REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4211 OF 2015

[Arising out of SLP (Civil) No. 7205 of 2007]

ZONAL GENERAL MANAGER, M/S IRCON INTERNATIONAL LTD. .. APPELLANT

VERSUS

M/S VINAY HEAVY EQUIPMENTS .. RESPONDENT

WITH

Civil Appeal No. 4213 of 2015 [arising out of SLP (C) No. 7216 of 2007] and

Civil Appeal No. 4212 of 2015 [arising out of SLP (C) No. 33491 of 2009]

J U D G M E N T

VIKRAMAJIT SEN, J.

1 Leave granted.

2 The Appellant, IRCON International, is impugning the Judgment of the Learned Division Bench of the Madras High Court, which had dismissed two Original Second Appeals preferred by the Appellant. Recapitulating the facts of this litigation, the Appellant was the successful tenderer in respect of a contract awarded to it by SIPCOT (not a party to the present dispute/ Appeal), for the construction of an Internal Road for the Industrial Complex at Irungattukottal,

Sriperumbpudur Taluk, Kanchipuram District, Tamil Nadu. The contract between these parties was made on 10.07.1997 and was valued at Rs.13,06,60,587/-. In furtherance of the execution of this contract, the Appellant entered into two subcontracts (hereinafter, "the subcontracts") with the Respondent herein, in respect of two Packages, namely "C1" and "C2", for the laying of roads valued at Rs.3,20,64,752/- and Rs.1,67,01,821/- respectively. The cumulative value of both packages amounted to Rs.4,87,66,573 /-.

3 The Respondent completed approximately 67 per cent of the work under the two subcontracts but thereafter ceased work on both. The Appellant cancelled the subcontracts, and managed the completion of the work by engaging other agencies. The cost of 67 per cent of the contractual work completed by the Respondent was estimated at Rs.3.23 crores, out of which the Appellant admittedly paid a sum of Rs.2.62 crores. The Respondent claimed an unpaid balance of Rs.61 lakhs as arrears due to it by the Appellant, and resorted to arbitration. The Appellant also took recourse to arbitration against the main contracting authority, SIPCOT, in respect of the pending payments pertaining to C1 and C2 packages. The Arbitrator was thus adjudicating the claims made by the Respondent against the Appellant in the First Arbitration, and the claims made in turn by the Appellant against SIPCOT in the Second Arbitration. The Arbitrator passed a common Award in the First Arbitration for both packages in favour of the Respondent for the sum of

Rs.7,87,21,820/- for C1 and Rs.1,38,78,139/- for C2, both sums carrying with them interest at the rate of twelve per cent from 04.03.2001 until the date of payment. Interest apart, the Appellant stood liable as a result of the Award to pay the Respondent Rs.9,25,99,959/-, including the aforementioned Rs.61 lakhs.

4 The Appellant filed two petitions (OP Nos. 107 and 108) under Section 34 of the Arbitration and Conciliation Act, 1996, thereby separately challenging the Award passed in respect of the two subcontracts. The Respondent filed two applications in the two petitions, contending that while the Appellant had rejected the Respondent's claims of payment arrears under the two subcontracts, it had, at the same time and contradictorily, claimed in the Second Arbitration against SIPCOT that its dues to Respondent were in turn payable to it by SIPCOT. By a common Order, the Single Judge dismissed the Appellant's petitions and allowed the Respondent's applications. The Appellants thereafter filed two Appeals before the Division Bench of the Madras High Court, which came to be dismissed. The Appellant's conflicting claims and statements in both arbitrations, seen and put together, have proved determinative in the dismissal of the Appeals by the Courts below; they shall prove similarly so here.

5 Detailing the arrears claim, it is seen that the Respondent incurred expenditure in the execution of the subcontracts on two categories of items: scheduled and non-scheduled. The Respondent claimed Rs.61 lakhs as its due

under both these heads. The Appellant's principle rebuttal in resistance to the Respondent's claim is that the main contract (between the Appellant and SIPCOT) and the subcontracts are wholly of a "back-to-back" nature and therefore the liability of the Appellant would be restricted to and coextensive of that which SIPCOT acknowledges. In other words, the acceptability and tenability of any claim made by the Respondent against the Appellant will depend first upon that claim's acceptability and tenability before SIPCOT in its capacity as the employer in the main contract. The Appellant declined to pay the Respondent for scheduled expenditures, claiming that the Respondent had unauthorisedly performed additional and increased quantities of works, also challenging the rate claimed by the Respondent for the same; that the Respondent could not claim any amount in excess of what was agreed to be paid by SIPCOT in respect of each item of work covered under C1 and C2 subcontracts. The Appellant also rejected the Respondent's claimed dues under the non-scheduled head (which work the Appellant itself had requested to be performed by the Respondent), stating that SIPCOT had refuted its liability towards non-scheduled expenditures. Indeed, the Arbitrator in his Award detected two "general pleas" as resonating from the Appellant: firstly, that the contracts C1 and C2 were on a "back to back" basis with IRCON's main contract with SIPCOT and unless SIPCOT paid for the

amounts claimed by the Respondent, the Appellant was not legally liable for the same; and secondly, that back to back basis applied even to non-scheduled items.

6 The Arbitrator found that the mention of "back-to-back" had been made only in the contract rider agreement for Package C2, and in subsequent epistles exchanged between IRCON and the Respondent from whose analysis two significant factors emerge. Firstly, that "back-to-back" only meant that the terms and conditions relating to technical specifications, and quality, quantum, manner and method of work to be done by the Appellant in the main contract, stood transposed on the subcontracts, C1 and C2; the primary liability of the Appellant to the Respondent, however, stood untouched, there having been no transference or transposition of this liability onto SIPCOT, either explicitly or implicitly. Secondly, the Appellant had in its Written Statement before the Arbitrator, reiterated the "back-to-back" nature and thereby agreed that the Respondent would be entitled to payment of dues as and when the Appellant received the payment for these from SIPCOT, the Respondent's claims having been "transmitted" by the Appellant to SIPCOT for the latter's consideration. The Appellant has taken the stance that it had no objection to the Arbitrator awarding a reasonable amount to the Respondent, subject to the Appellant being awarded the same amount by the Arbitrator in its Arbitration with SIPCOT. The Appellant was agreeable to a direction passed against it to make payment upon realization of the sum from

SIPCOT, after a 10 per cent deduction on the sum as the Appellant's marginal profit. The Arbitrator, unstirred by the Appellant's gambit at foisting the primary liability onto SIPCOT, located primary liability as resting with the Appellant, being the 'employer' in the subcontracts. The Arbitrator also instanced the Appellant's reprobative and approbative conduct, observing first the Appellants conditional willingness (supra) for the passage of a favourable Award in the Respondent's favour, and thereafter finding a retraction of the Appellant's position: viz. that - "Since SIPCOT refused to pay for these claims, IRCON has taken up a new stand that works were not done fully and payment has been made for whatever work was done by the claimant". Having so observed, the Arbitrator awarded as aforementioned.

7 The Single Judge rightly upheld the Arbitrator's repudiation of the applicability of the "back-to-back" principle to the issue of liability of payment in the facts of this case; affirming that the Appellant as Employer was primarily liable to the Respondent. Beyond this, the Single Judge adverted to the Award obtained by the Appellant against SIPCOT, wherein claims had been raised against SIPCOT on the basis of the earlier Award obtained against the Appellant. The Single Judge accepted the Respondent's contention that "the very same claim, which the respondent made against the petitioner has been made by the petitioner against the SIPCOT and on that basis, an award has been passed in favour of the petitioner".

It is facially apparent that, on the one hand, the Appellant had obtained a favourable Award in the Arbitration with SIPCOT by substantially relying on (and as compensation for) the adverse Award passed in its arbitration with the Respondent; on the other hand, it appealed before the Single Judge against the adverse Award which had substantially been the premiss and reason for the Appellant's success against SIPCOT. In addition, the Appellant expostulated that the Applications before the Single Judge ought to have been heard along with the Applications filed by SIPCOT for setting aside of the Award in Appellant's favour in the Second Arbitration. To not have done so would be to disjoin the Awards, leaving it open for the High Court to come to two dissonant conclusions in the two interdependent arbitrations; the Appellant's expressed fear being that while its obligation to pay, as sealed by the Award in favour of the respondent in the First Arbitration, would be sustained, the award in its favour against SIPCOT, if heard separately, would possibly be set aside, leaving it uncompensated and liable to pay the Respondent the claimed amount. The Single Judge observed that no material had been brought on record, nor a specific plea raised or details adduced, that SIPCOT had filed a Section 34 petition before the same Court in a challenge against the Award in the Respondent's favour; a mere statement from the Appellant's counsel made across the bar was not sufficient materially to justify the demand for connecting and hearing the petitions together.

8 The Learned Division Bench wholly ratified the reasoning of the Arbitrator and Single Judge below it, finding no reason to disencumber the Appellant from the obligation to fulfill the Respondent's claim. While entirely agreeing with the reasons given against the Appellant by the Arbitrator and the Courts below, we also find additional reasons for dismissing this set of Appeals.

9 While the Award in the SIPCOT arbitration is not immediately an appellate subject herein, yet it is still part of the record and therefore merits our consideration. Until an order to the contrary be adduced before this Court, this Award must be assumed to be standing and valid. Its validity and legitimacy in law, insofar as it has depended on the earlier Award qua the adjudication of claims, would only be justifiable by the validity of the earlier Award in the Respondent's favour. The earlier Award must, therefore, be presupposed to be valid, when the validity of the later Award has not been disproved or rebutted. Seen from this dimension, the Award in favour of the Appellant is positively valid, and its unsettlement an uninviting prospect.

10 Insofar as the question of primary liability therein is concerned, the law on subcontracts and employer liability is amply clear. In the absence of covenant in the main contract to the contrary, the rules in relation to privity of contract will mean that the jural relationship between the employer and the main contractor on the one hand and between the sub-contractor and the main contractor on the other

will be quite distinct and separate. No such clause to the contrary, existent in the main contract between Appellants and SIPCOT, has been highlighted before us by the Appellants, which would persuade us towards a deviation from the presumption of distinct and sole liability of the Appellant-Contractor as employer viz. a. viz. the Respondent-Sub Contractor. On the contrary, much of the exercise in determining the existence of a "back to back clause" in the contracts C1 and C2 appears to be misplaced. Such an accommodation or transference of liability needs to be pinpointed in the main contract, for it is SIPCOT's acceptance of liability of subcontractor claims which is of the essence; even a clause indicating "back to back" liability in agreements C1 and C2 would not serve to novate the main contract and fasten payment liability on SIPCOT, prevented as it would be by privity, for it would be a matter of SIPCOT's acceptance of subcontractor liability in the main contract, and not a matter of novation by imposition upon SIPCOT by two parties in a separate bilateral contract. Nothing presented before us suggests that SIPCOT's contract with the Appellant provided for "back to back" subcontracts whereby SIPCOT would be directly answerable for the payment claims raised by contractors. That subletting was provided for by the main contract, and indeed occurred, has been found by the Arbitrator (in both Arbitrations) and affirmed by the Courts below. This however, is quite distinct from concluding that SIPCOT contractually (in the main agreement) assumed primary liability for the

Subcontractor-Respondent's payment claims in respect of agreements made with the Appellant. The fact that the Respondent was represented and present in parleys and meetings between SIPCOT and the Appellant or that it was referred to in the correspondence exchanged between them does not lead to the conclusion that a Tripartite contract had come into effect by evolution.

11 The Appellant conceded before the Arbitrator that it would countenance an Award in favour of the Respondent as long as it was indemnified for the payment made to the Respondent by an equal offsetting payment by way of an Award in its favour in its arbitration with SIPCOT. The record, as has been hereinbefore referenced, shows that the Appellant was granted precisely such an Award. The legal import of the nature of the Appellant's admission of liability made before the Arbitrator in the First Arbitration now needs deliberation. The Appellant exercised care to make this concession by conjoining therewith its demand for adjustment in the Second Arbitration. To that extent the concession could be called a conditional one. At the heart of the concession however, the admission itself, taken alone, was not conditional. The Appellant thereby admitted an unconditional contractual liability on its part to pay the Respondent's contractual claim, albeit dressing the same in the shroud of conditionality, by the expedient of making the concession dependent upon a consequent favourable outcome in the Second Arbitration. This was then followed by a remarkable transition in the Appellant's legal posture, from

one of conditional agreeability, to outright denial of any and all liability on its part to pay the Respondent, stating that SIPCOT was wholly answerable for the satisfaction of all contractual claims and payments demanded by the Respondent, due to the "back to back" nature of the main contract with agreements C1 and C2. The Appellant, we find, stands bound and bonded by the legal consequences of this initial admission made by it before the Arbitrator. Having concluded thus, we yet underscore to observe that the Division Bench below proceeded on the merits in this matter in upholding the Award, and did not simply hold the Appellant to account for the consequences of its admission.

12 We also find that the Appellant's case is not advanced by its reliance upon the three Judge Bench decision in *Oil and Natural Gas Corporation Ltd. Vs. Western Geco International Ltd.* (2014) 9 SCC 263. We cannot subscribe to the argument on behalf of the Appellant that it was merely a Consultant and therefore could not be fastened with liability or was imperious to claims preferred by the Respondent for work contractually carried out, or, in respect of claims founded on the bedrock of *quantum meruit.*

13 For the foregoing reasons, we decline to interfere with the judgment properly exercised by the Arbitrator and Courts below, and sustain the impugned order in its entirety.

14 Interim orders stand recalled. Appeals dismissed. Parties are to bear their respective costs.

…..……J.
[VIKRAMAJIT SEN]

.....J
[SHIVA KIRTI SINGH]

New Delhi,
May 6, 2015.