

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.02.2016

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THE HONOURABLE MR.JUSTICE R.SUBBIAH

W.P.No.8708 of 2015

S. Shanmuga Sundaram

... Petitioner

Vs

Kamarajar Port Limited,
(erstwhile Ennore Port Limited),
represented by its Managing Director,
P.T.Lee Chengalvaraya Naicker Maaligai,
First Floor, No.23, Rajaji Salai,
Chennai 600 001.

... Respondent

PRAYER : Writ petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorarified Mandamus to call for the records of the respondent pertaining to the impugned order dated 08.03.2012 in EPL/Legal/01/2012 and quash the same and consequentially direct the respondent to conduct joint independent survey of the work done by the petitioner, accord opportunity to the petitioner to submit his claim, consider the same in accordance with law.

For Petitioners : Mr.Om Prakash
For Mr.J.Nithyanandan
For Respondent : Mr.Krishna Ravindran

O R D E R

The petitioner has come forward with this Writ Petition challenging the impugned order passed by the respondent and for consequential direction to direct the respondent to conduct joint independent survey of the work done by the petitioner, accord opportunity to the petitioner to submit his claim and to consider the same in accordance with law.

2. According to the petitioner, he is an Engineering Contractor engaged in civil and earth moving works. While so, the respondent herein had invited tenders for shifting of the rock stockpile area within the Ennore Port premises and subsequently, the petitioner was awarded with the contract vide work Order No.EPL/OP/B/95.46 dated 16.10.2008 and the same was readily accepted.

3. The salient features of the tender are as follows:

a) scope of work in the said tender was specified as, it is proposed to shift existing rock stockpile area at the north of the electrical sub-station to the northern end of the Ennore Port Premises. The weight of the rock varied from 1kg to 12,000 kgs.

b) No conditional tender was permitted, hence the petitioner could not make any conditions.

c) Inspection of the site was provided for, but a lot of the rocks were already submerged in water and the exact quantum was not assessable.

d) Time was the essence of the contract and there are severe conditions for liquidated damages for delay.

e) The assured total quantum of rocks to be shifted was mentioned as 1,71,815 Metric Tonnes and the break-up of the rocks and their indicative sizes were also mentioned.

f) Lump sum contract value quoted and agreed based on the quantity assured by the respondent was Rs.1,19,00,000/-.

3. Subsequent to the issue of the work order, the petitioner commenced the work immediately and started to move the materials as per the tender conditions. During the shifting of materials, it was found that the over all quantum of materials sought to be shifted was much higher and there were single rocks much heavier than 12 MT. But in the tender conditions, the quantum of materials was stipulated at 1,71,815 MT with a maximum single rock size of 12.00 MT. Therefore, the petitioner had to engage a much bigger crane with higher capacity in the interest of completing the work in time and also due to the pressure of respondent, he completed the work well within the stipulated time. The issue of excess rocks was intimated to the concerned officials of the respondent Port at the initial stage itself and at that time, the officials assured the petitioner that they would adequately compensate the petitioner during final payment. The exact quantity of rocks shifted by the petitioner is 4,45,893 MT as against the assured quantity of 1,71,815. After completing the work, the petitioner requested the respondent to assess the quantum of work done by the petitioner beyond the scope of the tender contract for processing of petitioner's payment and in respect of this issue, he also sent letters dated 7.5.2009, 13.7.2009, 1.9.2009 and on 15.6.2010 finally requesting the respondent to make payments on the basis of quantum of work done by him. Since the respondent did not take any steps to settle the matter, the petitioner

sent a letter dated 1.9.2009 requesting him to arrange for a joint survey in order to assess the excess quantity of rock shifted and the additional work carried out by him. Thereafter the petitioner sent a letter on 27.4.2011 enclosing the quotation given by M/s.Geo Exploration and Mining Solutions for carrying out a full survey and assessing the quantity of the total quantum of rocks moved. Even though the said letter was duly received and acknowledged, no action was taken. Finally he sent another reminder on 7.8.2011 expressing his difficulty and hardship and grave loss caused to petitioner by the respondent in delaying the matter and requested the respondent to dispose of petitioner's demand and representation as early as possible. Hence the petitioner was forced to file W.P.No.22555/2011 seeking for a direction directing the respondent to dispose of the petitioner's representation dated 15.6.2010. The above Writ Petition was disposed of with a direction to the respondent to consider the petitioner's representation dated 7.8.2011 and pass orders within a period of four weeks.

4. In pursuance of the order passed by this court, the respondent sent a letter dated 17.11.2011 requesting him to meet the Deputy General Manager of the respondent Port on 2.12.2011 for a discussion on appointment of a chartered assessor to access the overweight stones shifted during the execution of the subject work. After pre negotiations, the respondent has passed the impugned order on 8.3.2011 stating that the respondent Port is not in a position to consider the request of the petitioner for any amendment of the work order and extra payment as claimed by him. Therefore, the petitioner filed O.P.No.89 of 2013 under Section 11 of Arbitration and Conciliation Act, 1996 praying for appointment of an Arbitrator in March 2012. The said O.P.No.89 of 2013 was dismissed by this Court on 30.1.2015 granting liberty to the petitioner to invoke the remedy available under law.

5.It is the grievance of the petitioner that the impugned order is not in the nature of an arbitration award and cannot be challenged under section 34 of the Arbitration and Conciliation Act 1996. Further the petitioner has suffered heavy loss, owing to which, he has lost several opportunities. It is his further grievance that his additional claim towards excess work done by him would come to about Rs.2,30,00,000/- over and above what had already been paid by the respondent. The petitioner has completed the work to the satisfaction of the respondent and has paid his workers and suppliers by borrowing huge sums of money for heavy interest. Therefore, left with no other alternative, the petitioner has filed the present writ petition.

6. Learned counsel for the petitioner submitted that the respondent ought to have acted as an arbitrator or should have

referred the dispute to a competent arbitrator for proper adjudication by following the procedure established by law. Hence the impugned order is unsustainable, arbitrary and bound to be set aside. Therefore, he sought for setting aside the impugned order passed by the respondent with a direction to conduct joint independent survey to assess the actual quantity of the stones which has been removed by the petitioner and for a further direction to make the payment based on the joint survey report.

7. Learned counsel for the respondent, on the other hand, by filing a detailed counter, put forth his submissions, in support of the impugned order.

8. I have heard the submissions made on either side and perused the materials available on record.

9. In view of the submissions made on either side, this court sets aside the impugned order passed by the respondent and remand the matter back to the respondent to conduct joint independent survey to assess the actual quantity of the stones which has been removed by the petitioner and after conducting joint survey, based on the joint survey report, the respondent is directed to pass appropriate orders on merits and in accordance with law. Such exercise shall be completed within a period of eight weeks from the date of receipt of a copy of this order.

10. In the result, the Writ Petition is allowed. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

To

The Managing Director,
Kamarajar Port Limited,
(erstwhile Ennore Port Limited),
P.T.Lee Chengalvaraya Naicker Maaligai,
First Floor, No.23, Rajaji Salai,
Chennai 600 001.

+lcc to Mr.KrishnaRavindran, Advocate, S.R.No.10700
+lcc to Mr.J.Nighiyanandan, Advocate, S.R.No.10662

W.P.No.8708 of 2015

vd(CO)
srg(11/03/2016)



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