

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 01.08.2016

CORAM:

THE HONOURABLE MR.JUSTICE A.SELVAM  
and  
THE HONOURABLE MR.JUSTICE P.KALAIYARASAN

O.S.A.No.177 of 2010

M/s. Boss Infrastructure Pvt. Ltd.,  
New No.AB 6, 1st Street, AB Block,  
Anna Nagar,  
Chennai - 600 040. .. Appellant/R1

Vs.

1. Chennai Petroleum Corporation Ltd.,  
536, Annasalai, Teynampet,  
Chennai - 600 018,  
Rep. by its Company Secretary,  
Mr.M.Sankaranarayanan. .. R1/Petitioner
2. Mr.M.Venkatesan  
Sole Arbitrator, Retired Chief Engineer,  
National Highways, 34, Josier Street,  
Nungambakkam, Chennai - 600 034. ..2nd Respondent/  
2nd Respondent

Original Side Appeal under Clause 15 of the Letters Patent read with Order XXXVI Rule 1 of Original Side Rules against the Order of this court dated 04.02.2010 made in O.P.No.847 of 2007. Petition under section 34(2) of the Arbitration and Conciliation act 1996 to set aside the arbitral award dated 08.06.2007 passed by the Second Respondent herein.

For appellant : Mr.S.Parthasarathy,  
Senior Counsel  
for Irwin Aaron

For respondents : Mr. R.Muthukumaraswamy,  
Senior counsel  
for Mr.R.Senthil Kumar for R1  
R2 - Arbitrator

## J U D G M E N T

(Judgment of the Court was delivered by  
P.KALAIYARASAN, J)

This Original Side Appeal is directed against the order, dated 04.02.2010 passed by the learned single Judge in O.P.No.847 of 2010, setting aside the award of the Arbitrator, dated 08.06.2007.

2. The brief facts necessitated to go before the Arbitrator and leading to this Original Side Appeal are as follows :

(i) The appellant is the contractor under the first respondent. The contract was awarded by the first respondent, Chennai Petroleum Corporation Ltd to the appellant, M/s. Boss Infrastructure Pvt., Ltd., for providing pavement with concrete blocks on the sides of the roads at Refinery III Projects expansion. The contract is an item rate lumpsum contract. The contract was entered into between the parties on 09.08.2004 for an amount of Rs.1,19,11,854/- and the work was agreed to be completed in 8 months reckoned from the date of issue of letter of acceptance by the contractor. The additional work of providing red oxide over concrete blocks was also entrusted by CPCL to the same contractor to a value of Rs.8,78,296.50/-. The work was to be completed by 30.03.2005 and the entire work including the red oxide to be completed by 30.05.2005.

(ii) The Defect liability period of one year was over by 28.05.2006, as per Clause 8.5 of the Contract. The final bill was paid by the first respondent on 22.12.2005 and the job completion certificate was also issued on 27.12.2005. During defect liability period, there was enquiry with respect to the performance of contract by the Vigilance Commission. When the appellant made a request on 30.05.2006 for release of the retention money and 5% on the final bill, dispute arose between the parties. The first respondent made a claim for a sum of Rs.35,23,008/-, saying that the forensic science lab test report and enquiry showed that the claim of the first respondent regarding the supply of cements to the extent of 165 metric tonnes was a fraudulent one and the seals in the inpass / entry letter were created one and therefore, the appellant was called upon to make good the loss arising on account of alleged short supply of cement. It is also contented that there is short supply of red oxide to the extent of 9713 kgs.

(iii) The appellant requested for the appointment of Arbitrator, as per clause 12 of the Contract. The High Court permitted the appellant to go before the Arbitrator.

3. As per the letter of the first respondent, Arbitrator was appointed and the Arbitrator after hearing both the parties declared the order of the first respondent to recover from the appellant, as not valid and ordered the first respondent to refund the withheld amount and to defer the recovery proposed by it.

4. The reason assigned by the Arbitrator is that the first respondent failed to prove the defective quality and the quantity in performance of the contract by the appellant.

5. The learned single Judge, after analysing the contract entered into between the parties and considering the Award and arguments of both sides, found that the Arbitrator committed a serious legal misconduct in taking the view that the contract does not require the arbitrator to go in justification of the input and output of the product. The learned single Judge found that the Award passed by the learned Arbitrator is contrary to the terms of the contract and therefore, set aside the award.

6. The learned Senior counsel appearing for the appellant strenuously contends that when the contract price is paid on the basis of the volume of the work performed, but not on the basis of the material utilised, the decision of the learned single Judge about the legal misconduct by the Arbitrator by not deciding the justification of the input and output of the material is not correct. It is further contended that the contract being a item rate lumpsum contract and payment being made for the volume of work performed, the alleged bogus letters and the seals thereon did not fall within the purview of the reference for the Arbitrator. It is further contended that the employer is not concerned about the quantities of the materials used but execution of the work as per technical specification and to the satisfaction. It is also contended that the discrepancies in the 9 in pass letters as to the registration of Lorry numbers mentioned for the alleged transportation of the cement into the site and the forensic lab certificate pertaining to the seals are bonafide mistakes committed in entering the registration number of the lorries and the said letters and certificate of the lab have no relevancy.

7. It is also contended by the learned Senior counsel for the appellant that under Section 73 of the Contract Act, compensation is not payable for the actual loss caused on account of the breach committed and under Section 74 of the said Act, compensation is payable by way of penalty even if no loss has been caused and the learned single Judge awarded compensation notwithstanding the appellant had not committed any breach of the terms of the contract and there is no class in the contract for claiming penalty or damage.



8. The learned Senior counsel appearing for the first respondent repeatedly argued that under Section 37 of the Arbitration and Conciliation Act, the scope of interference is very narrow and the learned single Judge found that the appellant played a fraud upon the first respondent and the award is not in terms of the contract and therefore, rightly set aside the Award.

9. The cement alleged to have been brought in for laying of pavements have not been physically brought into the site and utilized for providing the pavement blocks and other work. As per the contract, laying pavement is not only the work allotted to the appellant but also laying of cement platform is also part of the work, as shown in the tender. Admittedly, the work was completed on 29.05.2005. The Defect liability period was also over by 28.05.2006 and the completion certificate was also issued on 29.12.2005. During defect liability period, Vigilance Commission started the probe. From the report of the Forensic lab and enquiry, it was found that there was fraudulent entry about the ingress of the stock with forged seals and entering the registration numbers of non-goods vehicle as goods vehicle. The first respondent calculated the shortfall of cements to the extent of 165 metric tonnes and red oxide to the extent of 9713 Kgs and made a claim with the contractor after default period. As per the terms of the contract, the contractor cannot absolve from his liability only because of the supervision by the Engineer-in-charge by conducting test during execution and also because of issuance of completion certificate.

10. The relevant portions of the contract, as to the liability and also the usage of materials are extracted below :

5.1.2. The contractor shall maintain a register, on day to day basis, giving the details of the receipt / consumption, source of supply and type of cement etc. The register shall always be accessible to the Engineer-in-Charge for verification.

8.5.1. Unless otherwise specified, the Defect Liability Period for the work shall be 12 (Twelve) months from the date specified in the Completion Certificate as the date of completion of the work. The Contractor shall at his own cost and initiative, correct, repair and / or rectify any and all defect(s) and / or imperfections in the design of the work (insofar as the Contractor shall be concerned with the design of the work or any part thereof) and / or in the work performed and / or materials, components or other items

incorporated therein as shall arise or be discovered during the said Defect Liability Period. In the event of the Contractor failing to do so the provisions of Clause 8.2.8 hereof shall apply.

8.5.2. The Defect Liability Period for the work shall remain extended beyond the initial period of 12 months, in all cases wherein Clause 8.5.1 is attracted till the defect(s) are repaired / rectified.

9.8.2. Notwithstanding payment in respect of the Final Bill, the Contractor shall be and remain liable in terms of Clause 8.5 and shall be entitled to receive the unadjusted balance of the Security Deposit remaining in the hands of the owner in terms of Clause 9.9.2 hereof.

21.0. Action and Compensation payable in case of Bad work :

The work during its progress or during the defect liability period can also be inspected by the Chief Technical Examiner or his authorised representatives of the Central Vigilance Commission and any defects pointed out by him shall be attended to by the contractor in the same manner as specified in Clause-77 of the General conditions of Contract.

#### 5.0. Concrete Mix Proportioning

Proportioning, as used in this specification, shall mean the process of determining proportions of the various ingredients to be used to produce concrete of the red strength, workability, durability and other properties. The Engineer-in-charge shall verify the strength of the concrete mix, before giving his sanction of its use. However, this does not absolve the contractor of responsibility as regards achieving the prescribed strength of the mix. If during execution of the work, cube tests show lower strengths than required. Engineer-in-Charge shall order fresh trial mixes to be made by the Contractor. A claim to alter the rates of concrete work shall be entertaining due to such change to mix variations. Any variation in cement consumption shall be taken into consideration for material reconciliation. Preliminary mix designs shall be established well ahead of start of work. The design mix shall conform to the guidelines IS 10262.

11. In Annexure I of the letter of expense, dated 30.07.2014, column 4 and 7 specify nominal mix of the concrete 1:4:8 by volume (1 cement : 4 coarse sand : 8 crushed stone aggregate) for laying plain cement concrete and 1:1;5:3 using 20 mm and down size aggregates including casting of kerb stones curing as per approved method setting up of kerb stone in PCC 1:4:8 for providing and fixing precast kerb stones.

12. Clause 5.0 of the contract specifically stipulates that any variation in cement consumption shall be taken into consideration for material reconciliation and the design mix shall confirm to the guidelines. Clause 5.1.2 recites that the contractors shall maintain a register on day today basis giving the details of the receipt / consumption, source of supply and type of cement etc.

13. Even before the Arbitrator, the first respondent argued that test of compressive strength does not reveal the quantum of cement and even that compressive strength was done on random samples in one item of contract and not in all items, in which cement is used.

14. There is no dispute that testing of compressive strength does not reveal the quantum of cement. Supervision by the Engineer-in-charge and compressive strength test made by them will not suffice to establish that the Contractor provided the pavement and cement work with the prescribed ratio. That is why the above Clauses specify the maintenance of Registers by the Contractor (i) on day today basis giving the details of the receipt / consumption, source of supply and type of consumption etc and (ii) to find out any variation in cement consumption in material reconciliation and the same shall be taken into consideration.

15. If the above factors are considered cumulatively, it is crystal clear that for maintenance of quality in providing pavement and also concrete work required materials including cement should be stored in the site and the same should be utilised in full to bring the quality in the stipulated ratio mentioned in the contract.

16. In this case, though investigation was started during the defect liability period, shortfall in bringing the required cement and red oxides could be concluded, after establishing the fraud through forensic science lab report and wrong entry of vehicles' registration number about bringing the cement and red oxides into the site.

17. As per Clause 8.4.4 of the Contract, the issuance of completion certificate shall not be construed as a waiver of any right or claim of the owner against the Contractor in respect of the work or the works at the job site, in respect



of which, completion certificate has been issued. Therefore, even after the defect liability period and even after the completion certificate is issued, the contractor will not be absolved from his liability in respect of work and the owner has got a right to claim against the Contractor for the breach.

18. Here in this case, the first respondent made a claim on the basis that there is shortfall in material, particularly cement to the extent of 165 metric tonnes and red oxide to the extent of 97123 Kgs, which works out to R2.35,23,008/-. For using forged seals, forensic science lab report has been placed before the Arbitrator.

19. The learned Senior counsel appearing for the appellant cited two decisions of the Hon'ble Supreme Court reported in Keshav Dutt v. State of Haryana [(2010) 9 SCC 285] and Ramesh Chandra Agrawal v. Regency Hospital Ltd., [(2009) 9 SCC 709] and contended that the appellant failed to examine the expert and therefore, the report cannot be relied upon.

20. As per Section 19 of the Arbitration and Conciliation Act, 1996, the Arbitral Tribunal shall not be bound by the Code of Civil Procedure, 1908 or Indian Evidence Act, 1872. Even as per Section 293 Cr.P.C, the Report given by the Director, Deputy Director or Assistant Director of a Central Forensic Science Laboratory or a State Forensic Science Laboratory may be used as evidence and the Court may, if it thinks fit, summon and examine any such expert as to the subject matter of his report.

21. In view of Section 19 of the Arbitration and Conciliation Act, the contention about the non-examination of the expert, need not be dwelled upon. It is suffice to mention that it is not the case of the first respondent that the report of the Forensic Science Lab is disputable one.

22. As the Contractor failed to provide the quality as stipulated in the Contract by utilising the required cement and red oxide, he committed the breach of terms of the Contract and therefore, he is liable to pay reasonable damages, as provided under Section 73 of the Contract Act.

23. Once it is established that there is shortfall in material, namely cement and red oxide in bringing to the site, it is construed that as per the terms of the Contract, the work has not been provided with the quality specified in the Contract. Therefore, it is crystal clear that the Arbitrator committed a legal misconduct misdirecting himself by saying that Contract does not require him to go in justification of

the input and output of product. The above finding is not in terms of the Contract.

24. The learned single Judge has rightly set aside the Award of the Arbitrator, as there was serious legal misconduct in passing the award which is in conflict with the terms of the contract between the parties. Therefore, this Original Side Appeal is liable to be dismissed.

In fine, this Original Side Appeal is dismissed, confirming the order of the learned single Judge, dated 04.02.2010 made in O.P.No.847 of 2007. No costs.

Sd/-

Assistant Registrar(CS IV)

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Sub Assistant Registrar

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To

The Sub Assistant Registrar,  
Original Side Section,  
High Court, Madras 600 104.

1 cc to Mr.R.Senthilkumar, Advocate, sr.43287

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