

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 15.09.2016

CORAM

THE HONOURABLE MR.JUSTICE **RAJIV SHAKDHER**O.P.No.263 of 2009

M/s.Madurantakkam Co-op. Sugar Mills Ltd., rep. By its Special Officer, Padalam, Chengai MGR District. .. Petitioner

Vs.

1. M/s.Karpagam Electricals,
Rep. By its Partner Thiru.K.R.Mohan,
No.75A, Peray Naidu Layout, Ram Nagar,
Coimbatore - 9.
2. The Arbitrator,
Justice K.Govindarajan (Retd.),
(Sole Arbitrator), Arbitral Tribunal,
No.8, Justice Ramanujam Road,
Malaviya Avenue, Sastri Nagar,
Chennai - 600 041. .. Respondents

* * *

Prayer : Petition filed under Section 34 (3) of the Arbitration and Conciliation Act, 1996 praying to set aside the impugned Award dated 24.12.2007 of the second respondent.

* * *

For Petitioner : Ms.G.Thilakavathi

For Respondent-1: Mr.Aniruth Krishnan
for M/s.Sarvabhauman Associates

O R D E R

1. This is a petition preferred under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter referred as "1996 Act"), to assail the award dated

2. Briefly, the challenge to the award is laid in the background of the following facts and circumstances :

2.1. The petitioner had floated a tender for supply, erection and commissioning of electrical equipment. Respondent No.1 submitted its bid. Respondent No.1 was declared successful and accordingly, an letter of intent dated 28.05.1993 was issued in favour of respondent No.1. The total value of the contract was a sum of Rs.93,12,032.79p.

2.2. Under the terms of the contract, respondent No.1 was given time till December 1993 to supply, erect and commission the electrical equipment, adverted to in the contract.

2.3. Pertinently, the contract imposed an obligation on the petitioner to clear the site and supply the necessary drawings.

2.4. It is the case of respondent No.1 that the entire contract was executed and therefore, completed on 29.06.1995.

2.5. On the other hand, the petitioner appears to have taken the stand before the learned Arbitrator that the supplies were made only in the month of July 1995.

2.6. Be that as it may, in view of the fact that only partial payments were made by the petitioner, correspondence ensued on the subject of liquidation of

2.7. The petitioner, it appears, took the stand that since, there was a delay on the part of respondent No.1 in executing the contract in time, penalty was imposed in that behalf. The record shows that the petitioner imposed a penalty on respondent No.1 in the sum of Rs.5,14,067/-.

2.8. The petitioner, thus, after adjusting the amount payable to respondent No.1 towards the balance price and Earnest Money Deposit (EMD), which in all amounted to Rs.3,40,787.46p., demanded from respondent No.1, a sum of Rs.1,73,279.54p.

2.9. The discussion with regard to the correspondence on this aspect of the matter is contained in paragraph 3 of the award. For the sake of brevity, I do not intend to repeat those facts. Suffice it to say, since, no resolution could be found, the matter was finally referred for adjudication to the Arbitrator, upon a petition, having been moved by respondent No.1 in this Court being : O.P.No.820 of 2002, under Section 11 of the 1996 Act, for appointment of an Arbitrator. This Court vide order dated 27.04.2006, appointed an Arbitrator in the matter.

3. It is, in this background that the matter came to be adjudicated upon by the Arbitrator.

3.1. In the course of the arbitration proceedings, the learned Arbitrator framed the following issues :

(1) Whether there has been delay in the performance of any stage of supply ? If

yes, to whom is such delay attributed and to what extent ?

(2) Whether the levy of penalty on the claimant by the respondent is sustainable ?

(3) Whether the claimant is entitled for waiver of penalty as claimed ?

(4) Whether the claimant is entitled to the award of all or any of the claims set out in para 12(i), (ii) and (iii) of the claim petition and if it is entitled to what extent ?

(5) Whether claimant is entitled for any interest as claimed ?

(6) Whether the parties to the proceedings are entitled for costs as claimed ?

(7) To what other relief/s are the parties entitled ?

4. Insofar as issue No.1 is concerned, the learned Arbitrator, after discussing the matter in the context of the material placed before him, came to the following conclusions :

i. That there was a delay in execution of the contract.

ii. That the delay could not be attributed solely to respondent No.1. In other words, the learned Arbitrator ruled that both parties were responsible for the delay in the execution of the contract.

5. On the aspects : as to whether the penalty levied on respondent No.1 was sustainable ? and, as to whether respondent No.1 was entitled to waiver of penalty ?, the learned Arbitrator returned a finding that the penalty could not be sustained, as respondent No.1 had erected and commissioned the electrical equipment within time, and delay, if any, was only with regard to the supplies made.

5.1. As indicated above, this was also the stand of the petitioner, which was, that the supplies were made in July 1995. However, notably, the learned Arbitrator came to the conclusion that the petitioner was not put to any loss, even he were to assume that the supplies made by respondent No.1 were delayed.

5.2. Consequently, the learned Arbitrator held that the penalty in the sum of Rs.5,14,067/- levied on respondent No.1 could not be sustained.

6. On the aspect, as to whether respondent No.1 was entitled to the claims set out in paragraph 12(i)(ii) and (iii) of the claim petition ?; the details of which, are given hereinbelow, the learned Arbitrator sustained the claim for the balance price, which is in a sum of Rs.2,90,787.46p., while the learned Arbitrator rejected the claim of respondent No.1 in the sum of Rs.40,471.20 towards supply of one number 1200 acb. The learned

Arbitrator, however, sustained the claim for EMD in the

sum of Rs.50,000/-.

6.1. Insofar as interest is concerned, the same was allowed, while dealing with issue No.5, albeit, at the rate of 9% per annum, from July 1995, till the date of payment or, up to five (5) months from the date of award, whichever is earlier.

6.2. The learned Arbitrator also indicated that, if, the amount is not paid within the period of five (5) months from the date of the award, the claimant will be entitled to seek interest at the rate of 12%, from the date of award, till the date of payment.

7. Insofar as cost is concerned, the parties were directed to bear their own costs.

8. It is in the background of the aforesaid findings that arguments on behalf of the petitioner have been advanced by Ms.G.Thilakavathi, while on behalf of respondent No.1 submissions were made by Mr.Anirudh Krishnan.

9. Ms.G.Thilakavathi, who appears for the petitioner, assailed the award on two grounds :

9.1. Firstly, on the ground that the learned Arbitrator had committed an error, in as much as, once he found that the delay was attributable to both the parties, he ought to have sustained the imposition of penalty by the petitioner.

9.2. The other ground, on which, the award was assailed, was on the rate of interest awarded by the learned Arbitrator.

10. On the other hand, Mr. Anirudh, submitted that no ground, for interference, had been made out, as envisaged under Section 34 of the 1996 Act.

11. Having heard the parties and perused the record, I am of the view that the grounds of challenge put forth by the petitioner cannot be sustained for the following reasons :

11.1. Firstly, while, undoubtedly, the learned Arbitrator holds both parties responsible for the delay, the record demonstrates that the delay on the part of respondent No.1 was only vis-a-vis supply of material which, had not impacted the erection and/or commissioning of the subject equipment. The erection and commissioning of the electrical equipment was on time. Secondly, and more importantly, the Arbitrator has also returned a finding of fact that the delay in the supply of equipment did not cause any loss to the petitioner.

11.2. Therefore, in my view, quite rightly, the learned Arbitrator rejected the claim of the petitioner, and held, that the penalty imposed on respondent No.1 equivalent to a sum of Rs.5,14,067/- could not be sustained.

11.3. Insofar as interest is concerned, I am of the view that the interest awarded is in line with the rate of interest, which was prevailing at the time, when, the award was passed.

11.4. Nothing has been shown to me, which would persuade me, to hold to the contrary.

12. In these circumstances, I find no merit in the petition. It is, accordingly, dismissed. The parties are, however, directed to bear their own costs.

sd/.R.S.A.J

15.09.2016

//Certified to be a true copy//

Dated this the day of 2017

R.s/11.01.2017

COURT OFFICER

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