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OSA NO.77 OF 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.02.2024

CORAM:

**THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR. JUSTICE R.SAKTHIVEL**

**OSA NO.77 OF 2020
AND
CMP NO.3077 OF 2020**

M/s.Oil and Natural Gas Corporation Ltd.,
Thalamuthu Natarajan Building
5th Floor, Tower-II, MM Department,
Gandhi Irwin Road, Egmore,
Chennai – 600 008.

... Appellant /
Petitioner

Vs.

1.M/s.A.P.Enterprises
Rep. By its Partner Mr.Mohabir Paul
6/1, Dum Dum Road,
Kolkatta – 700 074.

2.Hon'ble Mr.Justice N.V.Balasubramanian (Retd)
Sole Arbitrator
No.40, Sankarapuram, Alamelumangapuram,
Mylapore, Chennai – 600 004.

... Respondents /
Respondents

PRAYER: Appeal filed under Order XXXVI Rule 1 of Original Side Rules read with Clause 15 of Letters Patent, praying to set aside the order dated 14.11.2019 passed in O.P.No.911 of 2017.



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For Appellant /
Petitioner : Ms. Anbarasi Rajendiran
for M/s. AAV Partners

For Respondent-1 /
Respondent-1 : Mr. M. Sriram

J U D G M E N T

(Judgment of the Court was made by R.SUBRAMANIAN, J.)

The appellant is aggrieved by the dismissal of its challenge to the Arbitrator's Award dated 06.07.2017, in and by which, the Arbitrator while upholding the claims of the first respondent in part, disallowed the counter claim made by the appellant on the ground that the appellant had not proved the loss.

2. The brief facts that led to the proceeding under Section 34 of the Arbitration and Conciliation Act, 1996 reads as follows:

2.1. The appellant called for tenders for Shot Hole Drilling in the Palar River of Cauvery Basin. The first respondent became the successful bidder at a cost of Rs.10,25,57,160.60. A contract was entered



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into between the parties on 16.04.2010 which provided for various rights and obligations between the parties. Under the contract, the first respondent had submitted a Performance Bank Guarantee for a sum of Rs.70,11,905/-.

2.2.Soon after the contract, during May 2010, the first respondent wrote the appellant indicating its inability to go upto the depth of 60 meters as per the contract because of the soil condition in the area in question. There were exchange of correspondence between the parties on this issue wherein the first respondent had repeatedly pointed out that it is not able to achieve the desired results because of the unprecedented hardness of the surface in the land to be drilled.

2.3.Since the mechanical rigs that were used were not turning out beneficial results, the first respondent also attempted to use pneumatic drills. Finding that the results achieved by use of said pneumatic rigs was also satisfactory, the first respondent finally on 28.05.2010 informed the appellant that it may not be in a position to continue the work and required the appellant to modify the terms of the contract in order to achieve the desired results.



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2.4.The appellant on its part by its letter dated 03.06.2010 terminated the contract invoking the unsatisfactory performance provision under Clause 18.4 of the General Conditions of Contract. Consequentially, the Bank Guarantee that was offered for a sum of Rs.70,11,905/- was also invoked.

2.5.The appellant re-tendered the work for a contract value of Rs.12,98,37,483/- to another person and it is stated that the work has been completed.

2.6.It is thereafter, the first respondent made a claim for return of the Bank Guarantee and also seeking return of the expenses incurred by it under various heads. The total claim, nine in number, worked out to Rs.2,76,14,309/-.

2.7.The claim was contested by the appellant contending that the breach of contract was by the first respondent and hence, invocation of Bank Guarantee is just and proper. It was also contended that since the first respondent has walked out of the contract, it is not entitled to the expenses incurred by it and also for the return of the Bank Guarantee that



was invoked. The appellant also made a counter claim to the tune of a sum of Rs.2,72,80,322/- being the difference between the value of the two contracts.

2.8. Upon the above pleadings, the Arbitrator, a retired Judge of this Court, framed the following issues:

“1) Whether the Claimant is entitled for the various amounts claimed in the arbitration proceedings?

2) Whether the various claims made by the Claimant falls within the purview of the contract?

3) Whether the tender for integrated shot hole drilling and seismic job services for a geographical party to be deployed in Palar area of Cauvery Basin during field Season 2009-2010, had the details regarding the field work, scope of work was clearly defined?

4) Whether involving Bank Guarantee in this peculiar circumstances is justified or not?

5) Whether the bills produced by the Claimant are accounted by the Respondent?

6) Whether the Respondent was justified in levying and collecting liquidated damages?

7) Whether the Respondent was justified in terminating the contract entered with the Claimant?

8) Whether the Respondent is entitled to the counter claims made by the Respondent?

9) For any other reliefs, the parties are entitled to?

10) For any other reliefs, the parties are entitled to?”



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2.9.Evidence, both oral and documentary was let in before the learned Arbitrator. The Arbitrator upon a careful consideration of the evidence, concluded that both the parties had not breached the terms of the contract. The Arbitrator found that the claimant first / respondent herein had to walk out because of a peculiar situation which prevented it from continuing with the work. The claim of the first respondent herein that the appellant had committed breach of the contract was also not accepted. On an overall assessment of the evidence on record, the Arbitrator found that the claimant would be entitled to refund of the amount realized by invocation of Bank Guarantee, a sum of Rs.2,00,000/- towards establishment charges and Rs.1,00,000/- towards wages paid to the Labourers. All other claims were rejected. Adverting to the counter claim, the learned Arbitrator found that the appellant had actually paid only a sum of Rs.7,30,05,850/- for the other contractor who completed the work and therefore, there was no actual loss. Hence, the counter claim on that head was disallowed. However, the Arbitrator upheld the claim of Rs.5,12,783/- as liquidated damages.

2.10.Aggrieved, the appellant moved this Court under Section 34 of the Arbitration and Conciliation Act, 1996 seeking to set aside the Award.



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3.A perusal of the order of the Hon'ble Single Judge who dealt with the application under Section 34 shows that the only contention that was raised before him was regarding the rejection of the counter claim for the difference in value of the contract. What was sought to be contended was that though the total amount paid was less than the sum of Rs.10,25,67,160/- the contract itself provides for 20% plus or minus depending on the work and therefore, if the same would have been done by the first respondent, the appellant would have paid much lesser amount so the entire claim for differential value was based on assumption. The Hon'ble Single Judge who dealt with Section 34 application after referring to the judgment of the Hon'ble Supreme Court in ***ASSOCIATE BUILDERS VS. DELHI DEVELOPMENT AUTHORITY [2015 (3) SCC 49]*** and pointing out the limited scope of challenge to an Award under Section 34 of the Arbitration and Conciliation Act, 1996 concluded that on the evidence available, the Arbitrator had taken a plausible view which does not require interference under Section 34. On the above conclusion, the challenge was rejected. Hence this Appeal.

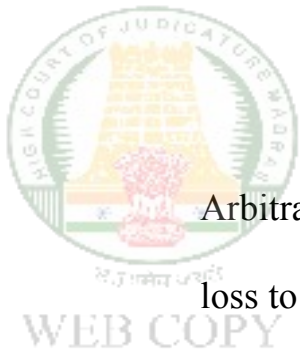
4.We have heard Ms.Anbarasi Rajendiran, learned counsel appearing for the appellant and Mr.M.Sriram, learned counsel appearing for the first respondent.



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5.The learned counsel appearing for the appellant would make a valiant effort to torpedo the order of the Section 34 Court by inviting our attention to the relevant provisions of both the contracts. Though the learned counsel would attempt to attack the award of the Arbitrator relating to the repayment of the amount realized by way of Bank Guarantee as well as the awards of Rs.2,00,000/- and Rs.1,00,000/- by the Arbitrator for establishment charges and wages, we do not think that we could entertain the submissions in appeal since we find that those questions were not addressed before the Hon'ble Single Judge who dealt with the Section 34 application. As we have already pointed out, the only question that appears to have been addressed before the Hon'ble Single Judge was the claim for the difference in the contract value.

6.On the claim for difference in the contract value, the learned counsel would submit that both the Arbitrator and the Hon'ble Single Judge fell in error in going by the total amount that was paid. She would invite our attention to the second contract where the cost of the drilling by mechanical means is almost Rs.100/- over and above the cost that was fixed under the first contract. Therefore, according to the learned counsel that difference in price should have been fathomed by the



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Arbitrator as well as the Hon'ble Single Judge to conclude that there was a loss to the appellant because of the re-tender.

7.As pointed out by the Hon'ble Single Judge, the scope of interference with an award under Section 34 is very limited and this Court cannot interfere with the award even if a difference view is possible, if it reaches the conclusion that the Arbitrator has arrived at a plausible conclusion on the evidence that is available. Interference under Section 34 or 37 is possible only when a cause is made out to bring in the challenge within the stated grounds in Section 34. One of the stated ground is perversity and the finding of the Arbitrator can be said to be perverse only if it shocks the conscious of the Court or when it is not based on any evidence or it is completely against the evidence that is on record. We do not find any of the above 3 features in the impugned award. The Arbitrator had analyzed the evidence and reached a conclusion that the total amount that has been paid by the appellant for getting the job concluded through the second contractor was actual loss than the contracted value in the first contract. Therefore, in the absence of any actual loss, the appellant cannot make a claim based on an assumed loss. We do not think that such a conclusion can lightly be interfered with by us under Section 37 more so,



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when such a conclusion has been affirmed by the Hon'ble Single Judge under Section 34 of the Arbitration and Conciliation Act, 1996.

8. We therefore do not see any warrant to interfere with the conclusion of the Hon'ble Single Judge and the appeal fails and it is accordingly dismissed. We direct the parties to bear their own costs in the appeal. Consequently, connected miscellaneous petition is closed.

[R.S.M., J.]

[R.S.V., J.]

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Index : No
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Neutral Citation : No
Speaking Order
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AND

R.SAKTHIVEL, J.

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