed under Section 34 of Arbitration and Conciliation Act, 1996 to set aside the original award of the Hon'ble Sole Arbitrator dated 05.03.2016 in the Arbitration Proceedings between the Petitioner and Respondents 1 to 3 to the extent it disallowed the Claim of the Petitioner and thus render justice.

For Petitioners : Mr.K.Aparna Devi

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

ORDER

Captioned 'Original Petition' ('OP' for the sake of brevity) is an application under Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)', which shall hereinafter be referred to as 'A and C Act' for the sake of brevity, assailing an 'arbitral award dated 05.03.2016' (hereinafter 'impugned award' for the sake of brevity), made by a Sole Arbitrator, who constituted the 'Arbitral Tribunal' ('AT' for the sake of brevity) which made the impugned award.

2. The entire lis pertains to a contract awarded by Southern Railway to 'Best Cast Constructions Pvt. Ltd.,' (hereinafter 'contractor'

for the sake of convenience). Suffice to say that this contract was *inter alia* for doubling of track between Shornur and Mangalore – Cannanore – Mangalore Section : Construction of Major Bridges with Pile foundation and Earthwork for approaches, 1) 14 spans of 12.19 M, PSC, Girder opposite to existing Bridge No.1162 at km 804/8-13 and 2) 1 span of 15.00M PSC Girder to existing Bridge No.11653 at km 804/17-805/1.

3. Southern Railway floated a tender on 15.07.1998, a formal agreement was entered into on 28.06.1999 (this formal agreement shall hereinafter be referred to as 'said contract' for convenience) and 24 months from the date of Letter of Acceptance (22.05.1999) is the time fixed for completion of said work. In other words, work had to be completed by 21.05.2001. This Court is informed that contractor had done another work for Southern Railway, which was treated as a targeted one, on completing the targeted work satisfactorily, said work was awarded to contractor and this is the reason for the gap between the date of acceptance of tender and the issue of Letter of Acceptance. However, it is not necessary to dilate further on facts owing to the thoroughly professional approach taken by the two learned counsel before me in the light of the limited supervisory jurisdiction of a Section 34 Court.

4. Ms.K.Aparna Devi, learned counsel for contractor (claimant before AT and petitioner in captioned OP) and Mr.P.T.Ramkumar, learned Standing Counsel for Southern Railway (Respondents before AT and Respondents in captioned OP also) were before me. Respondents before AT, who are also respondents in captioned OP, shall be referred to as 'Southern Railway' for convenience.

5. Regarding lis between contractor and Southern Railway, suffice to say that said work was affected by south west monsoon and Southern Railway taking the position that contractor has not achieved the requisite target, terminated said contract. This termination was assailed as unjust by the contractor. This is the crux and gravamen of the lis.

6. After long and protracted proceedings, a former Hon'ble Judge of the Supreme Court of India was appointed as sole Arbitrator, who constituted the AT.

7. Several issues ranging from whether time was essence of the contract, whether the parties are governed by price variation formula, whether the termination is valid were thrashed out in the lis before AT. To be noted, as many as 15 issues were framed by AT and the same have been captured in Paragraph 13 of the impugned award.

8. Notwithstanding the above position, as already alluded to supra, both the learned counsel before me took a very professional approach and submitted that captioned OP turns only on two short points. To be noted, this is notwithstanding very many grounds raised in the OP.

9. Learned counsel for contractor who opened the submissions, submitted that only two points are being urged and they are a) vitiation amounts and b) Sales Tax, which according to the contractor has been paid and which the contractor is entitled to be reimbursed.

10. To put it in statutory parlance, it was submitted that the challenge is predicated on 28(1)(a) and 28(3) of A and C Act. In other words, it has not taken into account the terms of the contract i.e., said contract in this case, is learned counsel's say.

11. Let me deal with the two points. With regard to vitiation amount, relevant clause in said contract reads as follows:

'Vitiation with respect to first three lowest tenderers for this work will be worked out as a whole and for item 1 of Annexure 'B'i.e., piling separately and the highest of the two will be borne by you, if vitiation occurs.'

12. Learned counsel very fairly submitted that '**highest**' of the two is clearly erroneous. It was submitted that it should effectively be '**lowest**'. This is a very fair submission.

13. In response to this, learned Standing Counsel for Southern Railway submitted that this vitiation amount has been framed as a specific issue by the AT and the same has been answered.

14. A perusal of the impugned award shows that this is Issue No.6 and the same reads as follows:

'(6) Whether the claimant is entitled to the refund of vitiation amounts recovered by the respondents?'

15. In answering Issue No.6, AT has opined that the Letter of Acceptance clearly indicates that parties have brought in vitiation with respect to first three lowest tenderers and this pertains to piling. AT has also opined that the plea of confusion about the vitiation clause is owing to the use of the expression 'highest'.

16. Be that as it may, the reason why AT has held against the contractor and found for Southern Railways with regard to vitiation clause are three fold. One is, no material has been placed before AT to show any error in calculation of vitiation amounts. The second is, absent

error in application of the clause being demonstrated, the contractor has not made out any case for refund of vitiation amounts. The third is very crucial as AT has held that it has rejected the very same argument of Southern Railways while upholding contractor's plea for price variation. In other words, AT has taken the approach which reminds one of the age old adage 'sauce for the goose is sauce for the gander too' as Issue No.6 has been answered in two paragraphs with clarity and specificity by AT. I deem it appropriate to extract and reproduce (infra) those two paragraphs of the impugned award being Paragraphs 80 and 81, which read as follows:

'80. Issue No.6. This issue relates to whether the claimant is entitled to refund of the vitiation amounts recovered by the Railways. According to the claimant the vitiation clause is too vague. It is also argued that vitiation clause can be applied only if the contract is completed,. The Letter of Acceptance clearly indicates in the Note after Annexure B that "vitiation with respect to first three lowest tenderers for this work will be worked out as a whole and for item 1 of Annexure B, i.e., Piling, separately, highest of the two will be borne by you if vitiation occurs.' The plea of confusion about the vitiation clause is raised by the claimant based on the use of the expression "highest" in that note. It is explained that vitiation is applied when tender submitted by the lowest tenderer whose tender is accepted, has quoted sums higher than those quoted by tenderers 2and3 for the

specified items of work and the lower of the three figures will be taken as the rate of the lowest tenderer. If the tender for a particular item made by lowest tenderers No.2 or 3 is less than the amount tendered by the lower tenderer whose tender is accepted for those items, the lowest tenderer will be paid only the lowest of the amounts quoted by lowest tenderers 2 or 3 whichever is less. In other words, the larger amounts quoted by the lowest tenderer for the particular item will not be paid to him but he will be paid only at the lowest of the rates quoted by the other two tenderers for that item.

81. Since there is in existence a vitiation clause and vitiation has been applied, by the Railways, while settling the bill of the claimant, it is for the claimant to establish that the application of the vitiation clause is in any manner erroneous. Though during arguments it was sought to be contended that vitiation clause should not be applied, no material was brought to my notice to show any error in calculation of the vitiation amounts. The main argument in the statement of claim is that the vitiation clause could be applied only at the end and only if the work is completed and since this did not happen, the clause could not have been applied. What I find is that for the specified items the rates quoted by the others (L2 or L3) were lower and that lower rate was adopted for calculation. This is seen to be consistent with the intention. It is not possible to accept the argument that unless the work had been completed the vitiation clause cannot be applied. I have rejected the very same argument of Railways while upholding the claim of the Claimant for price variation. There is no such clear intention discernible

from the Letter of Acceptance and the terms of the GCC and SCC relied upon by the Claimant. No error in calculation could also be found. The Railways has pointed out that 'Vitiation with respect to first three lowest tenderers for this work will be worked out as a whole and for item 1 of Annexure B ie., piling, separately and the highest of the two will be borne by your account, if vitiation occurs' A Statement of calculation is also furnished. That calculation shows according to the written submission of the claimant that the amount had been calculated as the difference between the figure quoted by the claimant and the lowest of the figures quoted among L1 to L3. On the basis of the explaining of the method of calculation I find that this is consistent with the application of the vitiation clause. Once it is found that there is a vitiation clause in existence, in the absence of any error in application of that clause being demonstrated it can only be held that the claimant had not made out any case for the refund of the vitiation amounts. It was not shown before me that while applying the vitiation clause any error has been committed by the Railways. They had adopted the rate of lowest tenderer where it was less than that quoted by the claimant for that item. I am therefore not satisfied that the claimant has made out a case for refund of vitiation amounts already recovered by the railways. Issue No.6 is thus found against the claimant. '

(underlining made by this Court to supply emphasis and highlight).

17. To be noted, underlined portions have already been alluded to supra.

18. This Court has already extracted and reproduced undisputed vitiation clause as between the parties. Obviously the confusion has occurred because of the expression 'highest' and it has been dealt with by AT by holding that the Letter of Acceptance demonstrates that parties did go in for vitiation and what has been applied to the contractor for sustaining the price variation claim will apply to vitiation clause also. Therefore, it cannot be gainsaid that impugned award has been made without taking into consideration the terms of the said contract. This answers Section 28(3) plea.

19. With regard to Section 28(1)(a) plea, learned counsel submits that it turns on the Indian Contract Act, 1872 (Act No.9 of 1872) as it is the common case of both counsel that the clause itself has caused confusion. The manner in which the same has been captured and answered by AT makes it clear that vitiation has been contemplated by the parties qua said contract and it has been decided. This puts an end to 28(1)(a) plea. Be that as it may, more importantly, the manner in which Issue No.6, which is the pointed issue pertaining to vitiation clause has

been answered (extracted and reproduced supra) makes it clear that the opinion of AT is clearly not an implausible view. Owing to not being an implausible view, there is absolutely no scope for this Arbitration Court to judicially intervene qua the impugned award in exercise of Section 34 jurisdiction.

20. This takes us to the second point relating to Sales Tax. Relevant covenant in said contract is Clause 19.1.1 and the same reads as follows:

'19.1 SALES TAX

19.1.1 Sales Tax on this works contract, if legally leviable and paid, shall be reimbursed by the Railway Administration to the Contactor based on production of documentary evidence viz.'

21. Though no specific issue has been framed with regard to this Sales Tax aspect of the matter, (to be noted, it has been raised as an additional claim and it is Claim No.15), this has been dealt with in Paragraph 93 of the impugned award, which reads as follows:

'93.Claim No.15 has already been answered by holding that the termination of the contract by the Railways was not illegal. As regards Claim No.1 as per letter dated 28.02.2009, the provision in the contract is clear, it is that the payment of sales tax could be made by the contractor in the first instance and it will be reimbursed by the Railway administration. It is not shown that the contractor had not been reimbursed for whatever it had actually

paid by way of sales tax. It is seen that a claim for sales tax by the Department is pending against the claimant and it is the claimant covered by that claim that the claimant is seeking to recover from the railways. On the terms of the contract the claimant has to first pay that amount after getting the correct amount determined in appropriate proceedings under the Sales Tax Act, and claim reimbursement of the same. The Railways has no case that it will not reimburse the sales tax amount as and when it is finally assessed and paid by the claimant and the claimant satisfies the Railways that it had paid the tax. In this situation, no award can be made under this head as claimed by the claimant.'

22. A perusal of Paragraph 93 of the impugned award makes it clear that Southern Railway has taken a very fair stand that it will reimburse the Sales Tax amount, but that would be after it is finally assessed, paid by the contractor and when the contractor satisfies Southern Railway that it has actually been paid. In this view of the matter, AT has interpreted the terms of the said contract and held that the contractor has to first pay after getting the correct amount determined by the fiscal authorities and thereafter, make a claim for reimbursement. AT has also made it clear that no award could be made in this situation. In other words, this question has been left open. Adverting to four receipts and a communication dated 01.06.2000 from contractor to Railways,

learned counsel for contractor submits that these were placed before the AT. In the case file, there is nothing demonstrable as to whether it was actually placed before the AT. In any event, it may not be necessary to delve into this aspect of the matter owing to stated positions taken by consent by both parties and the same is as follows:

a) As Southern Railway has already taken the stand that it will reimburse the Sales Tax, it is submitted that it is open to the contractor to approach Southern Railway with the requisite documents to show that Sales Tax has been paid with regard to said contract / said work, Southern Railway will process the same and reimburse the Sales Tax bill, if it is satisfied with the papers submitted by the contractor.

b) Contractor undertakes to submit the aforementioned papers, make the reimbursement claim within one month from today and Southern Railway undertakes to either reimburse or communicate its decision one way or the other within three months from the date of submission of papers by the contractor;

c) If the above does not draw the curtains on the matter, by consent parties agree to re-arbitrate (rather 'arbitrate' as impugned award has left this open) on this one aspect alone i.e.,

reimbursement of Sales Tax qua said contract qua said work covered by Clause 19.1 of Special Conditions of contract, which forms part of said contract.

23. Therefore, it follows as a sequitur that except this Sales Tax reimbursement, which in any case has been left open (in the impugned award and this order) impugned award stands sustained and there shall be no judicial intervention by this Court qua the impugned award.

24. Before concluding, this Court deems it appropriate to observe that claim regarding Sales Tax being Clause No.15 is clearly segregable and it can be segregated qua said contract. In this regard, **J.G.Engineers** principle being law down by Hon'ble Supreme Court in **J.G.Engineers Private Limited Vs. Union of India and another** reported in (2011) 5 SCC 758 is of relevance and most relevant portion 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....'

25. Captioned OP is disposed of on above terms. There shall be no order as to costs.

16.02.2021

Speaking order: Yes/No

Index: Yes/No

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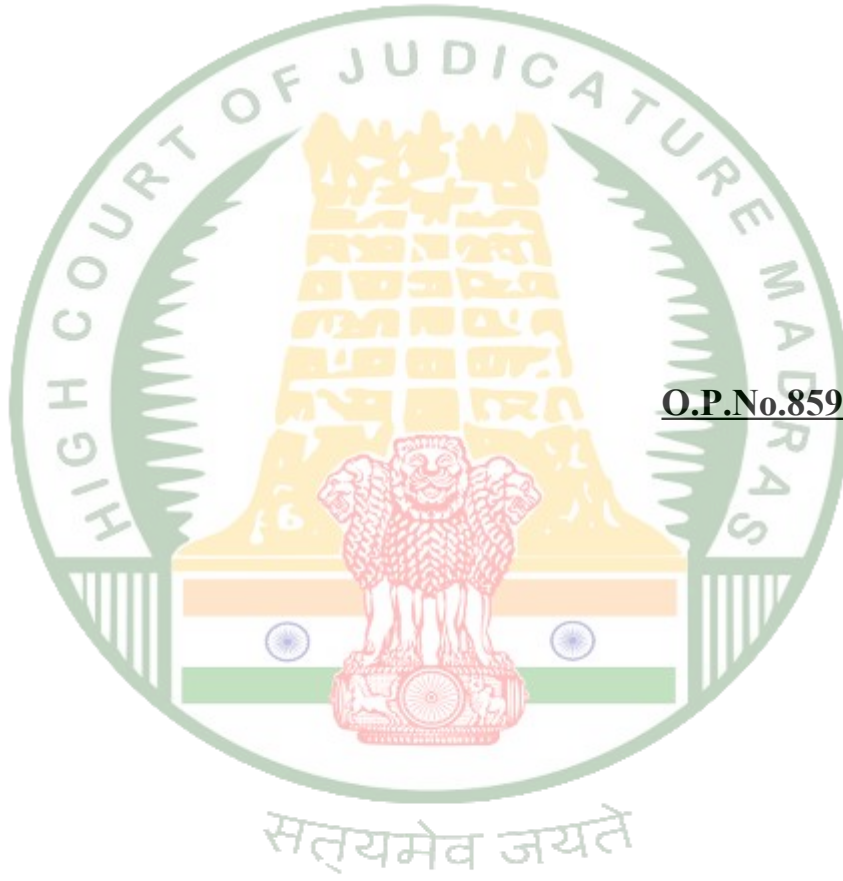


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