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OSA No.20 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.03.2025

CORAM

THE HON'BLE MR.K.R.SHRIRAM, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE MOHAMMED SHAFFIQ

OSA No.20 of 2019

Chennai Metropolitan Water Supply & Sewerage Board,
No.1, Pumping Station Road,
Chennai - 600 002.

through the Managing Director

... Appellant

vs.

1. SPML Infra Limited,
F-27/2, Okhla Industrial Area Phase II,
New Delhi 110020
Through its Authorised Signatory
2. Dr.T.S.Sethurathnam
Presiding Arbitrator
C-137, Sarvodaya Enclave,
New Delhi 110 017
3. Capt.S.Raja Rao
Arbitrator
House No.279, 1st B-Cross,
8th Main Road, 4th Block,
Basaveswara Nagar, Bengaluru 560 079



OSA No.20 of 2019

4. Mr.K.Ramalingam

Arbitrator

AP-506, 16th Street,

Vaigai Colony, Anna Nagar West,

Chennai 600 040

... Respondents

(Cause title for R-1 amended as per order
dated 21.03.2025 in CMP No.27820 of 2023
by the Hon'ble First Bench)

Prayer: Appeal filed against the order passed by learned Single Judge in OP
No.325 of 2009 dated 14.06.2017.

For Appellant : Mr.D.Balaraman

For Respondent No.1 : Mr.M.S.Krishnan,
Senior Counsel,
for Mr.K.Ashok Kumar

Respondents 2 and 4 – Arbitrators
Not ready in notice regarding Respondent No.3

JUDGMENT

(Judgment of the Court was delivered by the Hon'ble Chief Justice)

Appellant is unhappy with an order delivered on 14.06.2017 by
learned Single Judge of this Court under Section 34 of the Arbitration and
Conciliation Act, 1996 (the Act). By the said petition under Section 34 of
the Act, appellant challenged the majority award dated 15.12.2007.



OSA No.20 of 2019

WEB COPY

2. A tender was floated by appellant in October, 1997, inviting bids for construction of permeate conveyance pipeline. Respondent No.1 was the successful bidder and came to be appointed as contractor, pursuant to a contract dated 26.11.1998. The contract executed comprised of both Rupee as well as Japanese Yen component. Value of the contract in Indian rupees was INR 18,05,30,000/- while in Japanese Yen was fixed at JPY 51,90,42,904/-

3. The scope of work of the contract broadly obliged respondent No.1 to:

- a) construct pumping station and emergency station at Koyambedu;
- b) to supply and install electro mechanical and instrumentation equipment; and
- c) to supply and lay down 1700m of ductile iron pipeline with all accessories of the requisite diameter.



OSA No.20 of 2019

WEB COPY

4. Disputes arose between the parties as regards post-contractual changes brought about in the alignment of the pipeline, which respondent No.1 was obliged to lay down in terms of the contract.

5. The contract envisaged that only a part of the pipeline within the range of 10-15% would be laid underground and that a major part of the pipeline would have to be laid overground. It appears that due to post-contractual changes, not only the actual length of the pipeline which had to be laid got altered, but also the length of the pipeline which had to be laid underground also increased. In sum, while the actual length of the pipeline which had to be laid got changed from 17945m to 11887.2 m, the portion which had to be laid underground increased from 1759m to 5637m. In effect, the increase in that part of the pipeline which had to be laid below the road surface, in percentage terms increased from 10-15% to 47.42%.

6. Besides this, the main average depth of excavation evidently increased from 2.68m to 3.16m. In real terms, the increase was approximately 0.5m; while in percentage terms, the average depth of excavation increased by 18.65%.



OSA No.20 of 2019

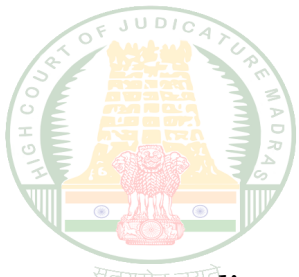
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It is these post-contractual changes which made respondent No.1 to lodge its claim for recovery of monies under various heads.

7. As it appears from the majority award, respondent No.1 lodged 16 claims, which included claim for interest; while appellant lodged a counter-claim for the alleged delay committed by respondent No.1 in the execution of the contract. In the counter-claim, appellant claimed liquidated damages of 10% of the contract price.

8. As per the majority award, it contained 22 sub-heads under Claim-1. Out of the 22 sub-heads, two sub-heads were rejected. Besides four other claims were also rejected.

9. In all, majority award directed payment of a sum of Rs.13,72,38,571/- to respondent No.1 with interest @12% per annum from 01.09.2003 till the date of payment. The award also provided that if the money as awarded was not paid within three months, respondent No.1 would be entitled to a further interest at the rate of 15% per annum till the date of actual payment of the amount so awarded. The parties were



OSA No.20 of 2019

WEB COPY

directed to bear their own costs.

10. Insofar as the minority award was concerned, the contractor was awarded Rs.1,54,57,574/- towards certain heads of claim. In addition, interest at the rate of 8% per annum for a period between August, 2003 and December, 2007 was also awarded and the interest is quantified at about Rs.54,61,676/-. The minority award also directed further interest at the rate of 6% per annum, if payment as ordered was not made on or before December, 2007. Even in the minority award, Board's counter-claim for liquidated damages has been rejected.

11. Appellant filed its Section 34 petition raising very broad grounds to assail the award. Appellant's challenge primarily was confined to claim Nos.2, 11 and 12. As regards Claim Nos.11 and 12, both parties agreed for quashing of the award under those two heads and remand the matter for fresh adjudication before a sole arbitrator who was appointed by the Court. Adjudication of claim Nos.11 and 12 was carried out by a former Judge of this Court, who was pleased to reject claim Nos.11 and 12 made by respondent Corporation. Respondent No.1 has not challenged this award.

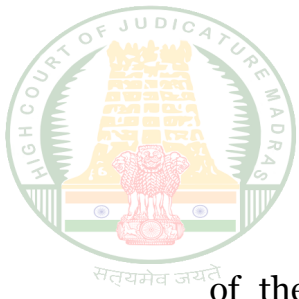


OSA No.20 of 2019

WEB COPY

That left only claim No.2 to be decided by learned Single Judge in the Section 34 petition. Learned Single Judge rejected the challenge under Section 34 of the Act by the impugned order pronounced on 14.06.2017, and that is the only point that we need to consider under this appeal filed under Section 37 of the Act.

12. This claim No.2 was in respect of additional work due to increase in depth of excavation and due to the increase in the length of pipeline running under the road due to post-contract changes in the alignment of the pipeline. The contractor's claim, i.e., of respondent No.1, was that as per the original tender drawing, only 1759m of the total length of pipe was under the road, but due to post-contract changes in the alignment of pipeline, a length of 5637m of the pipeline came under the road. It was also the contractor's case that due to revision of alignment, there was considerable reduction in the scope of work, i.e., reduction in the length of pipeline to be laid. Against total length of pipeline in original scope of 17945m, the actual length of pipeline laid was 11887.2m, out of which, length of pipe under the road portion is 5637m as indicated by respondent No.1 which is 47.42%



OSA No.20 of 2019

WEB COPY

of the pipeline actually laid. The contractor's case was Clause 1.04 of Volume 2A of the contract expressly stated that 10-15% of the pipeline will be laid under the road. It was also the contractor's case that as per the original contract, the main average depth of excavation for the entire pipeline was 2.68m but due to post-contract changes in the alignment, the main average depth of excavation as per “as built” drawings was found to be 3.16m, an increase of 0.5 m from 2.68m. The increase in the depth of excavation was therefore at 18.65%.

13. Admittedly, appellant paid a sum of Rs.4,67,47,483/- out of the claim of Rs.9,87,05,340/-that was made by the contractor, leaving a balance of Rs.5,19,57,857/-. It was this amount that was awarded in favour of the contractor.

14. Mr.Balaraman submitted that Clause 8.1 of the General Conditions of Contract (GCC) provided that the contractor shall be deemed to have inspected and examined the site and its surroundings and to have satisfied himself before submitting his tender, as to the nature of the ground and sub-soil, form and nature of the site, quantity and nature of the work



OSA No.20 of 2019

WEB COPY

and materials necessary for the completion of the work and the means of access to the site, the accommodation he may require and in general, to have obtained himself all necessary information as to risk, contingencies and other circumstances which might influence or affect his rights. Mr.Balaraman also submitted that Clause 20 of the GCC also provides for what would happen if unexpected underground structures were there. Mr.Balaraman submitted that the contractor, as per Clause 20, was expected to make his own examination and draw his own conclusions as to the underground structures which will be encountered and he shall have no claim for damages of any kind, on account of any errors, inaccuracies or omission that may be found. He also submitted that protection and temporary removal and replacement of existing utilities and structures was part of the contract, and all costs in connection therewith was included in the contract price in the tender. Mr.Balaraman therefore submitted that the contractor was not entitled to any extra payment for the additional underground pipeline laid or for the additional excavation he had done.

15. We would have agreed with Mr.Balaraman that these clauses would have prohibited the contractor from claiming any extra amount if



OSA No.20 of 2019

there were no post-contract changes in the alignment of the pipelines.

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16. Before we go into the scope of challenge to an arbitral award, it will be useful to reproduce the discussion made in the majority award under this head:

“Conclusion

In view of the major post contract changes in the alignment of pipeline, the Respondent's reference to the printed offer letter in the tender document or reference to pre-tender site inspection by the tenderer or various other clauses of the contract have become irrelevant.

It is also not a lumpsum contract as stated earlier. The unit rate for various item have been quoted lumpsum or even per metre basis. The entire work was executed under the supervision, direction and approval of the Engineers of the Respondent. There were series of contemporary correspondence in this regard. Further Clause 28 of GCC provided for execution of additional work.

Both the parties have cited various case laws in support of their respective contention. These have been discussed in detail hereinbefore. In the case of State of Maharastra vs. Nav Bharat Builders (AIR 1991 SC 11), the Hon'ble Supreme Court held that the Arbitrator is entitled to interpret any clause of the contract reading the contract as a whole, keeping in mind the intention of the parties. The claimant have submitted the case of M.L.Damlia & Co. vs. Union of India (AIR 1997 Cal 266). These cases have been discussed under Claim No.1. The



claimant also relied upon FIDIC condition of contract which states that unforeseen constraints permit compensation to Contractor who encounters an exceptional physical constraints not foreseen at the time of contract. The Respondent cited the case laws of Rajasthan State Mines and Minerals vs. Eastern Engineering Enterprises (AIR 1999 SC 3627). Ramachandra Reddy vs. State of Andhra Pradesh 2001(4) SCC 241 and C.H.Ramalinga Reddy vs. Superintending Engineer 1999(9) SCC 610. These cases have been discussed earlier and also under Claim No.1. None of the case laws cited by the Respondent prohibits the claim. The Claimant is entitled to payment due to major post contract changes in the alignment.

There was difference between the parties as to whether the work is an extra work or not. The absence of written order will not be towards payment, if the works in question are indeed extra works. However, in this case, there were written orders from the Engineer to take up the pipe laying work as per the revised alignment of the pipeline. Further in the instant case, details of pipe laying works indicating the depth of excavation, width of excavation, thickness of concrete, inert level of the pipe line were jointly recorded in job cards and signed by both the parties which indicated the execution of works by the Claimant under day-to-day supervision, inspection and approval by the Respondent. In this case, we hold that the works under the Claim No.2 are extra/ additional work for reasons as stated earlier and the Claimant is entitled to payment for the same.

In the instant case due to post contract changes in the alignment, the agreed fact situation ceased to exist. It cannot be denied that laying of pipeline under the road which involved cutting off road hard crust taking additional



safety measures during excavation of trenches and laying of pipeline, obtaining permission from the authorities etc., is more expensive than laying of pipeline beyond the road portion. Similarly, the cost of laying pipeline is also increased with the increase in depth of excavation, inter alia, due to additional shoring, additional de-watering, additional lift etc. The Respondent have furnished exhaustive details indicating the chainnages where the pipes were laid, the Respondent also indicated the depth of excavation as per the original drawing and also the depth of excavation as per the actual work. The Respondent have also indicated difference in depth for each chainnages. The difference in depth of excavation varied from 0.070 to 2.906 m. The Respondent have worked out as per depth analysis of CMWSSB procedure and the rates as per schedule of rates which works out Rs.4,79,15,214.71 (pages 181 of RV-6A). This amount for the reasons stated earlier is to be increased by 106% that is to say, the amount is Rs.9,87,05,340/-. The Respondent have already paid a sum of Rs.4,67,47,483/- leaving a balance of Rs.5,19,57,857/- and we make an award of the said amount in favour of the Claimant against Claim No.2.”

(emphasis supplied)

17. As is evident from the extract and as noted earlier, appellant itself has liquidated part of the claim, amounting to Rs.4,67,47,483/- albeit based on the agreed rates as against adjusted rates. As regards the adjustment in rates, the rationale provided by the arbitrators from the portion quoted above is quite evident and plausible. Whether such a view expressed by the



OSA No.20 of 2019

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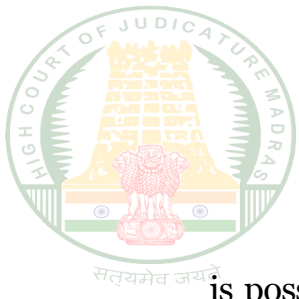
arbitrators can be interfered with under Section 34 of the Arbitration Act is a point that we have to consider.

The answer is no.

18. The award has been assailed on the ground prescribed in Section 34(2)(b)(ii) of the Act - it is in conflict with Public Policy of India. The Apex Court, in *Associate Builders vs. Delhi Development Authority*¹, which was followed in *Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India*², has analysed the expression "The Public Policy of India". The Court held that merits of an arbitral award are to be looked into under specific circumstances and went on to list 4 sub-heads under the head "Public Policy of India". The Court held, *inter alia*, that in a challenge to an award under Section 34 of the Act, the Court does not act as a Court of appeal. Interference is permissible only when findings of arbitrators or the Arbitral Tribunal are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when illegality is not trivial but goes to the root of the matter, and not when merely another view

¹ (2015) 3 SCC 49

² AIR 2019 SC 5041



OSA No.20 of 2019

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is possible. The Apex Court more importantly has held that the arbitrator is the ultimate master of quantity and quality of evidence while drawing arbitral award. The award based on little evidence or on evidence which does not measure up in quality to a trained legal mind cannot be held invalid.

The Court went on to hold that once it is found that arbitrators' approach is neither arbitrary nor capricious, no interference is called for on facts.

19. The arbitrators have returned a finding of fact that additional works were in fact carried out by the contractor and that there was in fact, a post-contractual realignment of the pipeline. There is also a finding of fact that this realignment, while reducing the length, resulted in approximately 42.47% of the pipeline being laid below the road surface as against 10-15% which was envisaged in the contract. In real and absolute terms, the total length of the pipeline found by the arbitrators in the majority award, reduced from 17945m to 11887.2m. Though under the contract, the contract was to lay only 1759m of the total length of pipeline below the



OSA No.20 of 2019

WEB COPY

road surface, after the post-contractual changes had been put in place, it ended up laying 5637m of pipeline underground.

20. Furthermore, there is also a finding of fact that main depth of excavation was also required to be varied even according to the calculation furnished by appellant. The difference in depth of excavation varied from 0.070m to 2.906m. There is also a finding of fact given by the Tribunal that post-contractual realignment of pipeline required contractor to negotiate culverts etc.

21. In view of the above, and as arbitrators are the ultimate masters of quantity and quality of evidence while drawing the arbitral award, and arbitrators have returned a finding of fact, we see no reason to interfere.

22. We find nothing wrong in the arbitrators' findings that for the additional items of work, contractor could be paid an enhanced rate as per the formula put in place by the arbitrators, who had authored the majority award.



OSA No.20 of 2019

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23. Therefore, we do not find that the arbitrators' findings are arbitrary or capricious or perverse. The findings do not shock our conscience and there is no illegality; let alone being trivial or going to the root of the matter.

24. Appeal stands dismissed.

25. Mr.Krishnan is pressing for cost. He is justified. Mr.Balaraman submits that he has restricted his challenge to the impugned order only to Claim No.2 and nothing else.

Keeping that in mind, we award only Rs.2,00,000/- (Rupees Two lakhs only) as costs.

(K.R.SHRIRAM, CJ.)

(MOHAMMED SHAFFIQ, J.)

21.03.2025

Index : Yes
Neutral Citation : Yes
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To
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1. The Authorised Signatory
SPML Infra Limited,
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4. Mr.K.Ramalingam
Arbitrator
AP-506, 16th Street,
Vaigai Colony, Anna Nagar West,
Chennai 600 040
5. The Sub-Assistant Registrar,
Original Side Section,
Madras High Court
- 6.The Managing Director
Chennai Metropolitan Water Supply & Sewerage Board,
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THE HON'BLE CHIEF JUSTICE
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