



IN THE HIGH COURT OF JUDICATURE AT MADRAS
(ORDINARY ORIGINAL CIVIL JURISDICTION)

MONDAY, THE 09TH DAY OF AUGUST 2021

THE HON'BLE MR. JUSTICE N. SATHISH KUMAR

O.P. No.543 of 2017

In the matter of Arbitration and Conciliation
Act, 1996

AND

In the matter of M/s. SICGIL India Ltd.

Vs.

Madras Fertilizers Ltd. In Award dt
30.01.2017.

M/s. Madras Fertilizers Ltd.,
Manali,
Chennai – 600 068.

... Petitioner

-Versus-

M/s. SICGIL India Ltd.,
Dhan Building,
#827, Anna Salai,
Chennai – 600 002.

... Respondent

O.P. No.543 of 2017

Original Petition praying that this Hon'ble Court be pleased to set aside the unregistered stamped Award dt 30.01.2017 passed by Justice Mr. K.P. Sivasubraminam in the Arbitration matter of M/s. SICGIL India Ltd. Vs Madras Fertilizers Ltd. In so far as awarding damages together with post award interest against the Petitioner and to allow the counter claim in its entirety as claimed by the petitioner/MFL.



hearing through video conferencing in the presence of Mr.V. Ayyadurai, Senior Counsel for Mr.V.B. Perumal Raj, Advocates for the petitioner herein and Mr.T.K.Bhaskar, advocate for the respondent herein and upon reading the petition and the award dated 30.01.2017 and the counter statement filed by the 1st respondent herein and this court having observed that even there is some delay, it cannot be ground to interfere a well-reasoned award, the learned Arbitrator had factually arrived a conclusion and interpreted the contract, and taking note of the nature of contract entered between the parties and the practice going on right from the year 1972 interpreted contract, in such view of the matter, this court is of the view that mere delay itself cannot be taken advantage by the petitioner to non-suit the well-reasoned award, it is to be noted that the delay is not only happened before this Court, earlier, Mr. Justice Ratnam (Retd.) appointed as Arbitrator was substituted by the present Arbitrator for the failure of petitioner to pay fees, therefore, when the petitioner itself caused some delay in the entire arbitral proceedings, they cannot blame the Arbitrator for releasing the award with some delay, on perusal of entire award, which consists of more than 123 paragraphs, this court satisfied that the challenge made under Sec.34 of the Act is nothing, but futile exercise on the part of the petitioner, though several judgments have been placed to contend that



the present case, the above judgements have been rendered in different context, where several years have been taken to pass the final order, which in fact, defeated the right of the parties to approach any higher court in time, in such view of the matter, those judgements no way helpful to the present petitioner herein, on perusal of entire grounds raised under sec.34 of the Act and also submission, this Court is not satisfied that none of the grounds to interfere with the award is made with regard to the allegation that claimant has not taken any steps to mitigate the damages, such plea was never raised either in the statement nor in the grounds challenging the award, in such view of the matter, such plea cannot be raised during submissions, therefore this court does not find any merit in the Original Petition and, **it is ordered as follows:-**

That the O.P.No. 543 of 2017, be and is hereby dismissed

WITNESS, THE HON'BLE MR.JUSTICE SANJIB BANERJEE,
CHIEF JUSTICE, HIGH COURT OF MADRAS AFORESAID, THIS THE
09TH DAY OF AUGUST 2021.

Sd/-

ASSISTANT REGISTRAR (O.S.II)

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

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13.09.2021

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O.P. No.543 of 2017

DECREE

DATED 09/08/2021

THE HON'BLE MR. JUSTICE

N. SATHISH KUMAR

FOR APPROVAL: 28.09.2021

APPROVED ON:29.09.2021

Copy to:-

The Hon'ble Mr. Justice K.P.
Sivasubramanian, Judge (Retd.),
High Court, Madras,
Sole Arbitrator,
New No . 47, Old No.46,
Pulla Avenue, Shenoy Nagar,
Chennai – 600 030.
with Covering letter.



IN THE HIGH COURT OF JUDICATURE AT MADRAS

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DATED: 09.08.2021

C O R A M

THE HON'BLE MR.JUSTICE N.SATHISH KUMAR

O.P. No. 543 of 2017

M/s. Madras Fertilizers Ltd.,
Manali,
Chennai-600 068.

... Petitioner

Vs

M/s. SICGIL India Ltd.,
Dhan Building,
No.827, Anna Salai,
Chennai-600 002.

... Respondent

PRAYER : Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, praying to set aside the unregistered stamped Award dated 30.01.2017 passed by Justice Mr.K.P.Sivasubramaniam in the Arbitration matter of M/s. SICGIL India Ltd. Vs. Madras Fertilizers Ltd. In so far as awarding damages together with post award interest against the petitioner and to allow the counter claim in its entirety as claimed by the petitioner/MFL.



For Petitioner : Mr.V.Ayyadurai, Senior Advocate
for Mr.V.B.Perumal Raj

For Respondent : Mr.T.K. Bhaskar

ORDER

(This case has been heard through video conference)

The challenge has been made to the award passed by the Sole Arbitrator dated 30.01.2017.

2. The brief facts leading to the filing of this Original Petition is as follows :-

The respondent is a Public Limited Company incorporated under the Companies Act. It has entered into an agreement with the petitioner on 21.06.1972 for sale and purchase of Carbon-di-oxide. The agreement was subsequently renewed from time to time and a fresh agreement was entered into between the petitioner and the respondent/claimant on 30.12.1993 for the period of 10 years with effect from January 1994. From the year 1994, invoices have been raised by the respondent/claimant on the basis of quantities raised by the petitioner on proper payment of excise duty, which was levied. Based on the above practice, the petitioner has made the payment as per the agreement without any default on the basis of practice availed in a way upon which payment of excise duty and other statutory



said practice was continued for more than 22 years from the year 1994.

Further, the respondent viz., claimant herein started raising invoices on the basis of flow meter installed by the petitioner from 10.10.2001, which was not agreed by the respondent/claimant. As the dispute has been raised by the respondent/claimant claiming invoices for the supply of products on the basis of flow meter recordings during negotiations between the parties, the petitioner had suddenly stopped supplying of gas from 31.12.2002, though the contract was expired only in the month of December 2003. Due to sudden stoppage of supplying gas had lead to huge loss to the respondent/claimant. Accordingly, the matter has been referred to arbitration as per the Clause 11 of the agreement claiming the following damages :-

(a) directing the respondent to pay a sum of Rs.378.24 lacs towards damages arising from the breach of the agreement dated 30.12.1993 together with interest at 18% on the amount so ascertained by the Hon'ble Arbitrator from the date of award till the date of payment."

3. The respondent took a stand before the learned Arbitrator that clause 16 of the Agreement envisages that settlement of any dispute by reference to arbitration, only if the dispute is as to the interpretation of the



agreement. The present dispute raised by the petitioner is with regard to the recovery of money for the goods sold and delivered. Therefore, it is not arbitrable as per clause 16 of the contract. It is his further contention that the invoices raised only based on the measurement of the goods sold on the basis of flow meter installed by the claimant. It is also his further contention that there was a negotiation, in which the claimant has agreed to pay the amount, however, they failed to pay the amount. Therefore, the supply of product was stopped. However, the same has been projected as if the contract was terminated. They have also pleaded counter claim for recovery of a sum of Rs.57,19,294.98/- towards differential amount.

4. The learned Arbitrator had framed the following issues :-

“1. Whether the dispute raised by the claimant is within the ambit of the Arbitration clause?

2. Whether the respondent had committed any breach of contract and whether the claimant is entitled to Rs.378.24 lakhs as claimed by the claimant?

3. Whether the claimant is entitled to interest at the rate of 18% per annum?

4. Whether the claimant had committed any breach of the contract and whether the respondent is entitled to counter



claim of Rs.93,83,684/-?

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5. Whether the respondent is entitled to interest at the rate of 18% per annum?

6. Whether the claim made by the claimant is sustainable in terms of the clause 11 of the agreement dated 30.12.1993?

7. To what other reliefs the parties are entitled to?

Both the parties have adduced oral as well as documentary evidence. It is to be noted that prior to the present Arbitrator, previously, Mr. Justice V. Ratnam (Retd.), was appointed as Arbitrator. As there was a dispute between the parties in payment of certain fees, one of the parties moved a petition under Sec.14 of the Arbitration and Conciliation Act (hereinafter called as 'Act'). Such being the position, in the place of previous Arbitrator, present Arbitrator Mr. Justice K.P. Sivasubramaniam (Retd.) was appointed and the issues as indicated above has been framed. After considering the entire materials on merits, learned Arbitrator had passed the final award as follows :-

“1. The respondent shall pay to the claimant a sum of Rs.3,25,40,500/- (Rupees three crores twenty five lakhs forty thousand five hundred only) with interest at the rate of 18% per annum from this date till date of realisation.

2. Towards the cost, the respondent shall pay to the



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claimant a sum of Rs. 8,00,000/- (Rupees eight lakhs) within a period of three months from the date of receiving this Award, failing which interest shall be payable at the rate of 6% per annum till date of realisation.”

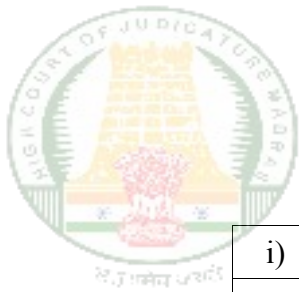
5. Totally, four grounds have been raised in the Original Petition filed under Section 34 of the Act. The first ground raised is with regard to the violation of fundamental policy of Indian Law, the second ground raised is that the reference is made beyond the scope of contract and not arbitrable, the third ground raised is that the learned Arbitrator had passed the award after passage of about 16 months of the hearing and the delay vitiates the entire proceedings and the fourth ground raised is that the learned Arbitrator had failed to appreciate the foundational facts of the case, and the award is liable to be interfered with under Sec.34 of the Act.

6. Now, in addition to the above submissions, Mr.V.Ayyadurai, learned senior counsel submitted before this court that clause 16 of the contract indicates only when there is a dispute between the parties, the matter can be referred to arbitration. Whereas correspondence exchanged between the parties clearly indicates that the matter has been settled between the parties. According to him, in view of such correspondence



exchanged, there was no dispute for reference. Hence, the issue is not at all arbitrable, which was not taken note of by the learned Arbitrator. Similarly, foundational facts have been interpreted and given a colour of termination, what was stopped is only a supply of goods for non-payment of bills and invoices raised. But, the same has been treated as termination. Therefore, the learned Arbitrator has not taken into consideration all those facts and in fact, it is also beyond the scope of contract. Hence, the learned Arbitrator has no jurisdiction to enter into the dispute. It is also stated that even while moving an application under Sec.9 and 11 of the Act, the respondent/claimant has not got any interim order of direction to re-supply the goods. Therefore, now, the damages cannot be claimed by the respondent/claimant, which was not taken note of by the learned Arbitrator. Finally, it is his contention that there is a delay in passing the award, which would vitiate the entire proceedings and it would lack a judicious approach in appreciating the foundational established facts. He has also placed following judgements to contend that the delay in passing the award is a vitiating factor :-

i)	2020 (8) MLJ 276 (SC) para 10	<i>Delay violates Art. 21</i>
ii)	2001 (7) SCC 318 Para 9	<i>May shake the confidence of people. It is the policy and purpose of law to have speedy justice.</i>
	Para 42	<i>Judges themselves normally forget the details of facts and niceties of the legal points advanced.</i>



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i)	2020 (8) MLJ 276 (SC) para 10	Delay violates Art. 21
	Para 45.4	3 months time to pronounce judgments. If not, parties should move the court.
iii)	2021 (2) CTC 365 (SC) Para 3	-do-
iv)	2020 (1) MLJ 169 para 10	It is natural for any Arbitrator to forget contentions and pleas raised by the parties
	Para 11	Delay defeats justice and encourages breaches
	Para 12	Directed to appoint fresh arbitrator
v)	2019 (2) RAJ 377 (Hyd)	Courts have no administrative superintendence power over Arbitrator Tribunal
vi)	2021 (2) RAJ 130 (Del) (15)	Recourse U/S. 14 is not mandatory

He has also submitted that the respondent/claimant has not taken any steps to mitigate the damages. Therefore, the damages awarded by the learned Arbitrator is not according to law. To support his contentions that the dispute is non-arbitrable, he has placed judgements as follows :-

A)	2020 (1) MLJ 169 (SC)	Granting relief regarding matter not in dispute constitutes patent illegality
	2020 (1) RAJ 506 (Mad) Para 12	Ignoring vital evidence constitutes patent illegality
B)	2020 (2) MLJ 285 (7.3)	Non-consideration of agreement in whole renders the award invalid.

7. Whereas, Mr.T.K.Bhaskar, learned counsel appearing for respondent has submitted that entire grounds made in the application only against factual aspect. The learned Arbitrator has considered each and



every pleas putforth by both sides and judicially took a decision. The award

is passed after considering all the documents and evidence by the learned

Arbitrator. The entire dispute revolves only whether invoices to be as per

flow meter recordings or as per the excise duty paid. The learned Arbitrator

had interpreted the contract. Such interpretation was always within the

domain of Arbitrator and he has taken a decision judicially, taking note of

all the documents and evidence. When the contention of the applicant that

documents relating to settlement is not considered, when perused, the

learned Arbitrator in para 74 of the award onwards recorded factual

findings. Therefore, it cannot be said that those factual aspects have been

ignored by the learned Arbitrator. The learned Arbitrator has also

considered entire documents placed before him and arrived a factual

findings. In such view of the matter, this Court cannot re-appreciate the

entire evidence. As far as the delay is concerned, the learned Arbitrator has

considered entire aspects and analysed all the documents and evidence and

made a fair award, however, the delay was occasioned not because of the

Arbitrator, it is only due to the attitude of respondent/claimant, failing to

pay the agreed fees. In fact, even in the year 2016, there was a proceedings

recorded by the Arbitrator, in which, the counsel for respondent/claimant

has agreed to pay fees, however, it has not been paid. Despite the same,

learned Arbitrator released the award. Therefore, mere delay cannot be a



ground to interfere with the well-reasoned award, which had considered all the documents and evidence. In support of his submissions, he has relied upon the judgement of *Delhi High Court* in the case of *Peak Chemical Corporation Inc. Vs. National Aluminium Co. Ltd. reported in 2012 II AD (Delhi) 304* and in the case of *MMTC Limited v. Sanco Tans Limited and Ors. in O.P. No. 20 of 2006 dated 16.02.2017*. He has also relied upon the judgements reported in (1) *AIR 2019 SC 5041* in the case of *Ssangyong Engineering and Construction Limited Vs. National Highways Authority of India (NHAI)*, (2) *2010 (11) SCC 296* in the case of *Sumitomo Heavy Industries Limited vs. ONGC Limited*, (3) *(2015) 14 SCC 21* in the case of *National Highways Authority of India vs. ITD. Cementation India Limited*, (4) *AIR 2019 SC 1168* in the case of *MMTC Ltd. Vs. Vadanta Ltd.*

8. In the light of the above submissions and materials on record, it is well settled that now the scope under Sec.34 of Arbitration and Conciliation Act is limited, only the grounds set out in Section 34 of the Act is made out, this Court can interfere with the Arbitral award. Similarly, it is also well settled that to interfere the award under the public policy of India, that intervention would be only on exceptional circumstances. In this regard, Hon'ble Supreme Court of India in its judgment reported in (1)



AIR 2019 SC 5041 in the case of ***Ssangyong Engineering and Construction Limited*** **Vs. *National Highways Authority of India***

(NHAI) has held in para 23 as follows :-

“23. What is clear, therefore, is that the expression “public policy of India”, whether contained in Section 34 or in Section 48, would now mean the “fundamental policy of Indian Law” as explained in paragraphs 18 and 27 of Associate Builders (supra), i.e. the fundamental policy of Indian Law would be relegated to the “Renusagar” understanding of this expression. This would necessarily mean that the Western Geco (supra) expansion has been done away with. In short, Western Geco (supra) as explained in paragraphs 28 and 29 of Associate Builders (supra), would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, in so far as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of



Associate Builders (supra).”

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“48. However, when it comes to the public policy of India argument based upon “most basic notions of justice”, it is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. It can be seen that the formula that was applied by the agreement continued to be applied till February 2013 – in short, it is not correct to say that the formula under the agreement could not be applied in view of the Ministry's change in the base indices from 1993-94 to 2004-05. Further, in order to apply a linking factor, a Circular, unilaterally issued by one party, cannot possibly bind the other party to the agreement without that other party's consent. Indeed, the Circular itself expressly stipulates that it cannot apply unless the contractors furnish an undertaking/affidavit that the price adjustment under the Circular is acceptable to them. We have seen how the appellant gave such undertaking only conditionally and without prejudice to its argument that the Circular does not and cannot apply. This being the case, it is clear that the majority



award has created a new contract for the parties by applying the said unilateral Circular and by substituting a workable formula under the agreement by another formula de hors the agreement. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this court. However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any court interfere with an arbitral award on the ground that justice has not been done in the opinion of the court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment.”

Thus, it has held that to interfere with the award, under the public policy of

India, based upon most basic notions of justice, the award can be interfered

only on very exceptional circumstances, when the conscience of the Court



is shocked by infraction of fundamental notions or principles of natural justice. Therefore, merely because, some other view is possible other than the view took by the learned Arbitrator, it cannot be a ground to interfere with the award. It is to be noted that entire dispute revolving around the interpretation of the agreement under Clause 11 of the contract, which reads as follows :-

“11. MFL shall raise invoices for the Product supplied on the basis of recordings of the Flow Meters installed by the company. In the event of such Meters, not functioning for any reason not practicable to adopt such measurements, MFL shall raise invoices based on the quantities on which excise duty has been paid by the Company or by MFL on behalf of the company.”

Clause 16 of the Contract governs that in the event of any dispute as to the interpretation of any of these presents, such dispute shall be settled through mutual negotiations or by appointing an Arbitrator, which reads as follows:-

“16. In the event of any dispute as to the interpretation of any of these presents such dispute shall be settled through mutual negotiations or by appointing an Arbitrator mutually agreed



upon or an Arbitrator from panel of Arbitrators of Indian Council of Arbitration.”

9. It gives two modes for settling the dispute, one is mutual negotiation and another one is appointment of arbitrator. It is stated before this Court that immediately after stoppage of supply, there were meetings, in which, the respondent/claimant has agreed to pay the amount with protest by letters dated 07.01.2003, 08.01.2003 and 09.01.2003. The learned Arbitrator has discussed the facts and the documents in para 74 onwards of the award, therefore, the contention of the petitioner that the settlement is reached between parties based on the documents at first cannot be accepted. The very negotiation started only to re-supply the products on certain conditions. The respondent/claimant herein has agreed to pay amount only to restart the supply and agreed to pay the amount is only under protest i.e. without prejudice to his right. Therefore, when the correspondence were exchanged with protest, which is not culminated into any settlement at no stretch of imagination could be considered as settlement reached between the parties in this regard. Therefore, the contention that there is no dispute remains for arbitration cannot be countenanced. Such contentions of respondent/claimant has been negated



on other factors placed by both sides. Therefore, this Court is of the view that the learned Arbitrator's view in this regard cannot be interfered with.

10. As far as the delay in passing the award is concerned, the learned Arbitrator has elaborately dealt all the materials and each and every pleadings and documents have been considered. Of course, there was some delay in pronouncing the award. On perusal of the award, the delay cannot be attributed to the Arbitrator. In fact, the delay was due to the admission made by the counsels to pay fees as agreed. There were proceedings in the year 2016 also in this regard. Only when the petitioner did not honour his commitment before the learned Arbitrator as per the proceedings, in fact, the Arbitrator has proceeded to release the award despite the fact that the fees has not been paid. Therefore, it cannot be said that the entire award itself is passed with later point of time. In fact, the release of award only was delayed. On perusal of the entire award, this Court is of the view that even there is some delay, it cannot be a ground to interfere a well-reasoned award. The learned Arbitrator had factually arrived a conclusion and interpreted the contract. Learned Arbitrator, taking note of the nature of the contract entered between the parties and the practice going on right from the year 1972 interpreted contract. In such view of the matter, this Court is

of the view that mere delay itself cannot be taken advantage by the



petitioner to non-suit the well-reasoned award. It is to be noted that the

delay is not only happened before this Court, earlier, Mr. Justice Ratnam

(Retd.) appointed as Arbitrator was substituted by the present Arbitrator for

the failure of petitioner to pay fees. Therefore, when the petitioner itself

caused some delay in the entire arbitral proceedings, they cannot blame the

Arbitrator for releasing the award with some delay. On perusal of entire

award, which consists of more than 123 paragraphs, this Court satisfied that

the challenge made under Sec.34 of the Act is nothing, but futile exercise

on the part of the petitioner. Though several judgements have been placed

to contend that the delay defeats justice, those judgements cannot be

applied to the facts of the present case. The above judgements have been

rendered in different context, where several years have been taken to pass

the final order, which in fact, defeated the right of the parties to approach

any higher court in time. In such view of the matter, those judgements no

way helpful to the present petitioner herein. On perusal of entire grounds

raised under Sec.34 of the Act and also submissions, this Court is not

satisfied that none of the grounds to interfere with the award is made with

regard to the allegation that claimant has not taken any steps to mitigate the

damages. Such plea was never raised either in the statement nor in the

grounds challenging the award. In such view of the matter, such plea

cannot be raised during submissions. Therefore, this Court do not find any



merit in this Original Petition. Accordingly, this Original Petition stands
dismissed.

Sd/- N.S.K.J.
09/08/2021

//Certified to be true copy//
Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

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