



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.09.2021

CORAM :

THE HON'BLE MR.SANJIB BANERJEE, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE P.D.AUDIKESSAVALU

OSA Nos.188 and 189 of 2019

M/s.NAPC Limited
184/214, Royapettah High Road
MMPDA Tower, 2nd Floor, Royapettah,
Chennai 600 014.

... Appellant in
both OSAs.

Vs.

1. The Superintending Engineer,
National Highways, TNSCC Complex,
Jai Nagar, 206/N, Jawaharlal Nehru Salai,
Opp. Mofussil Bus Stand, Chennai 600 106.

2. K.Srinivasan
Sole Arbitrator
C2, Block 1, Mayfair Apts, 2A, LIC Colony Road,
Velachery, Chennai 600 042. ... Respondents in
both OSAs.

Appeals filed against the common order dated 10.07.2019 in
OP Nos.881 and 899 of 2018 on the file of original side of this
court by upholding the arbitration award published for
implementation.

O.P.No. 881/18 : This Original Petition filed under Section 35
of the Arbitration and Conciliation Act to set aside the award
dated 23.05.2018 of the Arbitral Tribunal with respect to claim
-B only.

O.P.No.899/2018 : This Original Petition filed under Section 34
of the Arbitration and Conciliation Act to set aside the award
dated 23.05.2018 passed by the Arbitrator and direct the
registry to number the same for passing further order.

For the Appellant : Mr.Satish Parasaran,
Senior Counsel,
for Mr.Arun C.Mohan

For the 1st Respondent : Mr.Edwin Prabhakar,
Special Government Pleader
(Civil Side)



COMMON JUDGMENT

(Delivered by the Hon'ble Chief Justice)

The contractor is the appellant questioning an order passed under Section 34 of the Arbitration and Conciliation Act, 1996 setting aside an award on the ground of lack of authority and limitation. The appellant had partially succeeded before the arbitrator and the award provided for a sum of slightly over Rs.4.21 crore, inclusive of interest till the date of the award.

2. The contract was for the construction of a two-lane bypass around Kanchipuram in the Villupuram Division connecting NH4 and the Kancheepuram - Vandavasi Road. It included the construction of a major bridge. The contract was, as accepted by the parties, for a period of 24 months from April 18, 2010. A first lot of claim was made by the contractor on January 9, 2012 for the period up to October, 2011, which was rejected by the respondent employer on March 9, 2012. The tenure under the contract was extended on or about April 17, 2012 for a period of seven months. On July 27, 2012, a second lot of claim came to be made by the contractor for the period November, 2011 to May, 2012. Again, the employer rejected the claim on September 7, 2012. On or about October 16, 2012, the tenure was extended for a further six months. On January 30, 2014, the third lot of claim was made by the contractor. There is no dispute that the demand for arbitration was made by the contractor on August 14, 2015. Under Section 21 of the Act of 1996, the commencement of arbitration happens upon a demand for an arbitral reference made by one party being received by the other party. Despite the demand for an arbitral reference in accordance with the arbitration clause found at clause 50 of the agreement between the parties which is dated April 19, 2010, the contractor was constrained to request the Chief Justice's Designate under Section 11(6) of the Act of 1996 to constitute an arbitral tribunal. A sole arbitrator was appointed.

3. Unfortunately, the arbitrator has been quite unnecessarily impleaded as a party to the appeal since the arbitrator was also impleaded before the arbitration court. It is completely unnecessary for arbitrators to be arrayed as party unless personal allegations are made and the arbitrator is required to answer such allegations. Despite several orders in such regard, the unsavory practice continues in this court, of needlessly impleading arbitrators.

4. There is no dispute that the request under Section 11(6) of the Act of 1996 was prosecuted upon notice to the employer. At such point of time, the employer did not step up to suggest that there was no arbitration agreement between the parties or that the disputes raised by the contractor were not covered by any arbitration agreement. It was only upon the arbitrator appointed by the Chief Justice's Designate taking up the reference that an application was moved under Section 16 of the Act of 1996 questioning the authority of the arbitrator to proceed with the reference on the ground that a particular



government order of 1990 vintage issued by the Public Works Department precluded arbitral references where the value of the claim was in excess of Rs.5 lakh. Though the employer asserted the application of G.O.Ms.No.1545 dated July 26, 1990 before the arbitrator and seeks to rely on such notification to sustain the judgment and order impugned herein dated July 10, 2010, it does not appear that the relevant notification was referred to, even indirectly, in the agreement of April 19, 2020.

5. According to the respondent employer, the agreement between the parties makes a reference to "PS to SSRB" at clause 4.2(c). Clause 4.2 covers the governing law and the heading of such clause is "Laws governing contract, observance of laws". Sub-clause (c) and the reference to "PS to SSRB" implies the set of guidelines contained in the Preliminary Specifications to Standard Specifications to Roads and Bridges.

6. Though the submission in such regard makes little meaning, so that the entirety of the argument made on behalf of the employer is at least referred to, the whole of Clause 4.2 may be seen:

"4.2 LAWS GOVERNING CONTRACT OBSERVANCE OF LAWS:

Local regulations and attachments

a) The law to which the contract is to be subject and according to which the contract is to be constructed shall be the law for the time being in force in the Union of India and State of Tamil Nadu.

b) The contractor shall conform to all laws of the land, and the regulations and bylaws of any local authority, and of any after or lighting companies with whose systems the structure is proposed to be connected. He shall, before making any variations from the drawings or specification that may be necessitated for so conforming give to the Engineer written notice, specifying the variations proposed to be made and the reasons for making them, and apply for instructions thereon. In case the contractor shall not receive such instructions within seven days, he shall proceed with the work conforming to the provisions, regulations or by-laws in question and any variations in the drawings or specifications so necessitated shall be dealt with under Clause 27. The contractor shall give all notice required by the said Acts, regulations or by-laws and pay all fees in connection therewith. He shall also ensure that no attachments are made against all claims or liabilities arising from or based on the violation of such laws ordinances, regulations, by-laws, decrees or attachments by him or by his employees.

c) P.S.to S.S.R.B. is inseparable part of this contract."

7. Such clause has also, incidentally, been quoted in the impugned judgment. Nothing in sub-clauses (a) or (b) of Clause 4.2 of the said agreement makes any government notification or order applicable to the contract between the parties herein by the remotest reference thereto. It is now to be seen whether the



obscure reference to "PS to SSRB" would incorporate the reference to the government order of 1990. Extracts from the Preliminary Specifications to Standard Specifications to Roads and Bridges have been relied upon on behalf of the employer at pages 12 to 24 of the typed set filed on its behalf on September 29, 2021. It is submitted that paragraph 108.02 in the said Preliminary Specifications would cover the present situation. There is absolutely no connection between paragraph 108.02 of the Preliminary Specifications and G.O.Ms.No.1545 dated July 26, 1990. However, to do justice to the submission made on behalf of the employer, the entirety of the paragraph is noticed:

"108.02 Laws to the (sic 'be') observed -

The Contractor shall at all times observe and comply with all Union and state laws, local laws, ordinances and regulations which in any manner affect the conduct of the works and all such orders as exist at the present and which may be enacted in the future by legislative bodies or tribunals having legal jurisdiction or authority over the work, and no place of misunderstanding or ignorance thereof will be considered. He shall indemnify and save harmless the Government and all its officers, agents employees and servants against any claim or liability arising from or based on the violation of any such law, ordinance, Regulation, order or decree whether by himself or by his employees.

He shall also ensure that no attachments are made against materials or work forming part of or for the use of the contract.

All scaffolding runways hoists and other temporary construction shall comply with all pertinent requirements of Union and state laws, local laws, ordinances and regulations."

8. The relevant clause quoted above refers to Union and State laws, local laws, ordinances and regulations but does not refer to any instructions or orders issued by any government. Though the word "order" appears in the initial part of the clause, such word must be seen in the context in which it has been used and pertains to the conduct of the works and all such orders as existing at the time of the Preliminary Specifications being published as long as they were made by "legislative bodies or tribunals having legal jurisdiction or authority over the work." At any rate, if the government order of 1990 were to apply to the agreement of April 19, 2010 between the parties, a solitary line could have been incorporated either in the arbitration clause or elsewhere, particularly when the agreement was so detailed and specific.

9. The objection under Section 16 of the Act failed before the arbitrator. The arbitrator, thereafter, proceeded to render a speaking award on merits. The respondent herein was obliged to wait to revive the challenge to the authority of the arbitrator in course of the proceedings under Section 34 of the Act. The objection was accepted by the arbitration court.



10. In the judgment and order impugned herein, the work undertaken and the other preliminary details are noticed over the first 16 pages or so of the judgment before clause 4.2 of the general conditions governing the agreement dated April 19, 2010 is quoted in its entirety. The judgment, thereafter, notices G.O.Ms.No.1545, dated July 26, 1990 and quotes the same. In the discussion at paragraphs 13 to 25 where two issues are referred in tandem - limitation and the authority to go to arbitration - the impugned judgment refers to several precedents, including one cited by the respondent in course of this appeal, before concluding that the claim carried to the reference was barred by limitation and the value of the claim was such that it could not have been carried to an arbitral reference. The judgment and order impugned does not refer in any great detail to the relevant dates as to why the claim of the contractor was perceived to be barred by limitation. In any event, when the arbitration court was minded to hold that the arbitration was without jurisdiction, the point of limitation may not have been addressed.

11. The respondent has referred to a judgment reported at (2001) 10 SCC 30 (State of A.P. vs. Obulu Reddy) where, in connection with a reference under the 1940 Act, a similar circular issued by the State of Andhra Pradesh was referred to. The objection was taken at the earliest stage when a petition for appointment of an arbitrator was filed before a Civil Judge (Senior Division). Though the objection was overruled by the Civil Judge (Senior Division), the objection was accepted before the High Court and the Supreme Court endorsed the view taken by the High Court.

12. The judgment has no manner of application in the present case, particularly when no objection as to the invocation of arbitration was raised at the Section 11(6) stage by the respondent herein. At any rate, since the matrix contract of April 19, 2010, which contains the arbitration agreement was a stand-alone document and did not refer to the government order of 1990 or any other material from which the incorporation of the relevant government order would be necessary to be implied, the arbitrator cannot be faulted for having repelled, the rather unnecessary objection raised by the respondent herein.

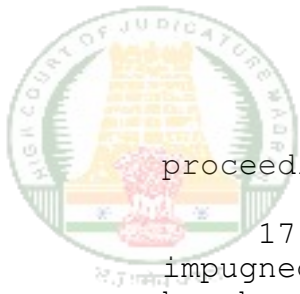
13. The second judgment which has been cited by the respondent is reported at (2009) 7 SCC 696 (M.R.Engineers and Contractors Private Limited vs. Som Datt Builders Limited). Section 7(5) of the Act of 1996 was considered by the court and it was held, inter alia, that where the contract between the parties stipulated that a condition of contract of one of the parties to the contract would form a part of their contract, (for example, the general conditions of contract of the Government where the Government is a party), the arbitration clause forming a part of the general conditions of contract would apply to the contract between the parties.



14. There are two aspects to the dictum in the said judgment. The first is the factual aspect as to whether there is any other document or the like which is referred to in the contract between the parties for such other document or the like to be looked into and an arbitration agreement culled out therefrom. For the moment, it may be assumed that even the negative is read into the Supreme Court dictum, implying thereby that if a specific arbitration clause is included in the agreement and a document is referred to in the agreement which negates the operation of the arbitration clause in certain cases, the same has to be recognised. In the present case, the factual matrix is not satisfied since no document or material is produced or cited by the respondent from which it may be reasonably gleaned or inferred that G.O.Ms.No.1545 would be applicable and would eclipse the specific arbitration agreement between the parties if the value of the claim was in excess of Rs.5 lakh. It is only upon the factual requirement being met that the legal aspect of the dictum would be required to be gone into: as to the impact of something in another document or record, which would detract from the specific clause in the agreement between the parties. In the absence of there being anything to detract from the arbitration clause, as in the present case, the second part of the exercise is completely unnecessary.

15. The arbitrator was perfectly justified in completely disregarding the needless objection carried by the employer, particularly in the light of the employer not taking such ground at the Section 11(6) stage. It probably is a matter that needs to be addressed at some level by the Government. Objections are needlessly carried and challenges are made and pursued mindlessly - and the State exchequer burdened - by the whims of officers who do not take any responsibility and seek to waste time and money on litigation since the money does not come out of their pockets.

16. As to the issue of limitation, since it is the admitted position that the commencement of the arbitral proceedings was on August 14, 2015, any claim that may have been lodged or the cause of action pertaining to which may have arisen within three years prior to August 14, 2015 could not be said to be barred by limitation. It has been noticed earlier in this judgment that three lots of claims had been made by the appellant herein: the first on January 9, 2012 which was rejected on March 9, 2012; the second on July 27, 2012 which was rejected on September 7, 2012; and the third on January 30, 2014, irrespective of when it may have been rejected. Since the claims in respect of the second and the third lots were made at a point of time within three years prior to August 14, 2015 when the arbitration proceedings would be deemed to have commenced, the arbitrator quite appropriately considered such claims on merits and passed adequate reasons to allow parts thereof. By the same yardstick, the arbitrator was justified in rejecting the claim initially made by the contractor on January 9, 2012, since the cause of action in respect thereof arose at a point of time more than three years prior to August 14, 2015 when the arbitral



proceedings are deemed to have commenced.

17. For the reasons aforesaid, the judgment and order impugned dated July 10, 2019 cannot be accepted and the same are hereby set aside. The arbitral award dated May 23, 2018 is restored. It is recorded that the challenge to the award made by the contractor, to the extent the further claim made therein was rejected, has been expressly abandoned at this appellate stage. There is no merit in the respondent's challenge to the arbitral award, whether on the ground of lack of authority or limitation or on merits. Accordingly, OSA Nos.188 and 189 of 2019 stand allowed to the extent indicated.

18. The appellant will also be entitled to costs of the proceedings in this court assessed at Rs.50,000/- (Rupees Fifty Thousand only). It would be ideal if such costs came out of the relevant officer of the respondent who engineered the challenge to the arbitral award in this court.

Sd/-

Assistant Registrar (CS-IV)

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Sub Assistant Registrar

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To

1. The Sub Assistant Registrar (OS)
High Court, Chennai-104.
2. The Arbitral Tribunal, Chennai.
3. Mr. K.Srinivasan
Sole Arbitrator
C2, Block 1, Mayfair Apts, 2A, LIC Colony Road,
Velachery, Chennai 600 042.

+1cc to Mr.Arun C.Mohan, Advocate SR.No.51400

OSA Nos.188 and 189 of 2019

RGN(CO)
GMY(21/10/2021)