



C.M.A.(MD)No.10 of 2020

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 25.04.2025

CORAM

**THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN
and
THE HONOURABLE MR.JUSTICE M.JOTHIRAMAN**

**C.M.A.(MD)No.10 of 2020
and
C.M.P.(MD)No.173 of 2020**

M/s.K.S. & Company,
4/150, Lake Area Main Road,
Mattuthavani,
Madurai - 625 107.

... Appellant

Vs.

The Superintending Engineer,
National Highways Circle,
No.5, Besant Road, Madurai.

... Respondent

Prayer : Civil Miscellaneous Appeal filed under Section 36 of the Arbitration and Conciliation Act, 1996, to set aside the Fair and Executable order dated 31.07.2019 in Arbitration O.P.No.40 of 2015 of the Principal District Court, Madurai.

For Appellant : Mr.R.Ramadurai

For Respondent : Mr.S.R.A.Ramachandran,
Addl. Government Pleader.



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C.M.A.(MD)No.10 of 2020

JUDGMENT
(By G.R.Swaminathan, J.)

The Superintending Engineer, National Highways, Madurai invited tenders for the work of construction of high level bridge across the river Kottakarai at Km.139/6 of NH 210. In response thereto, the appellant herein submitted their tender on 20.09.2006. The Tender Accepting Authority accepted the tender on 23.02.2007 and the contract value was fixed at Rs.10,48,35,478/-. Agreement dated 14.03.2007 was also entered into between the parties. The work was to be completed within a period of 18 months. However, there was delay on the part of the department and the work could be completed only on 15.12.2009. The contractor claimed that on account of the delay, they had suffered loss and submitted their claim to the department. The claim was originally rejected by the Divisional Engineer on 21.07.2010 and the matter was referred to the review expert. The review expert gave his decision on 10.10.2011 negating the contractor's request. Since the agreement had an arbitration clause, the contractor sought reference to arbitrator.



C.M.A.(MD)No.10 of 2020

WEB COPY

2.One Thiru.A.Thangiah, retired Superintending Engineer of the department was appointed as the sole arbitrator. The claimant lodged their claim before the arbitrator. The claimant contended that they are entitled to damages to the tune of Rs.2,97,17,677/- with interest. The department filed counterclaim controverting the claim made by the contractor. Evidence was adduced on either side. The sole arbitrator passed award dated 28.01.2015 partially allowing the claim. The operative portion of the award is as follows:-

“For the foregoing reasons and findings given on the claims and issues and in the result, the award is passed as follows:-

Claim No.	List of Claim	Amount Claimed	Amount awarded
I	Loss of Overhead & Profit	2,97,17,677	1,14,27,067
II	Interest Charges for withheld amount of steel	5,77,140	5,77,140
III	Interest charges for price variation	9,42,615	9,42,615
	Total	3,12,37,432	1,29,46,822
	Interest	Interest @ 24% p.a. on amount from 27.7.10 till date of payment	12% p.a. on amount from the date of this award till payment

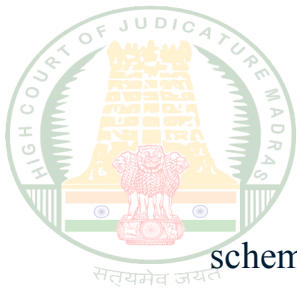


C.M.A.(MD)No.10 of 2020

Challenging the same, the department filed petition under Section 34 of the Arbitration and Conciliation Act, 1996 before the Principal District Court, Madurai in Arb.O.P.No.40 of 2015. The learned Principal District Judge vide order dated 31.07.2019 allowed the arbitration OP and set aside the arbitral award dated 28.01.2015 passed by the sole arbitrator in Arbitration Award No.1 of 2015. Questioning the same, this civil miscellaneous appeal has been filed under Section 37 of the Act by the contractor.

3.The learned counsel for the appellant reiterated all the contentions set out in the memorandum of grounds of appeal and submitted that the learned Principal District Judge had not borne in mind the restrictive parameters contained in Section 34 of the Act. He called upon this Court to set aside the impugned order and restore the award passed by the arbitrator.

4.Per contra, the learned Additional Government Pleader for the respondent submitted that the impugned order passed by the learned Principal District Judge is very much in consonance with the statutory



C.M.A.(MD)No.10 of 2020

scheme set out in Section 34 of the Act. He contended that the delay in completing the contractual works cannot be attributed to the department and that it is the contractor who has to own up the same. He also pointed out that when the final payment was made, it was accepted without any demur or protest and that therefore, after taking the final payment, it is not open to the contractor to make an about-turn and raise a claim for damages. He called upon this Court to sustain the impugned order and dismiss this civil miscellaneous appeal.

5. We carefully considered the rival contentions and went through the evidence on record. Section 34 (1) and (2) of the Arbitration and Conciliation Act, 1996 read as follows:-

“34. Application for setting aside arbitral award.—(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application 1[establishes on the basis of the record of the arbitral tribunal that]—



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C.M.A.(MD)No.10 of 2020

- (i) a party was under some incapacity, or*
- (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or*
- (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*
- (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:*

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

- (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or*

(b) the Court finds that—

- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force,*
or

(ii) the arbitral award is in conflict with the public policy of India.



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C.M.A.(MD)No.10 of 2020

[Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

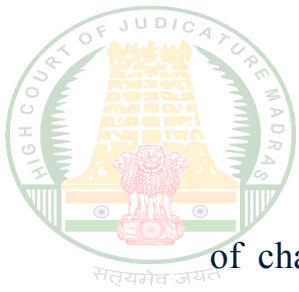
(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]

[(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award: Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.] ”

6.It is well settled that the scope for interference with an arbitral award under Section 34 of the 1996 Act is highly circumscribed ; the Court does not act as a Court of Appeal judging the merit of the arbitral award on facts. The proceedings under Section 34 are more in the nature



C.M.A.(MD)No.10 of 2020

of challenge procedure. Unless the challenge falls within the narrow scope of Section 34 of the Act, the award passed by the arbitrator even if wrong on facts cannot be interfered with.

7.The learned Principal District Judge had set aside the award for the following reasons:-

- (a) The contractor received the final payment without any protest.
- (b) The arbitrator had not appended the documents relied on by the parties to the award.
- (c) The delay had occurred only on account of the weak financial condition of the contractor and that the department cannot be blamed for the same.
- (d) The contractor had not submitted any proof to establish the loss suffered by them due to extension of period and he had not furnished any audited statement towards loss and profit accounts.
- (e) The reason for the delay was on account of the delay in shifting utilities such as water supply main lines and electric posts. But no reason has been assigned as to how this is a compensation event.



C.M.A.(MD)No.10 of 2020

WEB COPY

8. We are of the view that the learned Principal District Judge had clearly exceeded the jurisdiction conferred under Section 34 of the Arbitration and Conciliation Act. The fact remains that the contract could not be concluded within the stipulated time and there was delay in completing the contract works. The agreement itself provides that damages can be awarded in such a case. Paragraph No.44 of the agreement between the parties catalogues the list of compensation events. Paragraph No.44(a) and (c) are as follows:-

“44.Compensation Events

44.1. The following are Compensation Events unless they are caused by the Contractor:

(a) The Employer does not give access to a part of the site by the Site Possession Date stated in the Contract Data.

(b)

(c) The Engineer orders a delay or does not issue drawings, specifications or instructions required for execution of works on time.”

9. The arbitrator has given a finding of fact that in this case, the employer / department could not give a part of the site by site possession date as stated in the contract data. It is also an admitted fact that there



C.M.A.(MD)No.10 of 2020

was delay in issuance of drawings. These are clearly compensation events.

10.Secondly, the arbitrator merely applied what is known as “Hudson formula”. The contract value is Rs.10,48,35,478/-. Applying the aforesaid formula, the damages payable was arrived at Rs.1,14,27,067/-. We are of the view that the factual correctness of the reasoning adopted by the arbitrator could not have been gone into by the learned Principal District Judge. Only if the Principal District Judge had found that the findings of the arbitrator were patently illegal, then alone interference with the award could have been made. The principles and parameters governing the jurisdiction under Section 34 of the Act were not been borne in mind by the learned Principal District Judge.

11.We must also deal with the reason assigned by the court below that by accepting the final bill payment without any protest, the contractor had waived his right to make any further claim. In other words, the learned Principal District Judge has applied the doctrine of estoppel against the contractor. The principle of estoppel will apply only



C.M.A.(MD)No.10 of 2020

if the employer had altered his position on the basis of the representation or conduct of the contractor. The employer had paid the final bill payment which even according to them was payable to the contractor. The employer could not have withheld the said payment for any reason whatsoever. That apart, the contractor nowhere had undertaken that he would not raise any further claim when he accepted the final bill. In absence of such a declaration, the contractor cannot be held to be estopped or precluded from raising any claim (*vide Bharat Coking Coal Ltd. v. Annapurna Construction (2003) 8 SCC 154*). The contractor had spent his monies and carried out the works. He would obviously be facing financial difficulties and would be in need of infusion of funds. If he persisted in his dispute with the department, the department would obviously not have released the final bill payment. It is understandable that the contractor in such circumstances would sign on the dotted lines. When the contractor had only been paid what was due to him, any endorsement made by him in a standard format ought not to be held against him subsequently when he raises a claim against the department. The doctrine of estoppel is based on equity. Such a doctrine cannot be deployed to deny or defeat the legitimate claims that may be made later.



C.M.A.(MD)No.10 of 2020

WEB COPY

12. In this view of the matter, the order impugned in this appeal is set aside and the civil miscellaneous appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

(G.R.S. J.) & (M.J.R. J.)
25.04.2025

NCC : Yes/No
Index : Yes / No
Internet : Yes/ No
ias/skm

To:

1. Principal District Court, Madurai.

2. The Superintending Engineer,
National Highways Circle,
No.5, Besant Road, Madurai.

Copy to:

The Section Officer, ER/VR Section,
Madurai Bench of Madras High Court,
Madurai.



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C.M.A.(MD)No.10 of 2020

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C.M.A.(MD)No.10 of 2020

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