



O.S.A (CAD) No.86 of 2025

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **28.08.2025**

CORAM

THE HONOURABLE MR.JUSTICE **M.SUNDAR**

and

THE HONOURABLE MR.JUSTICE **HEMANT CHANDANGOUDAR**

O.S.A (CAD) No.86 of 2025

M/s.Thavam Constructions
Represented by its Managing Director
Mr.R.Subramani
S/o.P.Ramasamy Gounder
No.632, Phase -1, Tamil Nadu Housing Board
Krishnagiri Road, Tirupattur, Vellore District
Tamil Nadu - 635 601

... Appellant

Vs.

1. The Union of India
Represented by
General Manager, Southern Railway
Chennai - 600 003
 2. The Chief Engineer, Constructions
Office of the Chief of Administrative Officer
(Construction), Southern Railway
Egmore, Chennai - 600 008
 3. The Deputy Chief Engineer / Construction
Southern Railway, Near My Lady's Garden
Park Town, Chennai - 600 003
 4. Mr.Nandakumar (Sole Arbitrator)
Presently employed as Deputy Chief Engineer (GC-II)
Southern Railway, Tiruchirappalli
- .. Respondents



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Original Side Appeal filed under Section 13(1) of the Commercial Courts Act, 2015 read with Order XXXVI Rule 1 of Original Side Rules and Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 against the order dated 10.01.2025 in O.P.No.250 of 2014.

For Appellant : Mr.Ajay Francis Inigo Layola

JUDGMENT

(Judgment of the Court was made by **M.SUNDAR, J.**)

Captioned intra-court appeal has been filed under Section 37 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)' [hereinafter 'A and C Act' for the sake of brevity], to be precise under Section 37 (1)(c) of A and C Act.

2. In and vide captioned intra-court appeal, an order dated 10.01.2025 made by Section 34 Court (Commercial Division) in O.P.No.250 of 2014 (along with O.A.No.293 of 2014 thereat being an application under Section 9 of A and C Act) dismissing Contractor's challenge to an arbitral award dated 22.03.2014 made by 'Arbitral Tribunal' ['AT' for the sake of brevity] constituted by a sole Arbitrator is assailed. This 10.01 .2025 order shall be referred to as 'impugned order' for the sake of convenience.



3. Mr. Ajay Francis Inigo Layola, learned counsel for appellant

is before us.

4. Factual matrix in a nutshell is that there was a contract (said contract) for construction of 'RoB' ['Road Over Bridge'] at Level Crossing No.64 at Km 154/12-14 between Gudiyatham and Melalathur Railway stations in Katpadi-Jolarpettai Section. This contract is dated 28.02.2005 and the total value of the contract is a little over Rs.67.40 lakhs [Rs.67,40,883/- to be precise]; that the said contract was terminated by employer (to be noted, we are referring to 'Railways' as 'Employer' solely for the sake of convenience and clarity) in and by a termination notice dated 12.12.2005 followed by a termination order dated 21.12.2005 primarily on the ground that the Contractor has breached said contract by causing delay in completing the project i.e., completing only 30% of the work within the time frame when the contract should have been completed in full; that this termination of said contract led to eruption of disputes between employer and contractor and that in and vide a judicial order dated 04.11.2006 made by a Section 11 Court (to be noted, Section 11 Court was Hon'ble Chief Justice prior to 23.10.2015) vide O.P.No.371 of 2006, a sole Arbitrator was appointed and AT stood constituted; that parties went before the AT; that the AT, after embarking



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upon legal drill of adjudication, held that the Contractor is liable to pay a little over Rs.32.16 lakhs (Rs.31,16,835/- to be precise) *inter alia* towards damages on account of execution; that it is to be noted that this is one of the heads of counter claim made by Employer-Railways; that the claims made by the Contractor under eight different heads did not find in favour with AT and with regard to one head which pertains to declaratory prayer, a finding was returned that risk and costs can be enforced; that it is to be noted that the counter claim of Railways that was allowed was towards risk and damages on account of execution of left over works under said Contract 'through a third party'; that this 'award dated 22.03.2014' [hereinafter 'impugned award' for the sake of convenience] was assailed by the Contractor in Section 34 Court and as alluded to supra, Section 34 Court dismissed the Section 34 petition which was predicated primarily on the ground that the impugned award is in conflict with public policy of India (contravention with fundamental policy of Indian Law) [to be noted in codified parlance, it is Section 34(2)(b)(ii) read with Clause (ii) of Explanation 1 thereat]; that in Section 34 Court conflict with public policy ground was predicated by saying that AT having taken a different view in an identical matter; that Section 34 Court on comparison of the matters, came to the conclusion



that the other matter is very different on facts; that assailing the Section

34 Court order, captioned intra-court appeal has been filed by the Contractor.

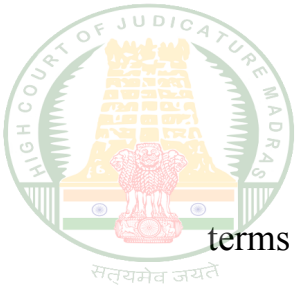
5. Mr.Ajay Francis Inigo Loyola, learned counsel for the appellant notwithstanding myriad grounds in the memorandum of grounds of appeal, predicated his campaign against the impugned order on two points and they are as follows:

i) The hire charges did not contemplate absorption of transportation charges by the Contractor and AT holding to the contrary tantamounts to wandering i.e., moving away from the terms of the contract;

ii) There is no termination clause in said contract and AT has wrongly placed reliance on termination clauses in 'GCC' ['General Conditions of Contract'].

6. This Court carefully considered the submissions of learned counsel for appellant.

7. To be noted, learned counsel for appellant pressed into service *Rashtriya Chemicals and Fertilizers* case [*Rashtriya Chemicals and Fertilizers Limited Vs. Chowgule Brothers and Others* reported in (2010) 8 SCC 563] for the proposition that AT cannot travel beyond the



terms of contract. To put it in codified terms, it was a Section 28(3) plea.

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8. As regards Section 28(3) of A and C Act, learned counsel on being pointed out that the same has not been raised before Section 34 Court fairly did not dispute the obtaining position that Section 28(3) point had not been raised before the Section 34 Court.

9. Be that as it may, this Court finds that Section 28(3) plea is a non-starter and the reason is, Clause 36.5 of said Contract, which reads as follows:

'36.5. Railway may give on hire to the contractor such materials as rails, steel cribs and released B.G/M.G wooden sleepers, if available, for use in execution of the work at the nearest Construction Stores, Depot, provided the contractor applies for them and give in writing his acceptance of the rate in terms of hire charges. The Contractor shall take over and transport the same to the site of the work at his own cost and also take all reasonable care of such materials and shall be responsible for all damages or loss'.

(Underlining made by this Court for ease of reference)

10. This takes this Section 37 Court to next point i.e., that AT fell in error in relying on GCC. A careful perusal of ANNEXURE II captioned 'AGREEMENT FOR WORKS' makes it clear that GCC will



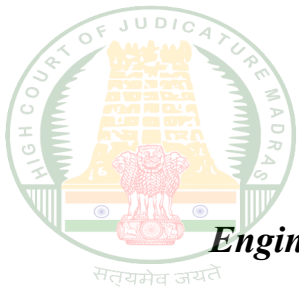
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apply. The contracting parties having agreed for the same, cannot renege and be heard to contend that GCC does not apply. To be noted, Clause 40 of said contract captioned 'Period of Completion' refers to GCC and more particularly Clauses 17 and 62 of GCC which inter-alia provide for termination. Clause 40.1 of said Contract reads as follows:

'40.1 The works are required to be completed within the time period stipulated in the special conditions of contract. The work is deemed to commence from the date of issue of letter of acceptance. time is the essence of the contract. The contractors will be required to maintain speedy and required progress to the satisfaction of the Engineer to ensure that the work will be completed in all respects within the stipulated period failing which action may be taken by the Railway Administration in terms of clause 17 and / or Clause 62 of the General Conditions of Contract.

11. Therefore, it cannot be gainsaid that GCC cannot be looked into. GCC certainly forms part of said contract.

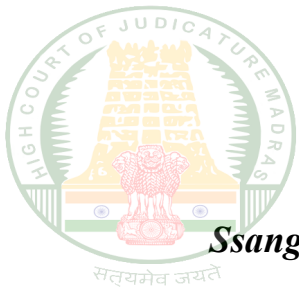
12. Reverting to the order of Section 34 Court, we find that Section 34 Court has captured the obtaining position that the protagonist of 34 petition i.e., the Contractor has pressed into service ***Associate Builders*** case [***Associate Builders Vs. Delhi Development Authority*** reported in (2015) 3 SCC 49] and ***Ssangyong*** case law [***Ssangyong*** 7/12



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Engineering and Construction Company Limited Vs. National Highways Authority of India reported in (2019) 15 SCC 131]. As

regards *Associate Builders* and *Ssangyong* case laws, Hon'ble Supreme Court on public policy [Section 34(2)(b)(ii)] carved out three facets, namely a) judicial approach, b) 'Natural Justice Principle' [NJP] and c) irrationality/perversity. Hon'ble Supreme Court also laid down three separate tests for these three facets of judicial approach and they are a) fidelity of judicial approach, b) time honoured *audi alteram partem* and c) Wednesbury principle of reasonableness, This was vide *Associate Builders*. Subsequently, in *Ssangyong* Hon'ble Supreme Court made it clear that in the light of amended Section 34, judicial approach is not available to a protagonist of a Section 34 petition and as regards irrationality/perversity, the same is available but not under Section 34(2)(b)(ii) but as patent illegality under Section 34(2A) which is limited to patent illegality on the face of the award. Patent illegality under Section 34(2A) is circumscribed by a proviso, which forbids reappreciation of evidence. To be noted, Section 34(2A) is nobody's case either before Section 34 Court or before this Section 37 Court. Therefore, we deem it appropriate to write that three facets of public policy put in place in *Associate Builders* case law stood explained in

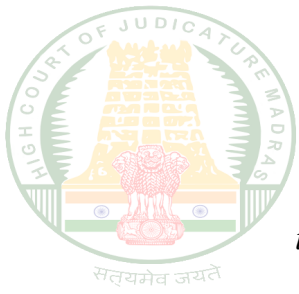


Ssangyong and **Ssangyong** if applied to the case at hand leaves the protagonist of the Section 34 petition with only NJP. It is nobody's case that there is NJP violation. Therefore, we find that the campaign of the contractor against the impugned award on the ground that it is in contravention of public policy (as already alluded to vide Clause (ii) of Explanation 1 of Section 34(2)(b)(ii) of A and C Act) turns out to be a damp squib.

13. This Court has made Rules in exercise of powers under Section 82 of A and C Act and under the Rules, a Section 37 appeal has to pass muster in the Admission Board. In this regard, it is pertinent to write that Rules made by the Madras High Court are titled 'The Madras High Court (Arbitration) Rules, 2020' and relevant rule is Rule 9, which reads as follows:

'9.Procedure in relation to Appeals under Sections 37, 50 and 59 of the Act:

(i) Every appeal under Sections 37, 50 and 59 of the Act shall be in the form of a memorandum of appeal signed by the appellant or his advocate. The memorandum of appeal shall be accompanied by a certified copy of the order appealed from. Provided that in cases of urgency, the appellant may apply to the Court for dispensing with the production of such certified copy of



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the order, by furnishing along with the appeal, a legible copy of the order appealed against, certified to be true, by the appellant or his advocate. In all such cases, the certified copy of the order shall be filed within such time as the Court may specify.

(ii) Every appeal under Sections 37, 50 and 59 shall be posted for admission before the Court. On hearing an appeal under Sections 37, 50 and 59 for admission, the Court may-

- (a) admit and order notice to the respondent*
- (b) direct the petitioner to issue notice along with memorandum of appeal and documents to the respondent before the matter is heard for admission; or*
- (c) dismiss the appeal, with or without costs.*

(iii) Where the court orders notice on admission, the Court shall endeavour to decide on the admission within three months from the date of first hearing.

(iv) Where notice is ordered under sub rule (iii), the Respondent shall not file any counter statement or counter affidavit, unless the Court directs otherwise.

(v) The Code, the Civil Rules of Practice, the Madras High Court Appellate Side Rules and the Madras High Court Original Side Rules shall apply, to the extent applicable, to the filing and hearing of appeals under Sections 37, 50 and 59.'



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14. We find that the captioned 37 appeal does not pass muster

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in the Admission Board in the light of the narrative, discussion and
dispositive reasoning supra.

Ergo, the sequitur is captioned Original Side Appeal is
dismissed. There shall be no order as to costs.

(M.S.,J.) (H.C.,J.)
28.08.2025

Index: Yes/No
Neutral Citation: Yes/No
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M.SUNDAR.J.,

and

HEMANT CHANDANGOUDAR, J.,

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