IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 06.11.2023	Delivered on: 21.12.2023

CORAM:

THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

AND

THE HONOURABLE MR.JUSTICE P.DHANABAL

O.S.A. (CAD).No.87 of 2021

and

C.M.P. No.16916 of 2021

M/s. Jones Foundations Private Ltd.
Represented by its Managing Director ... Appellant

Vs.

M/s. G4S Secure Solutions (India) Pvt. Ltd.,
represented by its General Manager / HR Head,
Chennai Hub. ... Respondent

PRAYER: Original Side Appeal filed under Order XXXVI Rule 1 of the Original Side Rules read with Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 and Section 13(1-A) of the Commercial Courts Act, 2015 praying to set aside the fair and decreetal order dated 11.11.2020 passed in O.P. (Comm. Divn.) No.442 of 2020 on the file of this Court and consequently, to allow O.P. (Comm. Division) No.442 of 2020 as prayed for.

For Appellant : Mr. K. Manoj Menon for
Mr. Menon Karthik Mukundan

For Respondent : Mrs. P.V. Rajeswari

JUDGMENT

(Judgment of the Court was made by P.DHANABAL,J.)

This Original Side Appeal has been filed as against the order passed by the learned Single Judge of this Court in O.P (Commercial Division) No.442 of 2020 dated 11.11.2020.

2. The appellant herein has challenged the Arbitral award passed by the Arbitrator in A.F. No.158 of 2018 through Arbitration Original Petition No.442 of 2020 on the file of this Court. The learned Single Judge has dismissed the said O.P. and thereby, the present appeal has been preferred by the appellant / petitioner.

3. The facts of the case in O.P. No.442 of 2020 are as follows:-

3.1. The petitioner M/s. Jones Foundations Private Limited is a company incorporated under the Companies Act, 1956 and the petitioner is carrying on the business of real estate development as a construction company, promoting residential layouts, group housing projects, consisting of villas, apartments etc., in and around Chennai. The respondent is carrying on business of providing security / guarding services for safety of men and materials.

3.2. The petitioner had entered into a Contract with the respondent on 08.09.2016 for providing guarding services with respect to two of the petitioner's projects. One is (i) Jones Cassia at Arasan Kazhani, SIPCOT, Ottiyambakkam Village, Chennai and another one is (ii) Jones Dawn Villa, Ponmar Village, Chennai. The sole objective of the petitioner to enter into such a contract was to ensure the safety of the occupants of the above projects and their properties / belongings. The contract period was 12 months. As per Clause II of the agreement, the respondent was obliged to provide the guarding services as per the Assignment Instructions, as set out in the Schedule II to the contract. It was specifically stipulated that all security personnel of the respondent deployed will ensure that they are fully conversant with the appellant's business activities and its related security requirements. The respondent commenced to provide Guarding services at the two sites and the respondent was grossly negligent and deficient in services as evident from the fact that there were a series of thefts, while the respondent's personnel were at site i.e., once in October 2016, 22.12.2016, 07.04.2017 and then on 03.05.2017. A professional security agency is entrusted with the responsibility of guarding / securing the petitioner's premises not only to prevent thefts but also act as deterrence to thieves / burglars, etc., from attempting such thefts. The appellant having suffered a fundamental breach of contract by the respondent, cannot be made liable to pay any amounts to the respondent for its purposeless / useless services, as the same not only resulted in loss to the petitioner and occupants of the said premises but also loss of reputation to the petitioner. Therefore, the petitioner refused to make any payment to the respondent for services in respect of Jones Cassia from October 2016 onwards and in respect of Jones Dawn Villa from January 2017 and ignored the invoices raised by the respondent on the petitioner.

3.3. Further, the petitioner caused the issue of a Legal Notice dated 09.05.2017 terminating the Contract and called upon the respondent to withdraw its security guards by 16.05.2017 and also pay damages to the petitioner quantified at Rs.48,60,000/- within 15 days. On 15.05.2017, the respondent replied to the said legal notice 09.05.2017 and did not dispute the petitioner's contentions, but only made a general, bare and evasive denials. Further, the respondent claimed erroneously that its liability was restricted to one month's charges under Clause 17 of the agreement. On 22.05.2017, the appellant issued a rejoinder notice to the respondent's reply dated 16.05.2017. On 29.06.2017, the respondent issued a Legal Notice to the petitioner calling upon him to pay a sum of Rs.24,53,731.70 allegedly towards services rendered and for interest and the same was replied by the petitioner through notice dated 12.09.2017 rejecting the respondent's claim and reiterating its demand for Rs.48,60,000/- as damages.

3.4. In the meantime, on 24.08.2017, the respondent issued a Notice of Arbitration referring the disputes between them and then the respondent filed O.P. No.622 of 2018 for appointment of the Arbitrator and the Hon'ble High Court has appointed Hon'ble Mr. Justice R.S. Ramanathan, a retired Judge of this Court to act as a sole Arbitrator. The learned Arbitrator conducted arbitration. The respondent claimed a sum of

Rs.32,48,582/-. The petitioner filed counter claim for a sum of Rs.48,60,000/- together with interest at 24% p.a. In fine, the learned Arbitrator awarded a sum of Rs.27,52,442/- and directed to pay the said amount within one month from the date of award, failing which, the respondent is entitled to claim 12% interest per annum to the said amount. As against the said award, the petitioner has preferred a petition before the Hon'ble High Court under Section 34 of the Arbitration and Conciliation Act, 1996 in O.P. No.442 of 2020. The learned Single Judge, after hearing both sides, had dismissed the petition. As against the order passed by the learned Single Judge, this appeal has been preferred by the appellant.

4. The learned counsel appearing for the appellant would contend that the Hon'ble Judge fails to examine the various grounds raised by the appellant in a proper perspective manner. The Hon'ble Judge failed to appreciate that the essential issue raised by the appellant was that the respondent as an expert rendering security services on the basis of a contract drafted by him, cannot escape all its responsibilities and liabilities for fundamental breach / non-performance and negligence by merely relying upon the limitation and exclusion clauses inserted by it in the

contract. The petition was dismissed at the admission stage without even correcting the computational error appearing in the face of the impugned award. As per the respondent's working in its Claim statement, amount as claimed by the respondent is only Rs.15,23,520/- towards invoiced amounts and Rs.6,50,501.30 as interest in all other heading to Rs.21,74,021/-, but the learned Arbitrator erred in computing it as Rs.30,56,022/- to the respondent. Further the learned Judge erred in holding that the contract, which is between an expert service provider and the customer is between two commercial entities of even keel, as there is no scope for negotiation on the terms on which services are provided. The learned Judge has without even considering the principle issue raised by the appellant or even the various terms and conditions in the said Contract has held them to be just and equitable, which renders the impugned order erroneous and arbitrary. The learned Judge failed to consider the counter claim and exhibit filed by the appellant and summarily rejected the claim. The respondent is not entitled to payment of the invoices under law and did not place any other material justifying its claim for payment, besides the invoices and the same has not been considered by the learned Judge. The learned Arbitrator has erroneously awarded interest at 24% p.a. on the claim amount of the respondent in violation of the Arbitration and Conciliation Act 1996. Therefore, the award passed by the Arbitrator and the order passed by the learned Single Judge are liable to be set aside.

5. The learned counsel appearing for the respondent would contend that they admitted the agreement entered between the parties and the respondent commenced the services on 08.09.2016 and had deployed the necessary security personnel as per the "Schedule of Locations" prescribed by the appellant. The persons deployed by the respondent were guarding the premises of the appellant in a responsible manner. There has never been any violations of Assignment instructions at any point of time from any of the persons deployed by the respondent in the premises of the appellant. The respondent has been periodically raising invoices from October 2016 on the appellant for the services rendered by them at different sites of the appellant. But the payments made by the appellant were neither periodical nor regular and a total sum of Rs.22,95,840/- remains unpaid on the invoices raised on the appellant until June 2017. The appellant herein had issued a Notice dated 09.05.2017 and the same was suitably replied by the respondent. The services of the respondent

were availed by the appellant till 24.06.2017 and there was a due of Rs.24,53,513.70 from October 2016 till 24.06.2017 together with interest @ 24% p.a. As per the agreement, G4S will not be liable in any way whatsoever and the client hereby expressly waives any right to any loss, injury, damage, cost of expense. The respondent will not in any way be responsible for the theft alleged to have occurred in the premises of the petitioner. Even as per the agreement, the respondent is not liable to pay any sum higher than the amount equivalent to one month's charges for the guarding services. Already, the respondent issued a Notice dated 29.06.2017 calling upon to pay a sum of Rs.24,53,513.70 being approximately calculated invoice amount of Rs.22,99,602/- from October 2016 till 24.06.2017 with interest at 24% p.a. In spite of that notice, no payment was made. Therefore, the respondent had filed the above said O.P. before the Arbitrator and the Arbitrator also after elaborate discussion, awarded a sum of Rs.32,48,582/- with interest @ 24% p.a. from the date of claim petition till the date of realization. As against the above said award, the appellant has preferred Original Petition before the Hon'ble High Court and the learned Single Judge has also correctly dismissed the said petition. Therefore the present appeal is liable to be dismissed.

6. Heard both sides and perused the entire materials available on record.

7. Upon hearing both sides and perusing the materials, the point for consideration in this appeal is whether the order passed by the learned Single Judge in O.P. No.442 of 2020 is sustainable and the appeal is liable to be allowed.

8. **Points:-** In this case, it is an admitted fact that both the appellant and the respondent entered into an agreement with regard to the guarding services. The appellant engaged services of respondent in two sites for guarding construction work. According to the respondent, the contractor has not paid the invoice amounts for the guarding services. The appellant's contention is that the respondent failed to guard the premises and there were frequent thefts in the sites and thereby he called upon the security guard services to pay the damages for a sum of Rs.48,60,000/- and sent notice. In turn, the respondent has also issued a notice by claiming a sum of Rs.22,99,602/-. Thereafter both the parties have exchanged their notices

and then the respondent had issued a notice of Arbitration and thereafter the parties approached this Court for appointment of Arbitrator u/S.11 of the Arbitration and Conciliation Act, 1996 and this Court also appointed the Hon'ble Mr. Justice R.S. Ramanthan, a retired Judge as Arbitrator and the learned Arbitrator had also, after hearing both sides and perusing the records, passed award by directing the appellant herein to pay a sum of Rs.27,52,422/- and directed to pay the said amount within one month from the date of award, failing which, the respondent is entitled to claim 12% interest per annum to the said amount.

9. Thereafter, this appellant has filed a petition before this Court under Section 34 of the Arbitration and Conciliation Act, 1996 and the same was also dismissed by the learned Single Judge. The learned Single Judge after referring the legal aspects as well as the Hon'ble Apex Court's judgment in ***Ssangyong Engineering and Construction Company Limited vs. National Highways Authority of India*** reported in ***(2019) SCC Online 677*** and after discussing the other legal aspects, dismissed the application. The appellant herein had raised so many grounds and none of the grounds come under the purview of Section 34 of the Arbitration and Conciliation

Act. It is well settled law that as per Explanation 2 to Section 34(2)(b)(ii) with regard to contravention with fundamental policy of India, Section 34 of Arbitration and Conciliation Act does not establish a review on the merits of the matter and challenges to covenants in a contract which has been entered in to between the commercial entities cannot be called in question under Section 34 of Arbitration Act petition.

10. At the time of arguments, the learned counsel appearing for the appellant fairly conceded that he is only requesting to reduce the interest from 24% to 9%. But the dispute is commercial dispute and the learned Arbitrator has also awarded a reasonable interest and it is well settled law that the scope of this Court to interfere with the award passed by the learned Arbitrator and the order passed by the learned Single Judge in the arbitration proceedings, is very limited and this Court cannot set aside the award in part.

11. In this context, it is relevant to refer the Clause 41 of the agreement and it reveals that the claimants are entitled to claim interest at 2%, If the invoice amounts were not cleared. Therefore, the learned

Arbitrator after referring the Clause 41 of the agreement, awarded the interest from November 2016 to May 2017. Further deducted one month charges towards the damages for the loss of articles, due to theft, the learned Arbitrator has awarded 12% as post award interest. Therefore the Arbitrator has awarded the interest as agreed by the parties. As far as Section 31(7)(b) is concerned, it will not be applicable to this case, since the specific rate of interest agreed between the parties to the proceedings. The learned counsel relied upon the judgment of the Hon'ble Supreme Court in the case of ***Delhi Airport Metro Express Pvt. Ltd., vs. Delhi Metro Rail Corporation reported in (2022) 9 Supreme Court Cases 286,*** wherein the Hon'ble Supreme Court in Para 20 and 21 held as follows:-

> "20. If clause (a) of sub-section (7) of Section 31 of the 1996 Act is given a plain and literal meaning, the legislative intent would be clear that the discretion with regard to grant of interest would be available to the Arbitral Tribunal only when there is no agreement to the contrary between the parties. The phrase "unless otherwise agreed by the parties" clearly emphasises that when the parties have agreed with regard to any of the aspects covered under clause (a) of sub-section (7) of Section 31 of the 1996 Act, the Arbitral Tribunal would cease to have any discretion with regard to the aspects mentioned in the said provision. Only in the absence of such an agreement, the Arbitral Tribunal would have a discretion to exercise its powers under clause (a) of

> sub-section (7) of Section 31 of the 1996 Act. The discretion is wide enough. It may grant or may not grant interest. It may grant interest for the entire period or any part thereof. It may also grant interest on the whole or any part of the money.
> 21. If the contention as raised on behalf of the appellant DAMEPL is to be accepted, the phrase "unless otherwise agreed by the parties" would be rendered redundant and would become otiose".

Therefore, from the above said judgment, it is clear that when the parties have agreed to the contrary on any of the aspects as mentioned in Section 31(7)(a), the Arbitral Tribunal would cease to have any discretion and would be bound by such agreement between the parties. In this case also, the parties agreed to pay 2% interest, if the invoice amounts were not cleared. Therefore the interest awarded by the Arbitrator is in accordance with law and within the purview of contract between the parties.

12. The learned counsel appearing for the appellant has relied upon the following Judgments:-

12.1. ***Krishna Bhagya Jala Nigam Ltd., vs. G. Harischandra Reddy & Anr. Reported in (2007) 2 SCC 720***

- wherein the Hon'ble Supreme Court has held in Para 11 as follows:-

> "11. On the merits of the claims made by the

contractor we find from the impugned award dated 25.06.2000 that it contains several heads. The arbitrator has meticulously examined the claims of the contractor under each separate head. We do not see any reason to interfere except on the rates of interest and on the quantum awarded for letting machines of the contractor remaining idle for the periods mentioned in the award. Here also we may add that we do not wish to interfere with the award except to say that after economic reforms in our country the interest regime has changed and the rates have substantially reduced and, therefore, we are of the view that the interest awarded by the arbitrator at 18% for the pre-arbitration period, for the pendente lite period and future interest be reduced to 9%".

12.2. ***Ennore Port Ltd., vs. HCC Van Oord ACZ Joint Venture reported in 2010-4-L.W. 257.***

- wherein the Hon'ble Supreme Court has held in ***Para 21*** as follows:-

"21. Now we come to the rate of interest. The Act provides that if a rate of interest is not fixed, then unless the award otherwise directs, it will carry at the rate of interest at 18%. But when the interest specified in the agreement is below the range of 6% to 8%, there is no reason why the Tribunal felt that it was fair and reasonable to award interest at the rate of 12%. It is obvious even from the award of the Tribunal that originally the tribunal felt that 9% would be justifiable rate of interest from 30.6.1993. This was rectified by invoking Section 33. The contract specifies the interest shall be that which is applicable to 46 days deposit which is between 6% to 8%. Double that interest was awarded for the delay beyond 56 days. So, while we do not interfere with the Arbitrator's construction of Clause 60.9 in the present case, in view of the decision in ***Krishna Bhagya Jala Nigam Ltd., vs. G. Harischandra Reddy & Another*** which is followed by our Court in ***M/s. Eastern Trading Company & others,*** we allow the appeal in so far as the rate of interest is concerned for the reasons given above. We reduce the rate of interest from 12% to 9%. The appeal is allowed to this extent. No costs".

12.3. ***M/s. Eastern Trading Company & 3 others vs. M/s. Kalpana Lamps & Components Ltd. and another reported in 2008-1-L.W. 814.***

- wherein the Hon'ble Supreme Court has held in ***Para 22*** as follows:-

"22. A perusal of the Apex Court judgment referred to above shows that taking note of the fact that after the economic reforms in our country, the interest rates had substantially reduced, the Apex Court reduced the awarding of interest at 18% per annum during the pre-arbitration period, for the pendente lite period and the future interest to 9% per annum. Taking note of the said decision of the Apex Court, we agree with the plea of the learned counsel for a reduction in the rate of interest that as against the interest awarded at 18% per annum by the Arbitrator, confirmed by the learned single Judge for the period from 09.09.1996 to the date of award, i.e., 24.4.1999 and from the date of the award till the date of payment, be reduced to 9% per annum. In the above circumstances, except for the reduction in the rate of interest awarded. We do not find any ground to interfere with the order of the learned single Judge. Hence, the appeal stands dismissed. No costs".

12.4. ***Oriental Structural Engineer P. Ltd., vs. State of Kerala reported in (2021) 6 SCC 150.***

- wherein the Hon'ble Supreme Court has held in ***Para 18*** as follows:-

> "18. The appeal court accepted reasoning of the Arbitration Court that the blank portion in the appendix to the bid would imply "zero" or "nil". The reasoning, in our opinion, is flawed and such an interpretation of the agreement would actually be contrary to and beyond the terms of the contract. The Tribunal in this case had already come to a factual finding on appreciation of evidence that there was no such implication. Such an exercise on the part of the Arbitration Court and the appellate Court would constitute rewriting the contract, which is impermissible. The Tribunal rejected the plea of waiver and we have reproduced its reasoning on that point. We cannot hold such reasoning to be perverse or improbable inthe factual background of the present case. The Tribunal in this case could have awarded interest as a compensatory or equitable measure, as there was no clause providing for exclusion or ouster of interest payment on delayed payment. The Tribunal determined the rate thereof in Paras 1.6 to 1.8 of the award. This part of the award specifies:
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> 1.6. It is, therefore, held that the claimants are entitled to interest on the amount as due under any IPCs issued by the Engineer or failing which, on the amounts as shown in the claimants' monthly statements submitted to the Engineer for certification and when

were not paid or had been withheld by the respondents and such interest shall be paid by the respondents for the period as 42 days after the claimants' respective monthly statements had been submitted to the Engineer for certification to the date of payment thereof in full. The Arbitral Tribunal further holds that on the unpaid sums and for the period of delay in the payment thereof as stated hereinabove, the respondents shall pay to the claimants interest @ 1% per month compounded monthly such rate being representative of the prevalent rate of access to money that the claimants were deprived of.

1.7. The Arbitral Tribunal therefore directs that the respondents shall pay to the claimants interest on the unpaid sum of Rs.2,15,72,150 for the period of the due dates of payment till the actual dates of full payment of such amount at the rate stated in Para 1.6 above in respect of IPC No.2 & IPC No.4.

1.8. The respondents shall further pay to the claimants such interest on the unpaid sums in respect of other IPCs Nos.5 to 14 issued by the Engineer or the claimants' monthly statements submitted to the Engineer for certification for the period from the due dates of payment till the actual dates of full payment at the rate as stated hereinabove.

The respondents are also directed to pay further interest @ 12% per annum on the interest amount determined pursuant to Paras 1.7 and 1.8 hereinabove from such dates of payment of the principal amount to the date of award".

12.5. ***Executive Engineer vs. Gokula Chandra Kanungo reported in (2022) SCC Online SC 1336.***

- wherein the Hon'ble Supreme Court has held in ***Para 20*** as follows:-

> "20. Noticing the similarity between the aforesaid cases and the present case, we find that the present case is also a fit case wherein this Court needs to exercise its powers under Article 142 of the Constitution of India to reduce the rate of interest. As already discussed hereinabove, taking into consideration the conduct of the respondent in delaying the proceedings at every stage which led to a long pendency of the dispute, we are of the view that, though it will not be in the interest of justice to interfere with the principal award, this is a fit case wherein the interest at all the three stages, that is pre-reference period, pendente lite and post-award period, requires to be reduced".

On careful perusal of the above said judgments, it is clear that in the absence of rate of interest in the contract, then the Tribunal can award interest as per the Act. The said case laws will not be applicable to the present facts of the case, because in this case, in the agreement itself, the interest has been fixed as 2% of the default amount. Therefore the contention of the appellant is not acceptable. Further this Court cannot modify the amount of Arbitration in respect of interest alone.

12.6. In this context, the learned counsel appearing for the respondent has relied on the judgment in ***Larsen Air Conditioning and Refrigeration Company vs. Union of India and others reported in 2023***

SCC Online SC 982 wherein, the Hon'ble Supreme Court has held in Para 15 as follows:-

> "15. The limited and extremely circumscribed jurisdiction of the court under Section 34 of the Act, permits the court to interfere with an award, sans the grounds of patent illegality, i.e., that "illegality must go to the root of the matter and cannot be of a trivial nature"; and that the tribunal "must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground [ref: Associate Builders (supra)]. The other ground would be denial of natural justice. In appeal, Section 37 of the Act grants narrower scope to the appellate court to review the findings in an award, if it has been upheld, or substantially upheld under Section 34. It is important to notice that the old Act contained a provision which enabled the court to modify an award. However, that power has been consciously omitted by Parliament, while enacting the Act of 1996. This means that the Parliamentary intent was to exclude power to modify an award, in any manner, to the court. This position has been iterated decisively by this court in Project Director, National Highways No.45E and 220 National Highways Authority of India v. M. Hakeem:
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> "42. It can therefore be said that this question has now been settled finally by at lease 3 decisions [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181], [Kinnari Mullick v. Ghanshyam Das Damani, (2018) 11 SCC 328: (2018) 5 SCC (Civ) 106], [Dakshin Haryana Bijli Vitran Nigam Ltd., v. Navigant Technologies (P) Ltd., (2021) 7 SCC 657] of this

> Court. Even otherwise, to state that the judicial trend appears to favour an interpretation that would read into Section 34 a power to modify, revise or vary the award would be to ignore the previous law contained in the 1940 Act; as also to ignore the previous law contained in the 1940 Act; as also to ignore the fact that the 1996 Act was enacted based on the Uncitral Model Law on International Commercial Arbitration, 1985 which, as has been pointed out in Redfern and Hunter on International Arbitration, makes it clear that, given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the "limited remedy" under Section 34 is coterminous with the "limited right", namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996".

On careful perusal of the said judgment, it is clear that the Court cannot modify the award. Therefore the contention of the learned counsel appearing for the appellant that the rate of interest to be modified from 24% to 9%, is not acceptable.

13. The learned Arbitrator after analysing all the facts passed reasoned award and the learned single Judge also after analysing the scope of interference under Section 34 of Arbitration and Conciliation Act and after referring the judgments of Hon'ble Supreme Court, elaborately discussed and passed detailed and reasonable order. Thereby, this Court

has no warrant to interfere with the order passed by the learned single Judge under Section 37 of the Arbitration and Conciliation Act.

14. In view of the said judgments and as discussed supra, this Court is of the opinion that this appeal has no merits and deserves to be dismissed.

15. Accordingly, this Original Side Appeal is dismissed. No costs. Consequently, the connected miscellaneous petition is closed.

(D.K.K.J) & (P.D.B.J)
21.12.2023

mjs

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D.KRISHNAKUMAR, J.,
and
P.DHANABAL,J

(mjs)

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