IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 17.02.2021

CORAM:

THE HONOURABLE Mr.JUSTICE **M.SUNDAR**

O.P.No.377 of 2014

M/s.Gammon India Limited,
Represented by Mr.J.L.Ashar,
Vice President, Head-Works Survey
Gammon House, Veer Savarkar Marg,
Prabha Devi, Mumbai-400 025. ... Petitioner

Vs.

1. The Commissioner,
   Corporation of Chennai,
   Rep.by Superintending Engineer (Bridges)
   Ripon Buildings, EVR Road,
   Chennai-600 003.

2. Sri.A.V.Rangaraju (Presiding Arbitrator)
   No.65/6 Sakthi Flats,
   Kamarajar Salai, Virugambakkam,
   Chennai-600 092.

3. Dr.D.Thirunavukkarasu (Co-Arbitrator),
   New No.60(Old No.56-B)
   Anjugam Nagar III Street,
   Ashok Nagar, Chennai-600 083.

4. Mr.A.Sampath Kumar (Co-Arbitrator),
   No.519 2nd West Street, West Avenue,
   Thiruvanmiyur, Chennai-600 041.
   (R2 to R4 are deleted in and by this order)

... Respondents

Prayer: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, praying to set aside the Arbitral Award dated 15.02.2014 relating to construction of 4 GRADE SEPARATORS (GROUP-1) DESIGN ENGINEERING, PROCUREMENT AND CONSTRUCTION IN CHENNAI CITY (CONTRACT PACKAGE NO.BR/D.C.NO.B3/722/2006) except with respect to the Claim No.2 for Rs.39,24,887.

For Petitioner : Mr.R.Venkataraman

For Respondents : Dr.P.Vasudevan for R1
R2 to R4-Arbitrators

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ORDER

Captioned 'Original Petition' ['OP' for the sake of brevity] was taken up for final hearing in the regular physical Court today.

2. Mr.R.Venkataraman, learned counsel on record for sole petitioner and Dr.P.Vasudevan, learned counsel on record for the contesting first respondent, namely Corporation of Chennai were before me and captioned OP was taken up for final disposal and arguments of both sides were heard out with the consent of both learned counsel.

3. An 'Arbitral Award dated 15.02.2014 bearing reference Agreement

No.BR.DC.No.B3/722/2006' [hereinafter 'impugned award' for the sake of brevity] made by a three Member 'Arbitral Tribunal' ['AT' for the sake of brevity] has been assailed obviously 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 in the captioned OP.

4. To be noted, the three noble men, who constituted the AT have been arrayed as respondents 2, 3 and 4 in captioned OP. This Court, from the submissions made/grounds urged, finds that the presence of the three noble men, who constituted the AT in captioned OP is not necessary. Therefore, following the procedure adopted by Hon'ble Supreme Court in ***Zonal General Manager, Ircon International Ltd. Vs. Vinay Heavy Equipments*** reported in ***(2015) 13 SCC 680*** [to be noted, deletion procedure is captured in order reported in **2007 SCC OnLine SC 4**], this Court deletes respondents 2 to 4 from the array parties in the captioned OP. Therefore, Corporation of Chennai, which has been described as the contesting first respondent supra, now becomes the lone respondent in captioned OP.

5. This Court, from hereon, in this order shall refer to the 'petitioner' as 'contractor' and 'lone respondent' shall be referred to as 'Chennai Corporation'.

6. Chennai Corporation awarded the work of construction of 4 Grade Separators to the contractor vide Letter dated 02.01.2007 bearing reference Lr.No.B3/722/2006. This was crystallized by way of recitals and covenants vide an Agreement bearing reference 'Agreement No.BR.DC.No.B3/722/2006' [hereinafter 'said contract' for the sake of brevity]. This Court is informed that value of said contract is Rs.4080.915 lakhs and the period for completion of work under said contract is 15 months. The work of construction of 4 Grade Separators as can be culled out from the case file reads as follows:

'This work of Construction of 4 Nos. of Grade Separators in Chennai under Package No.B3/722/2006 (Group 1) at:

1. North Usman Road – Kodambakkam High Road Junction
2. Usman Road – Duraisamy Road Junction
3. G.N.Road- Thirumalai Road Junction and
4. Pasumpon Muthuramalingam Salai- Turnbulls Road Junction'

7. The above shall be referred to as 'said work' for the sake of convenience.

8. Owing to the short statutory perimeter of Section 34 of A and C Act or in other words, the limited legal landscape within which a Section 34 Court should perambulate for testing an arbitral award, short facts shorn of elaboration will suffice. In this view of the matter, it will suffice to say that when said contract was put into operation for doing said work, disputes touching upon costs variation, 'Extension of Time' [EOT] and delay erupted. This is the crux and gravamen of the lis between the contractor and Chennai Corporation.

9. AT was constituted, AT entered upon reference and adjudicated upon the above lis. To be noted, before AT, contractor was the sole claimant and Chennai Corporation was the lone respondent. Contractor, as claimant before AT, made claims under seven heads and an abstract of these seven heads of claim, as captured in the impugned award can be usefully extracted and reproduced for better appreciation of this order. It reads as follows:

' Abstract of claims is as follows:

Claim No	Description	Amount in Rs.
1	Claim towards reimbursement of i. Uncovered overhead and loss of profit for the period from Feb., 2007 to Oct., 2009 amounting to Rs.6,93,75,555/- ii. Loss due to idling of Machinery and for reduced productivity at 10% from Feb., 2007 to Oct., 2009 amounting to Rs.4,62,50,370/- for Chennai Flyovers	11,56,25,925/-
2	Claim towards difference in value of contract for the Pasumpon Muthuramalingam Salai-Turnbulls Road Junction Flyover (Turnbulls Road-Cenotaph Road Junction)	39,24,887/-
3	Claim towards difference in escalation cost paid	45,67,782/-
4	Claim towards interest for the unpaid price escalation	24,12,245/-
5	Claim towards difference in amount of variation and non-tendered items	3,62,523/-
6	Claim towards interest from cause of action to date of award and post award period	To be quantified
7	Cost of Arbitration	To be quantified

which are the subject matter of this dispute before this Tribunal.'

10. This Court is informed that there was no oral evidence before AT and documentary evidence in terms of marking of exhibits also did not happen. On the basis of rival pleadings and whatever supporting material was available, AT passed an award acceding to claim no.1 in part and claim no.2 in full. Future interest at 10% per annum on claim no.1 and interest

from the date of completion of work on claim no.2 were awarded. To be noted, as already mentioned supra, date of impugned award is 15.02.2014 and there is no disputation that date of completion of work is 11.11.2009. Therefore, interest at the rate of 10% per annum was awarded from 15.02.2014 on part of claim no.1, and at the rate of 10% was awarded on entire amount claimed vide claim no.2 [Rs.39,24,887/-] from 11.11.2009.

11. Summary of the operative portion as can be culled out from the impugned award reads as follows:

'CONCLUSION:

SUMMARY OF AWARD IS AS FOLLOWS:

S.No	***Description of Award***	***Award Amount in Rs.***
1	Towards Loss of profit for the period from May, 2008 to Oct., 2009	1,20,00,000.00
2	Towards difference in value of contract for the Cenotaph Roa Junction Flyover	39,24,887.00
3	Towards difference in escalation cost paid	Nil
4	Towards interest for the unpaid price escalation	Nil
5	Towards difference in amount of variation and non-tendered items	Nil
6	Towards interest from cause of action to date	5,60,237.00
7	Towards Cost of Arbitration	Nil
Total		**1,64,85,124.00**

We therefore award a net amount of Rs.1,64,85,124.00 in favour

of the Claimants. The award shall carry a future interest @ 10% p.a commencing from three months from the date of award, i.e., from 15.05.2014, till the date of payment.'

12. With regard to interest on claims 1 and 2, which have been alluded to supra, finding returned by the AT vide claim no.6 is relevant and the same reads as follows:

> *'An interest at 10% per annum for the amount of Rs.1,20,00,000.00 is awarded from 15.02.2014 and again an interest at 10% per annum for the amount of Rs.39,24,887.00 from 11.11.2009 till the date of this Award, 15.02.2014 is also awarded under this claim.* ***Thus the amount awarded is Rs.5,60,237.00, as on date.'***

13. Learned counsel for petitioner, as protagonist of captioned OP, made one pointed submission in his campaign against the impugned award and that one pointed submission is, AT has not given reasons for not acceding to the entire claim of 11,56,25,925, which is claim no.1. To be noted, claim no.1 is towards loss of profit and loss due to idling of machinery. It is also to be noted that as alluded to supra, this claim no.1 was allowed in part and a round sum of Rs.1.20 crores was awarded.

14. Therefore, statutorily speaking, challenge to the impugned award is predicated on Section 31(3) of A and C Act. In response to the above submission, learned counsel for Chennai Corporation submitted that it cannot be gainsaid that the AT has not set out the reasons upon which impugned award is based as the impugned award makes it clear that the contractor has not substantiated its claim with documentary evidence as required under Section 73 of Indian Contract Act, 1872 (Act No.9 of 1872) and 10% of claim no.1 has been acceded to by applying ***Hudson's*** formulae, which has been articulated with clarity and specificity in the impugned award.

15. Before this Court proceeds further, it is necessary to record two significant aspects in this matter. One aspect is learned counsel for contractor submitted that out of seven heads of claim, challenge to impugned award predicated on Section 31(3) plea of A and C Act is confined to only that portion of the impugned award, which has not acceded to claim no.1 in its entirety. It was pointed out that claim no.2 has been awarded in its entirety and there was no challenge with regard to claims 3 to 7. To be noted, claim no.6 is interest details of which has been set out supra. Claim no.7 is cost of Arbitration which has been directed to be borne equally by both parties. Second significant aspect is, learned counsel for Chennai

Corporation submitted that Chennai Corporation has not preferred an independent OP assailing the impugned award. It was submitted that though Chennai Corporation had every intention of assailing the impugned award, efforts to present an application within the prescribed time and the condonable cap ran into rough weather and therefore, for all practicable purposes, there is no cross OP.

16. In a challenge to an Arbitral Award predicated on a Section 31(3) plea, this Court is conscious that it will not supply reasons or support the impugned award by embarking upon a process of expanding or qualifying the reasons given by the AT. Therefore, this Court deems it appropriate to extract and reproduce the rival pleadings, discussion and dispositive reasoning with regard to claim no.1 alone as contained in the impugned award and the same read as follows:

> '***Claim 1**:*
>
> *The Claimant stated that they had submitted their tender documents indicating the details of the rates, which also contained indirect expenses of 15% for certain work and 7.5% for certain work and 10% towards Profit, treating the date of completion as 19-05-2008. Further they insisted that the delay was not due to them. They suffered loss of profit and loss due to unutilized overheads and worked out the claim amounts as Rs.31378554.00 and Rs,37997001.00 respectively, totalling to*

Rs.69375555.00.

In addition to this, they worked out the loss due to productivity due to maintenance of work force and plants and equipments for the delayed progress prior to the stipulated date of completion and till the date of actual completion and claim amount as Rs.20919035.90 and Rs.25331334.10 respectively, totalling to Rs.46250370.00.

Thus the amount of claim 1 is at Rs.115625925.00.

The Claimant further submitted that the price escalation takes care of only price variation and not the loss of overhead and profit.

Further they have never waived their right to claim compensation for losses.

Stating that the delay is not attributable to the bidder, EOT was initially sought upto 19-03-2009 by the claimants, whereas the respondents granted only upto 30-11-2008. The decision in respect of the Cenetoph Road-Turnbulls Road Junction was finalized just less than a month of the extended completion date. Second EOT was granted upto 11-11-2009.

The Respondent in reply submitted that the Claim No.1 was claimed for the period from February 2007 to October 2009. The price escalation was awarded and sufficient EOT was granted only to compensate all other claims by the Claimant. Having received the price escalation without any objection, the Claimant is not entitled to make any further claim. The claim is not jsutifiable and there were no basis for the reasons put forth by the Claimant for the delay on delayed handing over of the site and shot temporary stoppage of work, as the Claimant completed the work within the granted time.

The Respondent further insisted that the claim No.1 is vexatious claim and thus liable to be rejected.

AWARD

Loss of profit and loss due to unutilized overheads are claimed from February 2007 to October 2009. Loss of unutilized overheads is a combination of items at 15% for certain work and 7.5% for certain work and the account is maintained. The delay in the project is to be computed only from and beyond the original intended date of completion of entire project till the date of actual date of completion i.e., from 20-05-2008 to 10-11-2009.

The table below shows the original contract value, value of completion, Value of work as on May 2008, delay and the balance value of work completed beyond the original intended date of completion of entire work. As per Hunson's formulae, 10% is being adopted both for overheads and loss of profit as per the trade practice in the contractual field.

Further any compensation claimed by the Claimant is to be substantiated with documentary evidence supported by vouchers, etc., which the Claimant grossly failed to do as per Sec.73 of ICA.

But, at the same time, it is an undeniable fact that, the works of 3 grade separator were delayed completion respectively by 96,224 and 540 days, etc., due to causes beyond the control of the Claimant. Therefore, it may not be right to deny the loss suffered by the Claimant also.

	North Usman Road	***Usman Road***	***G.N.Road***	***Cenetoph Road***
Contract Sum – Org.	*Rs.6.49 Cr.*	*Rs.14.00 Cr.*	*Rs.10.60 Cr.*	*Rs.7.15 Cr. (Rs.9.80 Cr)*
Total Value	*Rs.6.45 Cr.*	*Rs.6.315*	*Rs.7,701*	*Rs.7,341*
Value as on	*Rs.6.45*	*Rs.0.969*	*Rs.1,986*	*Rs.0.000*

	North Usman Road	***Usman Road***	***G.N.Road***	***Cenetoph Road***
May 08	*Cr.*			
Balance Value	*Rs.0.00*	*Rs.7,284*	*Rs.5,715*	*Rs.7,341*
Ahead / Delay	*24 Days Ahead*	*96 Days Delay*	*224 Days Delay*	*540 Days Delay*
Escalation Paid	*Nil*	*9593516.50*	*11841019.63*	*11292267.91*

In view of the above, the Tribunal is pleased to Award a sum of Rs.1.20 Crores, as a lump sum compensation to meet the ends of justice.

17. A bare perusal of the above without adding or subtracting to the impugned award leaves this Court with the considered view that the AT has stated the reasons upon which, it is based. This conclusion of this Section 34 Court i.e., supervisory Court under A and C Act is owing to the following reason:

a) (i) The lead case on a Section 31(3) plea is ***Dyna Technologies*** case being ***Dyna Technologies Private Limited Vs. Crompton Greaves Limited*** reported in ***(2019) 20 SCC 1; 2019 SCC OnLine***

SC 1656. In ***Dyna Technologies*** case law, Hon'ble Supreme Court laid down the law on a Section 31(3) of A and C Act plea and said that the mandate of Section 31 (3) of A and C Act is to set out basis/reasons, which are not lacking qua being intelligible, appropriate and/or adequate. Hon'ble Supreme Court significantly, in the ***Dyna Technologies*** principle, made it clear that Section 31(3) of A and C Act does not require an elaborate judgment to be passed by the AT i.e., Arbitrators and this is having regard to speedy resolution of disputes. This law laid down by Hon'ble Supreme Court is instructive. This is captured in paragraph 34 of ***Dyna Technologies*** case, which reads as follows:

> '***34.****The mandate under Section 31(3) of the Arbitration Act is to have reasoning which is intelligible and adequate and, which can in appropriate cases be even implied by the courts from a fair reading of the award and documents referred to thereunder, if the need be. The aforesaid provision does not require an elaborate judgment to be passed by the arbitrators having regard to the speedy resolution of dispute.*'

(Underlining made by this Court to supply emphasis and highlight)

(ii) Be that as it may, ***Dyna Technologies*** principle is the touch stone for testing a campaign against an arbitral award predicated under Section 31(3) of A and C Act. In ***Dyna Technologies***, Hon'ble Supreme Court culled out three facets on this aspects and on those three facets are a) proper, b) intelligible and c) adequate. To flip it and set out the same as grounds of challenge a) improper, b) unintelligible and c) inadequate. This has been elucidatively explained by Hon'ble Supreme Court in paragraph 35 of ***Dyna Technologies***, which reads as follows:

> *'35. When we consider the requirement of a reasoned order, three characteristics of a reasoned order can be fathomed. They are: proper, intelligible and adequate. If the reasonings in the order are improper, they reveal a flaw in the decision-making process. If the challenge to an award is based on impropriety or perversity in the reasoning, then it can be challenged strictly on the grounds provided under Section 34 of the Arbitration Act. If the challenge to an award is based on the ground that the same is unintelligible, the same would be equivalent of providing no reasons at all. Coming to the last aspect concerning the challenge on adequacy of reasons, the Court while exercising jurisdiction under Section 34 has to adjudicate the validity of such an award based on the degree of particularity of reasoning required having regard to the nature of issues falling for consideration. The degree of particularity cannot be stated in a precise manner as the same would depend on the complexity of the issue. Even if the Court*

comes to a conclusion that there were gaps in the reasoning for the conclusions reached by the Tribunal, the Court needs to have regard to the documents submitted by the parties and the contentions raised before the Tribunal so that awards with inadequate reasons are not set aside in casual and cavalier manner. On the other hand, ordinarily unintelligible awards are to be set aside, subject to party autonomy to do away with the reasoned award. Therefore, the courts are required to be careful while distinguishing between inadequacy of reasons in an award and unintelligible awards.'

(iii) There is nothing to demonstrate that the reasonings qua claim no.1 are improper that there is a flaw in the decision making process. This rules out impropriety. A plain and bare reading of the extracted (reproduced) portions of impugned award qua claim no.1 makes it clear that it cannot be gainsaid that the AT has not provided any reason at all. This douses the unintelligible facet. To be noted, AT has made it clear that there was no documentary evidence, damages were not proved under Section 73 of The Indian Contract Act, 1872 (Act No.9 of 1872) and ***Hudson's*** formulae has been applied. With regard to inadequacy, it has been made clear that the degree of particularity cannot be stated in a precise manner as the same would depend on the complexity of the issue. It was made clear that Court should have regard to the documents that were submitted by the parties and the contentions before the Tribunal.

(iv) The Hon'ble Supreme Court has also cautioned that setting aside of arbitral awards on this ground cannot be done in a casual and cavalier manner. To be noted, paragraph 35 of ***Dyna Technologies*** has been extracted and reproduced supra.

b) The next reason is, this Court finds that claims towards loss of profit and towards loss towards idling of machinery are certainly within the realm of Section 73 of The Indian Contract Act, 1872 and the law is too very well settled that such a claim has to be proved by placing relevant evidence before the AT. There is no disputation that there was no oral evidence before AT. It is nobody's case that the number and kind of machinery that was deployed or the number of days for which such machinery idled were set out with clarity and specificity before AT, much less with buttressing evidence. Therefore, AT adopting the ***Hudson's*** formulae and awarding 10% of the claim cannot be found fault with.

18. The contractor should consider itself lucky that there is no cross OP filed by Chennai Corporation as if there had been a cross OP, the award of Rs.1.20 crores being part of claim no.1 should have also passed the rigour of the above challenge. However, absent challenge from Chennai Corporation, this *Hudson's* formulae approach remains.

19. Owing to all that have set out supra, this Section 34 Court is of the considered view that the lone ground which impugned award is assailed fails and the captioned OP deserves to be dismissed.

OP dismissed. There shall be no order as to costs.

17.02.2021

Speaking order: Yes/No

Index: Yes/No

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M.SUNDAR.J.,

kmi

O.P.No.377 of 2014

17.02.2021