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OSA(CAD).No.43 of 2



THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.02.2024

CORAM:

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

**OSA(CAD).No.43 of 2022**

**and**

**C.M.P.No.4927 of 2022**

M/s.Thirumala Traders,  
Represented by Mr.A.D.S.Giri,  
No.227, Thirumala Complex,  
G.N.T.Road, Kavarapetti,  
Gummidipoondi, Thiruvallur District.

...Appellant

Vs.

1.R.Anbalagan

2.R.Sekar

3.AJS Contractors, represented by its  
Managing Partner, R.Sekar,  
Old No.40/3, New No.16/3,  
Vellala Teynampet, Chennai - 600 086.

4.G.Jayakumar

...Respondents

Prayer: Original Side Appeal filed under XIII(1) of the Commercial Courts Act, r/w. Section 37(1)(c) of the Arbitration and Conciliation Act, 1996, against the judgment and decree dated 08.02.2022 passed in Arb.O.P.No.(Com.Div.) No.33 of 2022.



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For Appellant : Mr.C.Jagadish  
For Respondents : Mr.V.Kannan for R1 to R3  
Mr.M.K.Subramanian  
for R4 - No appearance

### **J U D G M E N T**

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

This appeal under Section 37 of the Arbitration and Conciliation Act, challenges the order of the Section 34 Court, dismissing the original petition, seeking to set aside the award of the Arbitrator appointed under Section 11 of the Arbitration and Conciliation Act, 1996.

2.The facts that led to the dispute are as follows:-

The appellant, who was awarded a contract for construction of an Anaicut in the Pennaiyar basin circle in Tiruvannamalai District for a total contract value of Rs.6,95,42,300/- on 24.02.2014. An agreement was entered into between the appellant and the Public Works Department of the Tamil Nadu Government for execution of the work. The appellant had also provided performance bank guarantee for due performance of the work to the tune of Rs.34,80,000/- on 13.03.2014. The appellant entered into a memorandum of understanding with the 3rd respondent, a partnership firm for carrying out the entire contract work. The memorandum of

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understanding stipulated that the 3<sup>rd</sup> respondent / firm shall pay 5% of the contract value to the appellant and the same would be deducted by the appellant from the payments received by it from the PWD upon completion of the work.

3.The claimants sought for a reference of the dispute to the Arbitrator, contending that the appellant paid only a sum of Rs.2,95,70,701/-, leaving a balance of Rs.3,64,62,346/- and the Bank guarantee amount of Rs.34,80,000/- which was deposited by the claimants with the appellant, the claimants sought for an award against the appellant for a total sum of Rs.3,99,42,346/- with interest at 12%. Since no steps were taken for reference of dispute to the Arbitrator by the appellant, the claimant moved this Court under Section 11 of the Arbitration and Conciliation Act in O.P.No.952 of 2017 and this Court appointed a retired Judge of this Court as an Arbitrator on 24.09.2018. The Arbitrator entered upon a reference on 08.11.2018 and passed the impugned award on 27.02.2020.

4.The claim was resisted by the appellant and one of the partners of the 3<sup>rd</sup> respondent / partnership firm contending that the claimants did not complete the work. It was their claim that the claimant completed only the



first phase of the work worth Rs.278.17 lakhs and could not complete the remaining work. The appellant was forced to complete the work with the help of the 2<sup>nd</sup> respondent, one of the partners of the 3<sup>rd</sup> respondent firm, and the work was completed after two extensions in the year 2015. Therefore, according to the appellant, the claimants are not entitled to the claim made before the Arbitrator. Both the parties had let in voluminous evidence before the learned Arbitrator. Several documents were produced by the claimants as well as the appellant and the 2<sup>nd</sup> respondent. Oral evidence was also let in and there was lengthy cross-examination of the witnesses by the counsel for the parties.

5.The Arbitrator, upon consideration of the entire evidence on record concluded that the work was completed by the claimants and disbelieved the contention of the appellant that the 3<sup>rd</sup> respondent firm had not done the work and the work was completed by the appellant with the help of the 2<sup>nd</sup> respondent, one of the partners of the 3<sup>rd</sup> respondent firm. The Arbitrator, in coming to the conclusion, took into account various documents, which indicated that payments were made by the appellant to the 3<sup>rd</sup> respondent firm, even after completion of the first milestone. The contention that various payments were made to the 4<sup>th</sup> respondent, the partner of the 3<sup>rd</sup>

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respondent firm over and above the admitted sum of Rs.2,95,07,701/- was disbelieved by the Arbitrator on the ground that those payments were made even before the completion of the first milestone and therefore, the same cannot be treated as payments made for the subsequent work. The Arbitrator also disbelieved the claim on the basis that the value of the entire work upto the first milestone was only to 267.17 lakhs. The claim that the appellant paid a sum of Rs.576 lakhs even before the completion of the first milestone was totally unbelievable.

6.The Arbitrator had analyzed the entire evidence that was placed before him in coming to such conclusion. On the said conclusion, the Arbitrator passed an award for payment of sum of Rs.3,99,42,346/- with 12% interest from the date of the commencement of the arbitration i.e., 22.07.2017 till date of realization. Aggrieved, the appellant preferred O.P.No.33 of 2022 under Section 34 of the Arbitration and Conciliation Act, 1996, seeking to set aside the award.

7.The learned Single Judge, who dealt with the 34 application found that the none of the grounds raised in the 34 application would fall within the eight pigeon holes as set out in Section 34. In coming to the conclusion,



the learned Single Judge also referred to the judgment of the Hon'ble Supreme Court in *Associate Builders Vs. Delhi Development Authority* reported in (2015) 3 SCC 49 and *Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India* reported in (2019) 15 SCC 131.

8. After analyzing the scope of the jurisdiction under Section 34, the learned Single Judge concluded that the case on hand is not a fit case for interference with the award under Section 34. In fact, we find that the learned Single Judge had concluded that the case is not even fit for admission and the same is liable to be rejected or dismissed under Rule 8(1)(c) of the Madras High Court (Arbitration) Rules 2020. On the said conclusion, the learned Single Judge dismissed the original petition. Aggrieved, the instant appeal by the 1<sup>st</sup> respondent before the Section 34 Court.

9. We have heard Mr.C.Jagadish, learned counsel for the appellant and Mr.V.Kannan, learned counsel for the respondents 1 to 3.

10. Mr.C.Jagadish, learned counsel appearing for the appellant in his



attempt to torpedo the award and the order of the learned single Judge would submit, both the Arbitrator and the learned Single Judge erred in not advertg to the fact that there was no evidence available before the Arbitrator to show that the respondents 1 to 3 herein completed the work fully. The learned counsel would also point out the fact that payments were made separately to the 4<sup>th</sup> respondent by the appellant would demonstrate that the work was carried on by the 4<sup>th</sup> respondent. The learned counsel for the appellant would also submit that there is no evidence to show that the sum of Rs.34,80,000/-, the value of the bank guarantee was deposited by the respondents 1 to 3 herein with the appellant.

11.Contending contra, Mr.V.Kannan, learned counsel for the respondents 1 to 3 would submit that the Arbitrator has examined the evidence and has reached a particular conclusion, which cannot be said to be perverse. Drawing our attention to the limited jurisdiction of the Court under Section 34, the learned counsel would point out that the learned single Judge would dealt with the 34 application has rightly applied the law and has found that there is no ground has been made out within the limited window available to the 34 Court to interfere with the award. The learned counsel would also reiterate the principles that are set out in the judgments

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referred to by the learned Single Judge cited supra. We have considered the rival submissions.

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12. On a perusal of the award as well as the order of the Section 34 Court, we are unable to persuade ourselves to agree with the submissions of the learned counsel for the appellant. As it has been rightly pointed out that the jurisdiction of the 34 Court is very limited and our jurisdiction in an appeal under Section 37 is much narrower than the jurisdiction of the 34 Court. The learned single Judge had recorded as of fact that there is no perversity in the award.

13. Though the learned counsel for the appellant would make a very serious attempt to invite us to the evidence and implore us to give a different interpretation than what has been adopted by the Arbitrator and confirmed by the Section 34 Court, we do not think that we can carry out such an exercise in an appeal under Section 37 of the Arbitration and Conciliation act. If Section 34 Court has reached a conclusion, which is more probable, we do not think, we can interfere with the said conclusion, even though we may reach a different conclusion on a re-appreciation of the evidence. If we



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cannot carry out that exercise, we do not think, we can interfere with the order of the 34 Court. This appeal therefore, fails and it is accordingly, **dismissed**. No costs. Consequently, connected miscellaneous petition is closed.

(R.S.M., J.) (R.S.V., J.)  
02.02.2024

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Speaking

Nuetral Citation :No

**R.SUBRAMANIAN, J.**  
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